

HONG KONG / JUDGMENT

## MJB v. CWC

[2018] HKCFI 1344

COURT

Court of First Instance

DECIDED

19 June 2018

CASE / FILE NUMBER

HCMP761/2018

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HCMP 761/2018

[2018] HKCFI 1344

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 761 OF 2018

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IN THE MATTER OF EMB, a female, a child born on 10 September 2017

and

IN THE MATTER OF the Child Abduction and Custody Ordinance, Cap 512

and

IN THE MATTER OF the Hague Convention on the Civil Aspects of International Child Abduction,  
1980

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BETWEEN

MJB

Plaintiff

and

CWC

Defendant

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

Date of Hearing: 12 June 2018

Date of Judgment: 19 June 2018

## J U D G M E N T

### Introduction

This application was initiated by the Hong Kong Secretary of Justice in his capacity as the Hong Kong Central Authority for the return of an infant girl EMB of about 9 months old to United Kingdom. The application was made under the Child Abduction and Custody Ordinance Cap 512 and the 1980 Hague Convention on the Civil Aspects of International Child Abduction (“Convention”).

Leave was subsequently given to the Hong Kong Central Authority on 28 May 2018 to withdraw as plaintiff and to be replaced by EMB’s father as the plaintiff (“Father”), with EMB’s mother (“Mother”) being the only defendant.

There was no dispute that on 26 October 2018, the Mother flew to Hong Kong with EMB with a return date booked for 19 December 2017 and on 15 December 2017, she informed the Father that she would not return to the United Kingdom. Since then EMB has remained in Hong Kong. It was common ground that the date of EMB’s unilateral retention in Hong Kong by the Mother was 15 December 2017. The main dispute was whether such retention was wrongful under Article 3 of the Convention, and the sole issue before this Court was whether EMB was habitually resident in UK immediately before 15 December 2017.

### Background and the Father’s case

The Father was born in England and is now 45 years old. He holds UK passport. He grew up in UK and joined a bank (“Bank”) in 1999 as an International Manager and has since moved to various countries for work within the Bank every 2 to 3 years, including UK, Hong Kong, India, Dubai and Peru. According to the Mother, the Father had lived in Hong Kong for about 9 of the last 17 years and owns an apartment in Sai Ying Pun but none in UK, and on 29 March 2017 applied for permanent residency in Hong Kong, which was not successful.

The Mother was born in Hong Kong and is now about 35 years old. She grew up in Hong Kong. When she was a teenager, she had lived for about 3 to 4 years in Vancouver, Canada. Apart from this period, and the period between 18 August 2017 and 26 October 2017, the Mother has lived in

Hong Kong where her immediate family lives. The Mother is a Hong Kong Certified Public Accountant and Certified Internal Auditor and after graduation, she worked with a well known firm of accountants in Hong Kong. In 2010, she joined the Bank in Hong Kong where she worked for around 8 years before her resignation on 9 April 2018. The Mother holds 3 passports, a HKSAR passport, a BNO passport and a Canadian passport.

The parties met in about August 2015 during a short work trip in India and on 4 January 2017, the Father proposed marriage and the Mother accepted. On or about 14 January 2017, the Mother found she was pregnant.

As the Father's then role at the Bank in Hong Kong was ending on 31 March 2017, the Father said since about January 2017, he started to look for a new role within the Bank and also elsewhere. On 15 March 2017, the Father was first offered his current role in London.

The parties later married on 25 March 2017. After marriage, the parties resided in the Bank's staff quarters until the Father left for UK.

The Father's case was that by around 24 April 2017, both he and the Mother were aware that a move to the UK would be very likely and that they would be expected to move soon after the formal Human Resources (HR) process was complete. The Father continued to look for other options. In early June 2017, the Father was also offered a role within the Bank in the Philippines. He said he discussed with the Mother but her strong preference was for UK, and he declined the role in the Philippines.

The HR of the Bank issued a posting letter dated 17 June 2017 to the Father, which was the trigger for the relocation, and the Father accepted the offer on 28 June 2017 and was required to report to duty by 4 July 2017.

