TDX *v* TDY
[2015] SGHCF 4

Case Number	: Registrar's Appeal from the Family Courts No 254 of 2014
Decision Date	: 30 June 2015
Tribunal/Court	: High Court
Coram	: Debbie Ong JC
Counsel Name(s)	: Yap Teong Liang (T L Yap Law Chambers LLC) for the appellant; Bernard Sahagar s/o Tanggavelu and Low Wee Jee (Lee Bon Leong & Co) for the respondent.
Parties	: TDX — TDY

Conflict of Laws—Natural Forum—Custody Proceedings

Civil Procedure—Stay of Proceedings—Forum Non Conveniens

30 June 2015

Debbie Ong JC:

Introduction

1 Cross-border family disputes are becoming increasingly prevalent. This growing phenomenon has been observed by the Court of Appeal in the recent case of *BNS v BNT* [2015] SGCA 23 ("*BNS v BNT*") at [1], where it was said:

> In modern times, advances in technology, travel, and modes of communication have all shaped an interwoven world in which the cross-border movement of people occurs on an increasingly regular basis. Not infrequently, such persons will consist of married couples who choose to leave their countries of origin for a variety of reasons, such as to take up more attractive job opportunities for one or both of the spouses elsewhere, or to settle down in a place which they have assessed as having a more ideal environment for raising a family. So long as the marriage remains stable and loving, problems will not surface before the courts. However, in the unfortunate event that the marriage breaks down, difficult (and oftimes emotional) issues will have to be resolved by the courts where they cannot be resolved amicably by the parties, and these issues are invariably made more difficult where children, particularly young children, are implicated in the wake of the fallout of their parents' marriage.

2 *BNS v BNT* involved the issue of permanent relocation of children. In the present case, the court's leave for the relocation of the child was not sought; instead, one parent had unilaterally brought the child out of the country in which the child had lived since her birth to another country. However, both cases invoke the same concern over the welfare of the child caught in a cross-border dispute. One aspect in which the present case differs from the typical ones that come through our courts is that the parties in this case are not married to each other. Nevertheless, both are parents to the child born out of their relationship and as parents, both parties are integral to their child's welfare. The parties face the same difficulties as married parents whose relationship has broken down. The present dispute is one of the many cases that arises and will continue to arise from the modern phenomenon of increased movements across countries.

Facts and context

3 The appellant, referred to as the "Father" here, was born in Australia and works in Hong Kong. The respondent, referred to as the "Mother" here, was born in Singapore, and had worked and lived in Hong Kong from 2008 to 2014. The parties are not married to each other. They had a relationship while living in Hong Kong and their daughter, "B" was born on 15 May 2013 in Hong Kong. The Mother took B to Singapore on 23 June 2014.

4 The Father commenced proceedings in Hong Kong on 29 August 2014 seeking the custody, care and control of B, and also for B to be made a ward of the Hong Kong court and returned to Hong Kong. On 12 September 2014, the Hong Kong court made the interim order that the Father shall have access to B for two weeks once every four weeks provided that he bore the expenses related to collecting and sending B back to the Mother in Singapore. The Hong Kong court also made B a ward of the court. The Father's application (which was made on an *ex parte* basis) and the order were served on the Mother on 22 September 2014. On 24 September 2014, the Mother's solicitors in Hong Kong applied for a stay of execution of the order. On 25 September 2014, the Hong Kong court ordered a stay of execution of the access order until 6 October 2014, but allowed the Father to have interim access to B in Singapore between 26 and 28 September 2014.

5 On 26 September 2014, the Mother commenced proceedings in Singapore for, *inter alia*, sole custody, care and control of B to herself, and supervised access to the Father, as well as an order to prevent the Father from bringing B overseas without her consent. On 27 September 2014, the Mother obtained an order made on an *ex parte* application in Singapore that B shall not be taken out of Singapore by either party without the written consent of the other party. This order contradicted the Hong Kong order of 12 September 2014. Counsel for the Father highlighted that the Hong Kong proceedings and orders were not fully disclosed to the court at this hearing. The Father was in Singapore from 26 to 28 September 2014 to exercise his right of access to B. Notwithstanding that, the Mother only served the *ex parte* application made on 26 September 2014 and the order of 27 September 2014 on the Father after the access was over and B was returned to her on 28 September 2014.

6 At the hearing in Hong Kong on 6 October 2014, the Mother's solicitors indicated that they were preparing the application for the stay of the Hong Kong proceedings pending the result of the Singapore proceedings. However, this was not properly pursued and no summons for a stay of proceedings was filed at all. On the same date, the Hong Kong court ordered that the Father shall continue to have interim access and that the matter of stay of execution be adjourned until 16 October 2014. On 15 October 2014, the Mother filed a notice to act in person in the Hong Kong proceedings. However, she did not turn up for the hearing on 16 October 2014. At that hearing, the Hong Kong court ordered that B remained a ward of the court, that the Father had all the rights and authority that the law would allow him as a father if the child was legitimate, and that access was to be carried out in accordance with the order of 12 September 2014. The Mother's application for the stay of execution was also dismissed.