The Father arrived in UK on 3 July 2017. After he left Hong Kong, the Mother had to vacate the Bank staff quarters and she moved to her maiden family home in Tai Koo Shing.

On 8 July 2017, the Mother submitted her UK spousal visa application to the Home Office. Prior to the Mother's visa application being approved, on 25 July 2017, the Mother indicated that as a plan B, the Father could come back to Hong Kong for delivery and the three of them could "fly back together".

The Mother was on maternity leave until about 26 November 2017. On 28 July 2017, she applied and obtained unpaid leave from the Bank from 27 November 2017 until 26 January 2018. Thereafter, she was on sabbatical leave until she resigned.

On 15 August 2017, Mother's spousal visa application was approved and she booked her ticket on 16 August 2017, a one way business class ticket leaving Hong Kong on 18 August 2017. The Mother's brother ("Mr C") accompanied her to UK.

Upon arrival in UK on 18 August 2017, the Mother stayed in temporary accommodation provided by the Bank. On 21 August 2017, the Father and the Mother signed a lease for a large 5 bedroomed family house at Esher for a year commencing from 2 September 2017, with a 6 month break clause (2 months' notice after 4 months). The parties moved in on about 1 September 2017.

EMB was born in UK about 10 days thereafter. The Mother's own mother ("Madam K") also arrived in UK to be with the Mother.

According to the Father, on around 10 October 2017, the Mother asked if she could take EMB to Hong Kong for a holiday from November 2017 to 19 December 2017 and to attend her brother's wedding. On 12 October 2017, she asked to move forward the departure date to 26 October 2017 so that they could fly with Madam K who was leaving that day. The Father agreed on the understanding that the Mother and EMB would return to UK on 19 December 2017 in time to celebrate his birthday on 23 December and also Christmas and New Year in their new home in UK. According to the Father, the Mother left the majority of her personal belongings in their new home when she came back to Hong Kong, including her academic transcripts which she would need in applying for a new job.

At the Mother's request and in anticipation of their return for Christmas, the Father bought a Christmas tree for their new home. On 23 November 2017, the Mother purchased baby items for EMB's future use which were sent to the Father's parents' address in UK.

The Mother and EMB stayed in Madam K's home after arriving in Hong Kong on or 26 October 2017. The Father travelled to Hong Kong on 26 November 2017 to spend time with EMB and to fly back together with the Mother and EMB to UK. On 5 December 2017, the Mother told the Father that she had asked her line manager at the Bank whether it would be possible to change her plan and to return after maternity leave to Hong Kong instead of UK. The Father said he was shocked as he had discussed with the Mother working in UK just days before. According to the Father, the Mother said she wanted to keep the option open in case she could not settle into UK and if she could not be comfortable with anyone looking after EMB other than Madam K.

The Father said the Mother became more withdrawn and distant during his time in Hong Kong and as the deadline approached to return, she answered fewer and fewer of his calls and claimed to have "lost her voice" and to only communicate on WhatsApp. On 15 December 2017, the Father received a WhatsApp message from the Mother indicating that she would not return on 19 December 2017 as agreed and was not ready to return. The Father made it clear to the Mother that he did not agree to EMB staying in Hong Kong beyond 19 December 2017.

The Mother obtained a HKSAR passport on 22 December 2017 for EMB. On or around 18 December 2017, the Mother had purchased a ticket to return to UK on 18 January 2018. It appeared that the Mother was still intending to return to UK at that time. This could also be seen in a WhatsApp message she sent to the Father's mother on 22 December 2017 indicating that there was no need to send by post EMB's presents and that EMB would "come for Roro's presents", "Roro" being the nickname of the Father's mother.

The Mother eventually did not take her flight on 18 January 2018 with EMB.

On 3 February 2018, the Father flew to Hong Kong again to try to persuade the Mother to return to UK with EMB, but failed. The parties had attempted marriage counselling between March and April 2018 but failed to resolve their differences.

The Mother resigned from the Bank on 9 April 2018 without telling the Father.

The Father said his phone contact with the Mother then became more difficult and from around 20 April 2017, the Mother stopped answering his calls altogether. The Mother filed for divorce in Hong Kong on 23 April 2018. The Father came to Hong Kong on 4 May 2018 again for a further attempt to persuade the Mother to return to UK with EMB, but failed.

On 15 May 2018, the Father's solicitors wrote to the Hong Kong Central Authority to seek assistance and on the same day he filed his petition for divorce in UK. On 21 May 2018, the present proceedings were instituted on the ground that the Mother had wrongfully retained EMB in Hong Kong.

Both parties agreed to a stay of their respective divorce proceedings pending the outcome of the present application.

#### The Mother's case

The Mother's case as extracted from the written submissions of her Counsel Mr Marwah are set out in paragraphs 29-38 hereunder.

The Mother said she initially intended to give birth in Hong Kong at St Paul's Hospital. However, after the Father went to the UK, he first stated that he would be able to come back permanently (going so far as to exchange his one-way business class ticket for an economy return), and then that he could come back temporarily, and then said that he could not come back. Accordingly, the Mother resolved to go to the UK so that the Father could be there for the birth. Thus, the Mother's case was that her visit to UK was always intended to be temporary. The Mother said she was unable to care for EMB alone and the Mother required the assistance of her family and this was why the Mother's family arranged for Mr C to travel with her to UK, and for Madam K to join them after the birth.

In view of her intentions, and according to the Mother, although the Father's possessions were almost entirely relocated to the UK (244 boxes), only a small number of the Mother's clothes and sundries were shipped to cover her short visit (6 boxes). The vast majority of her belongings remained in Hong Kong and she made substantial preparations to move into her parent's home for her return from the UK with EMB. The Mother said she did not cut any of her ties to Hong Kong nor did she close her bank accounts, credit cards, and mobile phone contract. She did not resign from her work or look for employment in the UK and instead she took additional unpaid leave to take care of EMB.

The Mother urgently sought leave to enter UK for the birth but given her pregnancy, and her nationality status, a spousal visa was necessary or the Mother would not have been allowed to enter the UK. The Mother said she completed this application to obtain her visa, despite her reservations about actually making a move to the UK and that this was an interim solution that would allow the family to spend time together despite the Father's relocation.

After the Mother's visa was approved, she left Hong Kong accompanied by her brother Mr C on 18 August 2017. According to her, she had wanted a return ticket, the Bank's Human Resources arranged a one-way ticket as part of the Father's relocation package.

Upon arrival in UK, the Mother made arrangements for temporary housing of 4 months. According to the Mother, the Father had made no effort to establish any permanent home for the family and that this was not surprising as neither the Father nor the Mother was enjoying their temporary stay in UK during the Mother's short stay of less than 10 weeks, and at most it was expected to last only 3 months after EMB's birth. According to the Mother, this period also coincided with a deterioration in the parties' relationship, and the Mother's concern that the Father was not devoting sufficient attention and care to EMB.

The Mother said during her short stay, she did not integrate into UK. According to the Mother, she never considered a permanent relocation, she had no close family there, she had no friendship network there, she received minimal support from the paternal grandparents, and she made no attempt to find alternative employment there.

On 26 October 2017, the parties agreed that the Mother and EMB would return to Hong Kong and according to the Mother, she agreed to return to visit the Father later, and this was why a return ticket was booked. Upon arrival, the Mother and EMB moved into the room prepared for them in the Mother's parents' home, where they continued to live even when the Father visited in late November 2017.

The Mother also said her intention was clear namely that the family would permanently live in Hong Kong, although the Father had to temporarily stay in the UK, and they would continue to visit one another from time to time in the interim. Therefore, she continued to be employed by the Bank in Hong Kong and made no attempt to permanently relocate to the UK. Instead, she obtained an HKSAR passport and HKID and for EMB on 22 December 2017 and enrolled her in a playgroup on 17 January 2018.

During the visit by the Father, on 15 December 2017, the Mother had asked the Father to change her planned visit to the UK on 19 December 2017 to 18 January 2018 and the Mother said the Father had agreed.

The Mother said that during this period the relationship between the parties continued to deteriorate. As a result, the Mother eventually decided not to visit the Father in the UK as planned in January 2018. The Father continued to visit Hong Kong and the parties attended marital counselling. When it became apparent that the marriage had irretrievably broken down, the Mother filed her petition.