7 On 4 December 2014, the district judge ("the District Judge") dismissed the Father's application for a stay of the Singapore proceedings and made fresh interim orders to protect B's interests. The District Judge set aside the order of 27 September 2014 to enable B to travel to Hong Kong for access with the Father but required the Father to bear the expenses of the Mother or a nominated helper who shall accompany B for access. On 9 January 2015, final orders were made confirming the orders of 4 December 2014.

8 This is an appeal by the Father against the decision of the District Judge to dismiss the

application for a stay of the Singapore proceedings. I allowed the appeal, set aside the orders made in the courts below and ordered that the Singapore proceedings be stayed.

The parties' arguments

9 Counsel for the Father pointed out that the Hong Kong court had already made orders with regard to B, and that the Mother had participated in the Hong Kong proceedings and submitted to the jurisdiction of the Hong Kong court. He submitted that the Mother started the Singapore proceedings because she was dissatisfied with the orders made by the Hong Kong court. He argued that she could have applied to the Hong Kong court for the orders which she sought in Singapore or appealed against the Hong Kong orders but chose not to do so. Instead, she commenced proceedings in Singapore, failed to make full and frank disclosure of the status of the Hong Kong proceedings and orders and as a result, managed to obtain the orders in Singapore which contradicted the Hong Kong orders. She had neither exhibited the Hong Kong court order of 12 September 2014 nor disclosed that the Hong Kong court had ordered that B be made a ward of the court.

10 The Father's counsel further submitted that the Hong Kong court had held that B's habitual residence is Hong Kong and that the Mother had conceded in the Hong Kong proceedings that B was resident in Hong Kong. The Hong Kong court was a court of competent jurisdiction which was the appropriate forum to decide the issues. He further submitted that a parent could not unilaterally change the habitual residence of a child and it would be contrary to our commitment to prevent cross-border parental child abduction and the Hague Convention on the Civil Aspects of International Child Abduction (25 October 1980) 1343 UNTS 89 (entered into force 1 December 1983) ("HCCA") if the Mother could unilaterally remove B to Singapore and change her habitual residence by that unilateral act. I should state at this juncture, for the avoidance of doubt, that this was *not* an application based on the HCCA for the return of B; instead, the Father is only asking for a stay of the Singapore proceedings.

11 Counsel for the Mother submitted that the court of B's habitual residence is the more appropriate forum to decide on the merits of the case. He argued that B's habitual residence is Singapore as she had been in Singapore since 23 June 2014 and is settled in Singapore. Further, the Mother had no or little resources in Hong Kong and could not afford the costs of litigation in Hong Kong. He submitted that the Singapore court is therefore the more appropriate forum to make the orders.

The welfare principle in child proceedings with cross-border issues

12 The law is clear that in proceedings relating to a child, the welfare of the child is the paramount consideration. The Court of Appeal in *BNS v BNT* has recently reiterated in the context of cross-border relocation of children that (at [3] and [19]):

> 3 ... The welfare of the children must take its place as the court's focal (indeed, paramount) concern at all times.
>
> ...
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> 19 ... Indeed, if we take a broader view of matters, we observe that this principle is also, without doubt, the golden thread that runs through *all* proceedings directly affecting the interests of children. ...
>
> [emphasis in original]

13 As the welfare of the child is paramount, one might argue that the court ought to make a fresh determination of the issues in every case, regardless of any pending foreign proceedings or orders made by a foreign court. However, for the Singapore court to proceed in this manner could prevent a more appropriate forum from determining what is in the best interest of the child. It is emphasised here that to allow a court with substantial connection to the dispute to determine the matter is not necessarily inconsistent with the welfare principle. The welfare principle does not invariably require that the Singapore courts decide on the merits of the case afresh. This is further explained below.

14 It is well accepted in Singapore that the doctrine of *forum non conveniens* remains relevant in matrimonial proceedings, including proceedings involving the custody of children. The High Court in *Low Wing Hong Alvin v Kelso Sharon Leigh* [1999] 3 SLR(R) 993 first made it clear that the *Spiliada* principles (derived from and named after the seminal case of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*")) apply in matrimonial proceedings. Similarly, the High Court in *Mala Shukla v Jayant Amritanand Shukla (Danialle An, co-respondent)* [2002] 1 SLR(R) 920 applied the *Spiliada* principles to divorce and related ancillary matters, citing [16] of the Court of Appeal decision in *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Ltd and another* [2001] 1 SLR(R) 104 which reads:

> ... Unless there is clearly another more appropriate available forum, a stay will ordinarily be refused. If the court concludes that there is such a more appropriate forum, it will ordinarily grant a stay unless, in the words of Lord Goff [in *The Spiliada* [1987] AC 460], 'there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions' (hereinafter referred to as 'the unless question' or 'unless proviso' as may be appropriate in context). One such factor which would warrant a refusal of stay would be if it can be established by objective cogent evidence that the plaintiff will not obtain justice in the foreign jurisdiction. But the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceedings in Singapore is not decisive; regard must be had to the interests of all the parties and the ends of justice. We would emphasise that in determining the 'unless question' all circumstances must be taken into account, including those taken into account in determining the question of the more appropriate forum. However, in this stage of the inquiry the burden shifts to the plaintiff.

15 In my view, the application of the welfare principle in a case such as the present involves the proper application of the doctrine of *forum non conveniens*, which would in turn require the court to examine which jurisdiction is better placed to decide on the issues concerning the welfare of the child. Support for this view can be found in the decision of *Re A (an infant)* [2002] 1 SLR(R) 570 ("*Re A*"), in which Lai Kew Chai J referred to the decision of the House of Lords in *De Dampierre v De Dampierre* [1988] AC 92 ("*De Dampierre*"), which was a case where the *Spiliada* principles were applied to matrimonial proceedings. The learned judge considered at [4] that when applying *De Dampierre* and the *Spiliada* principles to issues relating to a child, the central question is which forum would more effectively evaluate the best interests of the child:

> The central question … is this: which was the more suitable or appropriate tribunal to resolve the issues between the parties. In the context of the guardianship of a child, and the related issues of custody, care and control, it seemed to me that we had to take into account a host of factors and determine *which forum would more effectively evaluate the best interests of the child*, in terms of a tribunal's understanding of and affinity to the cultural background, value systems, social norms and other societal circumstances relevant to the best way in which the child is to be brought up. [emphasis added]

16 The main issue in *Re A* was whether Singapore or France would be the more appropriate forum to decide the questions of custody and access to the parties' seven-year-old child. In this regard, Lai J considered that a child's welfare is more appropriately evaluated by the forum which is better equipped to determine what is best for the child in all material respects ranging from healthcare and education to moral, spiritual and other relevant needs (at [16]). In my view, this does not detract from the welfare principle.

17 The court's consideration of all the relevant factors when applying the doctrine of *forum non conveniens* and the weight to be given to these factors would depend on the nature of the dispute in question. It is a fact-sensitive inquiry. For example, in determining whether maintenance proceedings should be stayed, factors such as the location of the husband's assets and source of his income may take on a greater significance (see, *eg*, *BDA v BDB* [2013] 1 SLR 607 at [29]). In a case involving the custody, care and control and access of a child, the relevance and weight of the factors must be decided in the light of the welfare of the child. This enables the welfare principle to be applied at the private international law level and is also consistent with the principles on the stay of proceedings. In this respect, Lai J's decision in *Re A* is instructive on how the doctrine of *forum non conveniens* should be applied in proceedings concerning issues relating to a child such that the welfare of the child remains the paramount consideration.

18 Furthermore, the fact that there are pending foreign proceedings or that a foreign court has made orders in relation to the dispute must be considered when deciding whether the Singapore proceedings ought to be stayed. In *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd and another appeal* [2013] 4 SLR 1097 ("*Virsagi*") at [38]–[39], the Court of Appeal considered that *lis alibi pendens* is one of the factors to be considered in deciding whether the Singapore court is the more appropriate forum to hear the dispute. In the context of proceedings relating to the child, multiplicity of proceedings which results in increased (and unnecessary) costs, delays, tensions and energy as well as possibly contradictory orders will substantially affect the child's welfare.

19 In the court below, the District Judge, at [23]–[27] of his brief reasons ("the GD"), cited cases which dealt with the welfare principle in the *domestic* sense, covering observations such as the importance of the bond between a mother and her child. This understanding of the welfare principle in the *domestic* sense focuses on the substantive merits of the case. At [28] of the GD, the District Judge stated that:

> As the child [B] was physically present in Singapore the court had sufficient interest in her welfare. ... [T[here is no reason why a court in Singapore cannot make its own determination of what order should be made in respect of a child who is now in Singapore despite the existence of an order made earlier by a court in a foreign country. … [T]he court was not persuaded by the father's case that HK was the more appropriate forum.

20 In my view, a substantive determination of the case should be made only *after* it has been decided that Singapore is the more appropriate forum to hear and decide on matters concerning the child's welfare. In the GD, five paragraphs (*ie*, [23]–[27] of the GD) were devoted to the welfare principle in the *domestic* sense. Only one paragraph (*ie*, [28] of the GD) dealt with the Mother and B's present connection to Singapore, which formed the main reason for the finding that Singapore was the more appropriate forum. Little was said of the significance of the connections to Hong Kong, the issue of *lis alibi pendens*, and how they were taken into consideration in deciding the application for stay and the welfare of the child in the fullest sense. In my view, the District Judge focused too heavily on the factors relating to the child's welfare in the domestic sense and did not give sufficient consideration to the other factors which are in fact highly relevant in a case involving international elements and *forum non conveniens*. As I have mentioned at the outset, the application of the

welfare principle does not always mean that a court should re-examine the substantial merits of the case and make its own orders afresh. This is an application for a stay of proceedings. The welfare principle remains paramount but the court must properly apply the doctrine of *forum non conveniens* in this case and decide if Singapore is the more appropriate forum to decide the matter before going on to make fresh orders on its merits.

21 I find the exposition made by Lord Donaldson of Lymington MR in *Re F (A Minor) (Abduction: Custody Rights)* [1991] Fam 25 helpful in explaining this (at 31):

> The welfare of the child is indeed the paramount consideration, but it has to be considered in two different contexts. The first is the context of which court shall decide what the child's best interests require. The second context, which only arises if it has first been decided that the welfare of the child requires that the English rather than a foreign court shall decide what are the requirements of the child, is what orders as to custody, care and control and so on should be made.