Mr C had filed an affirmation to support his sister's case and had said that his sister had planned to stay in Hong Kong to give birth and that the Father would fly back for the birth but all of a sudden the Father said he was unwilling to fly back. Mr C also gave details of the events which took place after he arrived in UK with his sister and the lack of support, including financial support, on the Father's part. Mr C left UK on 4 October 2017 and confirmed that his wedding in Hong Kong was on 5 December 2017 to which the Mother was invited.

Madam K also filed an affirmation to support her daughter's case. Madam K said she had reservations about the Mother giving birth in UK as Madam K thought that the Father had been very unsupportive, and there was lack of support for the Mother if she was to move to UK. She said there was a family discussion among the Mother's maiden family and they then came up with a short term plan, which was for Mr C to travel to UK with his sister to assist with the logistics and that Madam K would then arrive later to help taking care of the baby and the Mother and then the Mother would return to Hong Kong with them for a longer plan to be arranged. With this plan in mind, Madam K said she ensured that the Mother's room in their flat would be ready for the Mother to return with the baby. Madam K also complained that the Father did not know how to take care of EMB.

### The legal principles

Article 3 of the Convention provides that :

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

*it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*

*at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*

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

Mr Egerton, Counsel for the Father had referred this court to by Cheung JA in JEK and LCYP [2015] 4 HKLRD 798, CACV 98 & 125/2015, 27.08.15, where Cheung JA has restated the principles on habitual residence as follows :

*“(1)*

*Habitual residence is a question of fact which should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce;*

The factual question is: has the residence of a particular person in a particular place acquired the necessary degree of stability (permanent is the word used in the English versions of the 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;

The concept corresponds to the place which reflects some degree of integration by the child in a social and family environment;

The question is the quality of the child's residence, in which all sorts of factors may be relevant. Some of these are objective: how long is he there, what are his living conditions while there, is he at school or at work, and so on? But subjective factors are also relevant: what is the reason for his being there, and what is his perception about being there?

There is no legal rule, akin to that in the law of domicile, that a child automatically takes the habitual residence of his parents; 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 the other relevant factors, in deciding whether a move from one country to another has a sufficient degree of stability to amount to a change of habitual residence."

Mr Marwah, Counsel for the Mother, had summarized the established principles applicable to determining habitual residence under the Convention, and set out the following principles, in addition to what has been set out above by Cheung JA in *JEK v LCYP* :

Under the Convention jurisprudence, a child can only have one habitual residence (ie no "concurrent habitual residences");

The burden is on the parent seeking return to prove habitual residence;

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

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 approach must be "child-centred". A child may be present in a country with only a temporary purpose or in ambiguous circumstances. A child may conceivably have no country of habitual residence; and

Where the parties present “irreconcilable affidavit evidence” the court will look to see if there is independent extraneous evidence in support of one side. That evidence must be compelling before the judge is entitled to reject the sworn testimony of a deponent. Where the evidence contained within the affidavit is inherently improbable and therefore so unreliable, 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 or her case.

On the case of new born children born to mothers temporarily present in another jurisdiction, Mr Marwah had referred the Court to *Delvoye v Lee*, 329 F.3d 330 (3rd Cir 2003) cert. den. 72 U.S.L.W. 3281 (US, Oct 20, 2003).

In the above case, the father spent about a quarter of his time in New York with the mother and the rest of his time in Belgium where he was living. When the mother became pregnant, she agreed to have the baby in Belgium and travelled there on a three month tourist visa. The mother later returned to the United States with the baby, and the father sought a return of the baby under Article 3 of the Convention. The issue was whether the baby was habitually resident in Belgium at the time of his removal to the United States.