22 It is only in Lord Donaldson's *second context* –after the court has decided that Singapore is the more appropriate forum to decide the matter –that it may make orders upon a fresh determination on the merits. I now turn to consider the question of whether Singapore or Hong Kong is the more appropriate forum to determine the issues concerning B.

Which court is the more appropriate forum

23 In applying the *Spiliada* principles to the present case involving the welfare of a child, I found Lai J's views in *Re A* to be a helpful starting point. In that case, Lai J held at [4] that in the context of the guardianship of a child, and the related issues of custody, care and control, the court had to take into account "a host of factors" in order to identify the forum that is better equipped to determine the child's best interests.

24 The determination of which court is better placed to decide on the issues concerning the child by having regard to the child's best interests requires an examination of all the circumstances. In the present case, the relevant factors would include B's connections to Hong Kong and Singapore. As the well-being of a child is closely connected to her parents' circumstances, it would also be relevant to consider her parents' connections to Hong Kong and Singapore. Another important factor that has to be considered would be the existence of parallel proceedings in Hong Kong.

25 Having considered all the relevant factors and circumstances of the case, I found Hong Kong to be clearly the more appropriate forum to hear the issues concerning B.

Considering the habitual residence of the child as a factor

26 In the present case, both parties agreed that the habitual residence of the child is relevant, but disputed over where that might be. Counsel for the Mother submitted that the court of the child's habitual residence, which he argued is Singapore, is the more appropriate forum to decide on the merits of the case. On the other hand, counsel for the Father pointed out that the Hong Kong court had made the orders on the basis that the child was habitually resident in Hong Kong.

27 The habitual residence of the child is a relevant consideration in deciding which forum is more appropriate to decide on the issues concerning a child. But it is not the sole consideration. I will explain below the relevance of habitual residence to the present inquiry.

28 Habitual residence is relevant in the search for the most appropriate forum in our present factual context and it is also a factor used in selecting the forum in cases under the HCCA. As there is a good body of law in other jurisdictions on the meaning of habitual residence under the HCCA, I will consider how habitual residence is understood in the HCCA in order to obtain some guidance on its meaning for use in the present case.

29 Under the regime put in place by the HCCA, countries co-operate to trace and return abducted children to their habitual residence, entrusting the court of the child's habitual residence with the task of resolving the disputes between the parents or any interested persons or institutions with respect to the issues relating to the child, such as guardianship and custody. Singapore acceded to the HCCA on 28 December 2010 and implemented its obligations on 1 March 2011 with the enactment of the International Child Abduction Act (Cap 143C, 2011 Rev Ed) ("ICAA").

30 The Court of Appeal in *BDU v BDT* [2014] 2 SLR 725 at [25] accepted Prof Leong Wai Kum's summary of what countries have agreed to do under the HCCA (see Leong Wai Kum, *Elements of Family Law in Singapore* (LexisNexis, 2nd Ed, 2013) at p 270):

> *… Every court other than the court of her habitual residence has agreed to desist from investigating into the substantive issues relating to her welfare to defer to the court of her habitual residence.* Put another way, the understanding of the child's welfare under the [HCCA] is not the substantive understanding (as under the domestic law of guardianship and custody) but rather the more limited understanding, that *where she has been unlawfully removed from her habitual residence, her welfare is best served by swiftly returning her to her habitual residence*. There the courts will look into the substantive issues. [emphasis added]

31 Thus, under the HCCA regime, the habitual residence of the child is the sole criterion in determining which court should decide on the child's substantive welfare. It is a specific approach voluntarily adopted by the contracting states and based on the premise that the court of the habitual residence is generally best placed to decide on the welfare of the child. The High Court of Australia in *MW v Director-General of the Department of Community Services* (2008) 244 ALR 205 at [59] cites K Beevers and J Peréz Milla, "Child Abduction: Convention 'Rights of Custody' –Who Decides? An Anglo-Spanish Perspective" (2007) 3 J Priv Int L 201 at p 202 on the premises adopted in the HCCA:

> The aims of the Convention are distilled from a number of fundamental principles that featured prominently during the negotiation of the Convention and led to its wide acceptance. These are that the interests of children are paramount in cases of child abduction; that it is generally contrary to the best interests of any child to be abducted; and that it is the courts of habitual residence (normally the home environment of the child) that are generally best placed to decide on the future upbringing of the child. So the Convention seeks to restore the child's status quo in order both to reduce the incidence of international child abduction through the provision of legal rules which effectively mean there is nothing to be gained by abducting this child, *and to ensure that the decision on the future of the child is taken in the forum conveniens, ie, the most appropriate jurisdiction to make such a determination.* [emphasis added]

32 The reason for this is that the different socio-cultural attitudes of each country might influence their perspective of what is in the best interest of the child. It was observed in Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* (HCCH Publications, 1982) at p 431 that:

> 22 ... it must not be forgotten that it is by invoking "the best interests of the child" that internal jurisdictions have in the past often finally awarded the custody in question to the person

who wrongfully removed or retained the child. It can happen that such a decision is the most just, but we cannot ignore the fact that recourse by internal authorities to such a notion involves *the risk of their expressing particular cultural, social etc attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched*. [emphasis added]

33 The present case is *not* brought under the HCCA regime; it is a case that turns on the application of the doctrine of *forum non conveniens* and the welfare principle. It follows that the child's habitual residence is not the *only* consideration. However, a similar approach which searches for an appropriate forum to decide the child's welfare is used. Habitual residence remains a relevant consideration even in a case that falls outside the HCCA regime because the court of the child's habitual residence is likely to have a close affinity with and good understanding of the child's cultural background, value systems, social norms and other societal circumstances. As such, the principles that the courts have articulated in the context of the HCCA to determine the child's habitual residence are useful even in the present case which falls outside the HCCA regime.