Mr Marwah had referred to the following passage of one Scottish commentator which was cited by the US Court of Appeals in the above case:

*“[A] new born child born in the country where his ... parents have their habitual residence could normally be regarded as habitually resident in that country. Where a child is born while his ... mother is temporarily present in a country other than that of her habitual residence it does seem, however, that the child will normally have no habitual residence until living in a country on a footing of some stability.”*

The US Court had also set out the relevant concept as defined in an earlier US case, as follows:

*“[A] child’s habitual residence is the place where he... has been physical present for an amount of time sufficient for acclimatization and which has a ‘degree of settled purpose’ from the child’s perspective ... [A] determination of... where any particular place satisfies this standard must focus on the child and consists of an analysis of the child’s circumstances in that place and the parents’ present, shared intentions regarding their child’s presence there.”*

Mr Marwah further referred to *London Borough of Lambeth v JO and others* (by their Children’s Guardian) [2014] EWHC 3597(Fam), in which care proceedings were brought by the local authority concerning 4 children. The children all had connections with Nigeria and England as their father went to live in UK from Nigeria and the two older children were born in England and had always lived in England. There was no dispute that they were habitually resident in UK. The mother was a Nigerian national who resided mainly in Nigeria. One of the younger children was born in UK and had lived with the mother in Nigeria for the greater part of her short life and the youngest Ty was born in UK and had never been to Nigeria.

On the habitual residence of Ty, as she had never been to Nigeria, Ms Justice Russell found that she could not find that Ty was habitually resident in Nigeria on the sole basis that she was with her mother who was habitually resident in Nigeria, nor could she find that Ty was habitually resident in UK on the basis of her presence. She held that a new born baby had connections to her family over and above those of her mother and existed within her own social and family environment and that although Ty was dependant on her mother but that her residence in London corresponded to some degree and was in close proximity to her father's and therefore her, social and family environment. The court in the end could not find that Ty had, at that stage, habitual residence in either country.

The Court's attention was drawn to a recent case ME and CYM [2017] 4 HKLRD 739 concerning an infant child. In that case, the child was born in Hong Kong and after her birth, she lived in Hong Kong with her parents until the family left for London when the child was about 3 months old. The family initially had booked tickets to return to Hong Kong after about a month, but ended up staying in London for about 6 months. They later returned to Hong Kong with return tickets to London booked about a month later. The mother refused to return to London with the child and filed a petition for divorce. Lok J refused the father's application for return under the Convention, and found that the father had not satisfied the burden on him to prove that UK was the place of the child's habitual residence. Lok J found that the Hong Kong was the habitual residence of the child before the London trip and Hong Kong remained the habitual residence of the child.

It was held in the above case by Lok J, amongst other things, that the social and family environment of the child was the main consideration in determining the question of habitual residence and that in the case of a very young child where the mother was 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; that the mother, the primary caregiver of the child had not integrated in the social and family environment in UK even though her stay there exceeded five months. This was because (i) she did not have residency in UK, only a tourist visa; (ii) the family did not have separate accommodation and they had to stay at the house of the father's parents which could only be regarded as temporary accommodation; (iii) despite the time given to the father, he was not able to secure a stable job with sufficient income to support the family.

With the above general legal principles in mind, I now turn to the facts of present case.

## Discussion

The Father had produced, amongst others, WhatsApp messages/emails between the parties between 25 April 2017 and 9 May 2018 and also WhatsApp messages between the Mother and the Father's mother ("Madam B") between 3 April 2016 and 7 May 2018.

The WhatsApp messages on 25 April 2017 between the Father and the Mother, indicated that the Mother was relieved to hear from the Father that the UK role was still open.

Those messages between the Mother and Madam B showed that they had a warm relationship at the time and in a message on 11 May 2007, the Mother had told Madam B that there were 3 options open to the parties at that time, which were (i) to take the innovative role in London, or (ii) to take the innovative role under local terms in Hong Kong which the Mother said the Father was not keen, or (iii) to leave the Bank. The Mother had further indicated that if the Father decided on the 1st option, they had to check with HR if they could leave for UK a month or two after she gave birth. The Mother went on to say that as a wife, she would support any decision the Father was to make. The Mother further asked Madam B as to which option would be best, and Madam B responded the 1st option as the Father would have a house and all expenses paid. The Mother said she agreed and that she was leaning towards this option too.

In fact, on 11 May 2017, the Mother had also sent the Father an email, and amongst other things, said she was asking for some tips from her friend (with a new born) who relocated to London with her French husband. On 15 May 2017, she sent a WhatsApp message to the Father indicating her support for the Father so long as he was happy, the family would be happy with or without a job in Hong Kong or elsewhere.