34 I would point out that in the HCCA regime, the habitual residence of the child relevant for the purpose of the HCCA is that determined *at the time of the removal or retention* of the child. So a child may be habitually resident in country X at the time of removal for the purpose of the HCCA, but settled in country Y by the time of the proceedings. She could even have acquired a new habitual residence in country Y by then. The HCCA is a specific regime which looks at the habitual residence of the child at the time of removal or wrongful retention and if the exceptions in Art 12 (for example, the child is settled in the new country) and Art 13 (for example, there is grave risk of harm to the child if returned) do not apply, the authority shall return the child to that habitual residence. In cases outside the HCCA applying the doctrine of *forum non conveniens*, the habitual residence of the child both *at the time of removal or retention* and *at the time of proceedings* would remain relevant.

Determining the habitual residence of the child

35 It has been explained that the concept of habitual residence under the HCCA is useful when determining a cross-border child dispute involving the doctrine of *forum non conveniens* and the welfare principle. Thus while this is *not* an application made under the ICAA and HCCA, some guidance is taken from the meaning of habitual residence under the Convention.

36 In Singapore, the parliamentary debates during the second reading of the International Child Abduction Bill recorded the understanding of "habitual residence" as presented by the (then) Minister for Community Development, Youth and Sports to Parliament (*Singapore Parliamentary Debates, Official Report* (16 September 2010) vol 87 at cols 1269–1270):

> The term "habitual residence" is not defined specifically in the Bill. This is in line with the practice of the Convention and the Contracting States. In other words, it is not defined so that the Court will have discretion to determine the child's country of habitual residence and the Court will arrive at such a determination based on evidence adduced. For instance, let me correct a common misperception. The country of habitual residence does not refer to a child's domicile or citizenship or passport that the child may hold but the Court, instead, will take into account factors which determine a child's personal ties to a place. Relevant factors that a Court may consider – I want to emphasise 'may' because their discretion still takes precedence – would include factors like the age of the child, whether he or she has his own views, the maturity of the child, the child's cultural affiliations. For instance, the language he or she speaks or the place that he or she has the most links to, the country perhaps where he has been in school the longest, and so on. There

will be many other factors. The point I am trying to make here is that, we cannot be sitting in this House hard-code all the different permutations or factors which the Court would have to take into account.

37 The main thrust of the speech, as I understand it, is to emphasise broadly that habitual residence is not necessarily equivalent to domicile, citizenship or nationality, but is the country to which the child is closely connected, having lived in it for some time and integrated into its community and culture.

38 In my view, determining the child's habitual residence would involve a holistic assessment of all the circumstances of the case. I agree with Lord Brandon of Oakbrook in *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, often cited for the general principles in the determination of habitual residence under the HCCA, that "the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case" (at 578). Each case would have to be decided on its facts.

39 That said, the courts are not without guidance as to how to approach such an issue. In a recent decision of the UK Supreme Court, *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC 1038 ("*In re LC*"), Baroness Hale of Richmond adopted a "child-centric" approach to the determination of a child's habitual residence:

> 61 It would be wrong to overlay these essentially factual questions with a rule that the perceptions of younger children are irrelevant, just as it was to overlay them with a rule (rejected in *A v A* [2014] AC 1) that a child automatically shares the habitual residence of the parent with whom he is living. The age of the child is of course relevant to the factual question being asked. ...
>
> 62 Clearly, therefore, this is a child-centred approach. It is the child's habitual residence which is in question. It is the child's integration which is under consideration. Each child is an individual with his own experiences and his own perceptions. These are not necessarily determined by the decisions of his parents, although sometimes these will leave him with no choice but to buckle down and get on with it. …
>
> 63 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.

40 The High Court of Australia in *LK v Director-General, Department of Community Services* (2009) 253 ALR 202 also provides some guidance. The court took the view that, in order to ascertain the habitual residence of the child, it must consider where the caregiver of the child lives (at [27]). In addition to that, the court must also consider what each parent intends for the child, and it is not sufficient to simply have regard to the intention of the primary caregiver (at [34]).

41 I also find useful the case of *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and other intervening)* [2014] AC 1. In that case, the UK

Supreme Court accepted the views of the European Court of Justice ("ECJ") in *Mercredi v Chaffe (Case C-497/10 PPU)* [2012] Fam 22 ("*Mercredi*") where it was observed that since "[a]n infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent" (at [50]), the court should assess the primary caregiver's integration in her social and family environment to determine if in fact she was habitually resident in the country she had moved to. In this regard, factors such as the reasons why the caregiver moved, the languages known to the caregiver, and the caregiver's geographic and family origins must be taken into consideration.