During exchanges on 26 May 2017, the Father had said he did not like UK and would try and stay in Hong Kong. Evidence showed that he did try to apply for a Hong Kong role. The Mother produced WhatsApp message with the Father from 4 to 9 June 2017 looking around for flats in Hong Kong to stay and the Father applying for a dependant visa to stay in Hong Kong. However, later on the same day, on 9 June 2017, the Mother had said to the Father that it might be a good idea to take either the Philippine job or the UK job as both were good with good career prospects and it would be good for the parties to go for an adventure, a new environment. On 15 June 2017, the Father had said the Philippine role was unlikely.

During the WhatsApp messages between the parties on 20 June 2017, the Mother had said she might have to fly the third week of July or before, and then later went on to say her parents were not happy with the idea and that her mother was worried but that her brothers came round to help her and to defend her (and the Father's) choice of moving so soon and so sudden. She also told the Father that Mr C would accompany the Mother to help her settle down and that Madam K would go over for a month to help with the baby. The Mother further said the parties must have a place to settle down even if it was temporary flat at least until the baby reached 3 months. The Mother said on 21 June 2017, she was looking forward to their adventure and that everything would be better once they settle down.

Thus despite what Mr C and Madam K now said in their affirmations, it would appear that notwithstanding their concerns, they were willing to take active steps to help the Mother to settle down in UK at the time of her move. Further, their criticisms of the Father were not supported by the Mother's own WhatsApp messages with the Father.

The evidence showed that :

The Mother had immediately focused on a spousal visa application and letters in support of such application, and only considered entering on a tourist visa as the last resort if she could not secure a spousal visa in time to fly to UK. The Mother had stated her intention to live and work in UK;

The Mother had attempted to take driving lessons in Hong Kong in preparation for the move to UK;

There were enquiries in relation to the Mother's employment with the Bank in UK;

The parties had a Plan B that the Father would be in Hong Kong for EMB's birth in the event that the Mother's visa was not granted in time to enable the Mother to fly to UK prior to EMB's birth;

The parties had explored to purchase a property as a home in England;

The parties subsequently decided to rent the house in Esher for a year with both parties signing the rental agreement;

The quantity of sea and air freight the Mother sent to England, including personal items, university transcripts, baby equipment and 9 months supply of contact lenses;

The Mother purchased equipment for an older baby to include a booster seat shipping them to UK rather than Hong Kong; the Mother purchased the booster seat on line on 23 November 2017 and had it sent to the Father's parents' address in the UK;

The opening of utility accounts: water, electricity, gas and registration for Council tax under both parties' names;

The Mother applied in July 2017 to open a UK bank account;

The Mother set up a mobile telephone account in UK;

The Mother sought to join the National Childbirth Trust to meet and connect with other mothers with similar aged children;

The parties planned to travel in Europe from England, in particular a holiday in Turkey in May 2018;

The Mother registered EMB and herself with the National Health Service including being registered for introducing EMB to solid foods in the 6th month ie March 2018;

The Mother had asked the Father to buy a car in the UK;

The tickets purchased by the Mother for the October trip to Hong Kong was on a return basis, with the agreed return date of 19 December 2017.

It was also the Father's case that his family had provided significant support and encouragement to the Mother, as set out below :

Pre and post birth discussions between the Mother and Madam B and the Father's sister;

Joining the Mother to the Father's family WhatsApp group since 5 January 2017 (the day after their engagement) to assimilate into the Father's family;

Sourcing baby products for the Mother;

Discussing potential names for EMB;

Frequent affectionate, personal and intimate exchanges between the Mother and Madam B, and also the Father's sister;

The Mother sought Madam B's opinion and advice on purchasing a home in the UK;

Organising family gatherings;

Helping the parties' move into their new house in Esher in September 2017.

I find that the WhatsApp messages between the Mother and Madam B and/or the Father's sister showed that there was a warm relationship between them and both Madam B and Father's sister were very supportive of the Mother. I also find that the Mother had integrated into Father's family. From the WhatsApp messages/emails between the parties, they had a very loving and close relationship at the time and they were discussing constantly about the move. The Mother was very supportive of the Father and was excited and looking forward to what she saw as an adventure. In a WhatsApp message on 2 August 2017, she had said "Let's make good use of coming few years to explore Europe ... more adventures together", "Add Croatia in the list".

Further, on 16 August 2017, two days before she was to fly out, the Mother had said "... But we really have to find a place to rent/buy in Esher asap like within the coming two weeks" and then 4 minutes later, she then said "6 mth-1 year lease in Esher looks more likely at the moment. Don't you think so?"

The Father had said that it was standard in UK for a lease to be of one year term with a 6 month break clause. In any event, it would appear that the parties' decision to take a lease for 6 months to one year was to keep their options open in case they were to decide to buy a property in Esher as their home. There was no evidence that there was anything wrong with their marriage at the time or that they were going to live apart.

The Mother said in her affirmation that her move to UK was solely for the purpose of giving birth in the presence of the Father. Mr Marwah had also referred to what the Mother had said in her WhatsApp messages on 28 June 2017 when she asked the Father not to leave her behind and that she did not want to go through the pregnancy and few months after baby's birth without her husband/daughter's father by her side.

Mr Marwah submitted that the Mother was anxious not to be separated from the Father and she had to follow him although she felt her life was falling apart and that she did not want to go. Mr Marwah submitted that the Mother had no choice and that she did not want to move and she only went to UK to explore the possibility of settling in UK. He however conceded that the Mother's ambivalence was not shared with the Father.

The Mother did not produce any contemporaneous WhatsApp messages/emails between her and her mother and/or her brother to indicate that she did not want to move or she only went to UK to explore the possibility of setting in UK. What the Mother now said in her affirmation was not supported by her WhatsApp messages/emails to the Father or to his family at the time. There was no sufficient evidence that her intention at the time was simply to go to UK temporarily to give birth and then to return to Hong Kong shortly thereafter.

Although the evidence showed that the Father himself had said he did not like UK and had stated his intention to return to Hong Kong and that he had also said he considered being in the UK for 3 years, the Mother's messages/emails showed that she was very supportive of the relocation for a few years, as she herself had said, to make good use of the coming few years and to travel to Europe.

Even when she travelled to Hong Kong on 26 October 2017 with EMB, there was no sufficient evidence that she had by then planned not to return to UK. In fact, all her messages until 15 December 2017 indicated she had planned to return to UK.

In her WhatsApp message of 14 November 2017 to the Father, she had expressed enthusiasm for the Father buying a heater and the Christmas Tree. The Mother responded appreciatively to the Father contacting her "boss severine" on 21 November 2017. As said earlier, the Mother purchased the booster seat on line on 23 November 2017 and had it sent to the Father's parents' address in the UK. On 25 November 2017, she sent a message to the Father to ask him to bring a bigger bag with him to Hong Kong and she might need him to carry some stuff back to UK. Even on 22 December 2017, the Mother sent a WhatsApp message to her mother in law and asking Madam B to save money on posting to Hong Kong and that EMB would go to UK to collect her presents.

In fact, although the date of unilateral retention was agreed by the parties to be 15 December 2017, as said earlier, the Mother in fact did purchase another ticket to return to UK on 18 January 2018. Further, even in her resignation letter on 9 April 2018, the Mother had put down her UK mobile telephone number for contact.

What the Mother had said in her WhatsApp message of 15 December 2017 was:

*"I am feeling much better these days in Hong Kong and realising the need to improve the situation us as a family to grow stronger. I really think at least temporarily I will not return to England."*

Thus, even on 15 December 2017, the Mother had not decided to leave UK permanently. The packing list of 244 boxes sent to UK showed that quite a lot of the boxes contained furniture and household items which were at the parties matrimonial home at the Bank quarters in Hong Kong, including the baby crib and baby stuff.

Mr Marwah submitted that the Mother did not cut any of her ties in Hong Kong, nor did she resign from her work and that the Mother had maintained her gym membership in Hong Kong even though it was suspended when she found out she was pregnant. She has no friends and no connections in UK. The Mother had maintained her roots in Hong Kong, and that the room at her maiden home was kept for her.