42 The courts in different jurisdictions have taken on various approaches to the finding of a child's habitual residence. Some would accept that a very short stay can amount to habitual residence if the requisite intention was present. This seems to be more relevant to the acquisition of domicile, rather than to habitual residence. Both parents' intentions are also relevant in determining a child's residence. However, it is also possible that a unilateral removal by a parent can give rise to a new habitual residence after some time has passed and the child is integrated into the new country (see New Zealand case of *SK v KP* [2005] 3 NZLR 590 at [76]; *Punter v Secretary for Justice* [2004] 2 NZLR 28 at [81]–[82]). In such cases, there is no shared or joint intention on the part of both parents but the child may be found habitually resident after being settled in the country to which she was unilaterally removed by one parent.

43 In my view, to determine the child's habitual residence, the court will have to consider where the child has been living and how settled she is in that country, including how integrated she is to the country in terms of the environment, education system, culture, language and people around her in that country. The court will also have to consider where her parents are habitually resident and whether one or both parents had the intention that the child should reside there.

44 The age of the child is also highly relevant. Where older children are concerned, the inquiry should include objective and subjective factors. Baroness Hale in *In re LC* has said at [60]:

> …the question is the quality of their residence, in which all sorts of factors may be relevant. Some of these are objective: how long were they there, what were their living conditions while there, were they at school or at work, and so on? But subjective factors are also relevant: what was the reason for their being there, and what were their perceptions about being there?

Where a child is very young, there may be less emphasis on the subjective factors (the child's intentions) while the objective ones (where the child is settled) may take on greater significance. The parents' intentions and residence will also be important in the case of a very young child.

45 These are all guides which are helpful in determining the habitual residence of the child. At the end of the day, the question is one of fact to be decided by reference to all the circumstances of the particular case. The courts must approach the issue with common sense and adopt a holistic assessment of all the circumstances.

B's habitual residence

(1) B's habitual residence up to the time she was brought from Hong Kong to Singapore

46 B was born in Hong Kong and had lived in Hong Kong until she was taken to Singapore on 23 June 2014. Her Mother had lived in Hong Kong for six years, while her Father still lives and works in Hong Kong. As B had been living with both parents in Hong Kong since her birth, she must have been habitually resident in Hong Kong until 23 June 2014. There is no other country of habitual residence applicable to B up to June 2014. In fact, the Hong Kong court observed in its reasons for the decision

on 16 October 2014 that the Mother "never challenged [the Father's] case that [B] was habitually resident in Hong Kong *prior to* the Removal".

(2) B's habitual residence after she was brought from Hong Kong to Singapore

47 The ECJ pointed out in *Mercredi* at [53] (and this was cited in *In re LC* at [61]) that:

> 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.

48 As B is a very young child, she would not have been as settled in a community the way an older child who has been living and schooling in a community for more years might have. In determining whether her habitual residence has changed, it is necessary to give attention to other factors including her residence before removal, the length of time she has spent in each country and her parents' intentions, residence and circumstances.

49 When B was taken to Singapore, the consent of the Father for her to remain in Singapore in a permanent way was not present or was at least unclear. The District Judge had thought that "the mother had brought [B] to Singapore with the knowledge and consent of the father" (at [28] of the GD), but this was only with respect to a short trip in June, for the District Judge also noted that "[the Father] had consented to [B] being brought to Singapore albeit '*for a few days or so*'" (at [3] of the GD). Even if the Father had consented to the trip to Singapore in June 2014, it did not follow that he must therefore be taken to have consented to B's permanent relocation to Singapore. It appeared that the Father became concerned that the Mother might not bring B back to Hong Kong and he consequently took out proceedings on 29 August 2014. Hence, this was not a case where both parents had a shared intention that B should settle down in a more permanent way in Singapore. In fact, her Father who is resident in Hong Kong seeks to have her returned to Hong Kong. In considering both parents' intentions, I do not make any judgment on whether an unmarried father has the authority to decide on the habitual residence of his child. I consider both parents' intentions as part of all relevant facts in determining this issue, which involves a question of fact.

50 When the Mother left Hong Kong with B on 23 June 2014, it was not all that unequivocal that she had intended to reside in Singapore with B on a long term basis. The Hong Kong proceedings began a few months after B was brought to Singapore, and the Mother participated in it initially. Counsel for the Father had pointed out that the Mother did not dispute in the Hong Kong proceedings that B was habitually resident in Hong Kong. Even though the Hong Kong proceedings occurred a few months after June 2014, the Mother did not raise any argument in those proceedings that B was not habitually resident in Hong Kong but in Singapore. Perhaps this was because the Mother was still connected to Hong Kong (for example, in terms of her work) and had not settled down in Singapore at that point in time. The evidence does not show that the Mother had changed her habitual residence to Singapore in those few months when proceedings were commenced. Instead, the picture that emerges is that during that difficult period, she was living out her life in manageable bite-sized pieces, beginning with spending time in Singapore at that time while sorting things out. At the time B was taken to Singapore, the Mother messaged the Father on 23 June 2014 at 4.53 pm that "we'll be away till things calm down". There was evidence in the "WhatsApp" messages exchanged between the Father and Mother that suggested that she was thinking through things and had not decided on long term plans. Considering all these circumstances, I found that B's habitual residence had not changed during these months. She remained habitually resident in Hong Kong even after her removal in June

2014.