I accept the Mother's family origins are in Hong Kong. There were however no photographs produced by Madam K of the room said to be kept for the Mother as at 18 August 2017 when she left Hong Kong. The Mother was clearly very close to her maiden family. That she would have a room to stay in Madam K's home whenever she came back to Hong Kong would not be surprising as after all, it was not the Father's case that the Mother, or the parties, would not visit Hong Kong at all after their move to UK. There was however no sufficient evidence that the Father would be able to stay in that room with the Mother and when he came over in November 2017, he had to stay elsewhere. What is clear was that at the time when the Mother left Hong Kong on 18 August 2017, the parties were a loving couple and the parties had left no matrimonial home and no family possessions in Hong Kong. They had vacated the Bank's quarters and the Father's flat in Sai Ying Pun had always been rented out.

There were the temporary Bank quarters for the Mother to stay in when she arrived in UK and if the Mother was intending to stay for only a short while in UK and to leave after giving birth, there would not have been any need to sign a one year lease at all. Although the lease the Mother signed was only for one year (with a 6 month break clause), it was for a settled home for the parties and their new baby. The evidence also showed that the Mother has at least one friend with her French husband from whom the Mother had sought "tips" on relocation. The house in Esher was near the Father's friends whom the Mother met. As I said earlier, the WhatsApp messages showed the Mother had integrated well into the Father's family. As mentioned earlier, the Mother had a warm relationship with Madam B and the Father's sister who had been both very supportive. The Mother had applied for and obtained a spousal visa. In my view, the facts of the present case can be distinguished from ME and CYM.

It has been said a short period may suffice for establishing habitual residence and the circumstances of each case are different. In my view, even though the Mother was in UK for only about 10 weeks, there was a sufficient degree of stability and integration in the social and family environment in UK within that time for her residence to be said to be habitual. I find that the Mother had agreed to relocate with the Father and she was habitually resident in UK by the time she left on 26 October 2017.

As for EMB, up until she left with the Mother on 26 October 2017, UK was her only home. As said by Ms Justice Russell in the London Borough of Lambeth case, a new born baby has connections to her family over and above those of her mother and exists within her own social and family environment, although she accepted that an infant would be dependent on the mother.

As a new born baby physically present in UK, EMB was also in close proximity to her father's, and her own social and family environment. EMB's paternal grandmother and aunt live in UK. The Mother had said that the Father himself was habitually resident in Hong Kong and not UK, I do not find there was sufficient evidence to support this. In my view, EMB was habitually resident in UK since her birth and when she was brought to Hong Kong on 26 October 2017.

As said earlier, even on 15 December 2017, the Mother only indicated an intention not to return to UK "temporarily", and thereafter, she in fact booked a ticket to return to UK on 18 January 2018. I find that, on the evidence as at 15 December 2017, there had not been a change in the habitual residence of the Mother or EMB, and that it had remained UK where the Mother had relocated.

## Conclusion

It was not disputed the Father had "rights of custody" as defined under the Convention. In light of my findings above, the retention of EMB by the Mother in Hong Kong on 15 December 2017 was wrongful under Article 3 of the Convention.

The Mother did not raise any other objections to return. However, there were no proposals made by her on logistics. Neither were there any proposals made by the Father until this Court's enquiry during the hearing. The Father disclosed that he had surrendered the lease on the house in Esher and had rented a 2 bedroom fully furnished home in Maidstone in Kent, near his mother which he proposed to vacate to allow the Mother and EMB to reside therein. The Father had also put forward other proposals. There was apparently a return date in the English Court on 10 August 2018.

As the Father's proposals were put forward at a late stage, I am not sure what the Mother's position would be. Thus, I would like to hear the parties further in relation to the logistics before I make the order for return. I therefore fix a hearing on 27 June 2018 at 10:00 am (estimated length of hearing: one hour) to deal with this.

(Bebe Pui Ying Chu)

Judge of the Court of First Instance

High Court

Mr Robin Egerton, instructed by CRB, for the plaintiff

Mr Azan Marwah, instructed by Withers, for the defendant

Ms Kwok Hin Pansy, SGC of Secretary of Justice, observer

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