51 The habitual residence of B prior to and after she was brought to Singapore is a relevant factor in the application of the doctrine of *forum non conveniens*. However, the habitual residence of the child is *not* the *only* factor as all other relevant factors must also be considered. As I have mentioned earlier, the habitual residence of the child prior to removal is the sole criterion under the HCCA regime, but this case is not an application under the HCCA. Even if it can be said that B was habitually resident in Singapore by the time of the Singapore hearing, the court must also consider all of the factors, including the fact that B had been habitually resident in Hong Kong at the time she was taken to Singapore. She had spent 13 months of her young life since birth in Hong Kong, and only five months in Singapore at the time of the hearing before the District Judge on 4 December 2014. The search is for the forum which can best evaluate her welfare, not simply the forum of her present habitual residence.

B's physical connection to Singapore

52 Quite apart from where B was habitually resident when the Hong Kong and Singapore orders were made, another factor was B's presence in Singapore after she was brought here. One can be habitually resident in country X but physically present in country Y at the time of proceedings. Counsel for the Mother had submitted that B was settled in her living arrangements in Singapore.

53 A very young child may be as settled in one country as another so long as she is with her familiar caregivers. B is a very young child and is likely to be able to adjust to living arrangements in Hong Kong and in Singapore, as long as she is with caregivers that she feels secure with. For a very young child, this factor may not bear as much weight compared to the case of an older child who has spent many more years settled in the environment where, for example, she is integrated to the school system and has established bonds with friends around her. I did not think that B was very much more integrated into the Singapore community relative to her integration in Hong Kong in the months after she was brought to Singapore. In relation to the question of which forum which is better placed to evaluate B's interests, this factor has a lesser significance in the present case than in a case of an older child well settled and integrated into the home and formal school for a substantial number of years in the country, for that country in which she is substantially integrated may be better placed to evaluate her educational, social, emotional, moral and health needs.

54 At this juncture, I should point out that the issue before me (and thus, the decision that I reached) pertains only to whether the Singapore proceedings should be stayed and *not* whether B should be returned to Hong Kong. The Hong Kong order made on 16 October and 12 September 2014 related to access. They were not orders for B to be returned to Hong Kong. Even if B was settling down in Singapore at the time of the Singapore proceedings, ordering a stay of the Singapore proceedings merely allows the Hong Kong court to make substantive orders for her welfare and does not in itself involve uprooting her from an environment she is settling into (even *if* that was the case). It remains open to the Mother to seek orders in the Hong Kong court for B to be relocated to Singapore. Suppose relocation is permitted and the Mother and B settled down in Singapore after some years, the more appropriate forum in future to determine proceedings may then be Singapore. Such matters would have to depend on all the relevant facts at that time.

Parties' connections to Hong Kong and Singapore

55 In the present case, the parties were in some way connected to Hong Kong and Singapore. The "seat" of the parties' relationship was in Hong Kong, where they had met, had an intimate relationship and had a child. Their relationship has now broken down, and one party has moved to Singapore while

the other remains in Hong Kong. B has been taken from Hong Kong, in which she had lived for the first year of her life, to Singapore. The Father continues to live in Hong Kong while the Mother now lives in Singapore.

Lis alibi pendens

56 It is also pertinent that, in the present case, there are parallel proceedings in Hong Kong and Singapore. In fact, the Hong Kong proceedings appear to be in a more advanced stage than the proceedings in Singapore. This is not surprising given that the Hong Kong court made its first interim order on 12 Sept 2014, before any proceedings had begun in Singapore.

57 The existence of parallel proceedings would generally weigh in favour of a stay, and the weight to be given to parallel proceedings would depend on the circumstances (see *Virsagi* at [39], citing *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2009) at para 75.094). While it is sufficient to have parallel proceedings in order for the foreign proceedings to weigh into the analysis, the degree to which the respective proceedings have advanced is an important consideration (see *Virsagi* at [39]–[40]). I would like to emphasize that in proceedings involving a child such as the present, the child's welfare remains the paramount consideration even in cases involving *lis alibi pendens*.

58 *Lis alibi pendens* was a significant factor in the recent High Court decision in *AZS and another v AZR* [2013] 3 SLR 700. In that case, the parties and their son were French nationals. The husband had filed for divorce in France in April 2012 and the wife commenced divorce proceedings in Singapore on 14 June 2012. Interim orders for custody and maintenance issues had already been made in Singapore, and the husband had agreed to abide by the orders. The High Court held that, in relation to the issue of whether the Singapore divorce proceedings ought to be stayed on the ground of *forum non conveniens*, the *Spiliada* test applied. Applying the test, it held that, looking at the various factors in totality, France was clearly the more appropriate forum to hear the matter. The wife conceded that the issues regarding their prenuptial agreement should be adjudicated in France, but argued that custody arrangements and maintenance should be heard by the Singapore courts, as the parties and child were resident here. However, the case involved concurrent divorce proceedings in Singapore and France, and *lis alibi pendens* was one of the factors in favour of a stay (see [13]). Andrew Ang J noted that the residence of the parties gave them a real and substantial connection to Singapore, but the other factors, including the *lis alibi pendens*, favoured a stay of proceedings (at [22]–[23]):

> 22 As this case involved concurrent divorce proceedings in Singapore and France, the doctrine of *lis alibi pendens* came into play as another factor in favour of a stay….
>
> 23 Looking at the various factors in totality, France was clearly the more appropriate forum to hear this matter. While I agreed with the Wife that the parties' residence in Singapore favoured the hearing of matters relating to custody of the son and maintenance in Singapore, the other factors in favour of France as the appropriate forum were overwhelming. …

59 The learned authors in James Fawcett & Janeen Carruthers, *Cheshire, North and Fawcett Private International Law* (Oxford University Press, 14th Ed, 2008) at pp 440–441 explain the difficulties with parallel proceedings in the following terms:

> … It is highly undesirable to have concurrent actions in England and abroad: this involves more expense and inconvenience to the parties than if the trial were held in merely one country; it can also lead to two conflicting judgments, with an unseemly race by the parties to be the first to obtain a judgment and to subsequent problems of estoppel. ...

> … [T]he fact that the refusal of a stay of English proceedings will lead to a multiplicity of proceedings in England and abroad is an important additional element to be taken into account under the doctrine of *forum non conveniens*. …

60 This is a case where *lis alibi pendens* operates within the doctrine of *forum non conveniens* (as envisaged in *Virsagi* at [38]–[40]). On 27 Sept 2014, had the court determining the *ex parte* application been fully aware of the Hong Kong proceedings and orders, as well as the fact that the Father was physically present in Singapore at the time of the hearing, would it have come to a different decision? B had been in Singapore for only three months then, all other factors connected her to Hong Kong, and there was already an order in Hong Kong which made her a ward of the Hong Kong court. The Hong Kong application would have been heard *inter partes* in less than three weeks' time from that date.

61 At the hearing on 16 October 2014, the Hong Kong court was informed that the Mother had taken out proceedings in Singapore in September 2014 seeking sole custody for herself and supervised access for the Father. The Hong Kong court observed in its reasons for the decision on 16 October 2014 that "[w]hat is clear is [the Mother] issued the Singaporean proceedings only after she had been served with the Hong Kong wardship proceedings".

62 In my view, it is not in the welfare of B to have two sets of proceedings and orders on the matter of guardianship, custody, care and control and access. The multiplicity of proceedings has already led to different orders on access. The confusion and uncertainty would only add to the tensions between the parents which in turn would have an adverse impact on B's welfare. Costs, energy and time are needlessly expended on the parallel proceedings which risk becoming more protracted. On the facts of the present case, this factor weighs in favour of Hong Kong being the more appropriate forum to hear the dispute.

My decision and concluding thoughts

63 I find that B was most substantially connected to Hong Kong. Hong Kong is the forum which can best evaluate her needs and welfare and is clearly the more appropriate forum. In reaching this decision, the welfare of B was always the paramount consideration. Hong Kong was the seat of the parties' relationship. Both parties and B were clearly habitually resident in Hong Kong at least until June 2014, and I have found that B's habitual residence had not changed after she was taken to Singapore. It was against B's welfare to have multiplicity of proceedings. The Hong Kong proceedings have advanced further than the Singapore proceedings and the Hong Kong court has been actively and efficiently fulfilling its obligations to B, who was made a ward of the court. In fact, after this decision was made in February 2014, the Hong Kong court had on 5 March 2015 ordered the continuance of the access order of 12 September 2014. This Hong Kong order was then mirrored in Singapore by an order of court dated 6 March 2015. A stay of execution of my order was dismissed by the family court in May 2015. Other orders were also made by the Hong Kong court in May 2015. Further, counsel for the Father had informed this court, in a subsequent hearing for leave for extension of time to file a notice for leave to appeal, that the Mother had obtained an expedited order in April under the Protection from Harassment Act (Cap 256A, 2015 Rev Ed) against the Father, so that the Father is prevented from exercising access as he is not permitted to contact the Mother. All these proceedings are adversely affecting the welfare of the child. I note that both the Hong Kong order of 16 October 2014 and the Singapore orders (which I have set aside) have given the Father generous access of 2 weeks once in every 4 weeks. B should not be deprived from enjoying access with her father. It is in B's welfare for there to be no further delay preventing her from spending time with the Father. These events post-dated my orders and were of course not taken into account in the decision which pre-dated them.

64 As B's welfare is the paramount consideration, the entire case must be examined and the solution that is in B's welfare must be taken. If the Mother had felt that she needed to relocate to Singapore with B on a long term basis, it would have served B's interests better if she could have worked out an arrangement with the Father before taking B to Singapore. If this was not possible, then the Hong Kong court, the only court that B and the parties were connected to at that time, ought to have been the forum to adjudicate all their parenting disputes, including the determination of a relocation order. But no application was made to the Hong Kong court at that time. Then, not long after B was taken to Singapore, the Father took out proceedings in Hong Kong and the Hong Kong court made orders to protect B's welfare. B and both her parents were still very much connected to Hong Kong and Hong Kong was the more appropriate forum to evaluate what was in B's best interests. The fact that the Mother and B are presently living in Singapore can be brought to the attention of the Hong Kong court as it evaluates what is best for B. It is not in B's interest to have the dispute contested in two forums.

65 I emphasize that B's welfare is well protected. It is not the case that just because Singapore proceedings are stayed, the welfare of the child will be disregarded. B's welfare will be adequately safeguarded as a ward of the Hong Kong court. The Hong Kong court had already made orders as early as in September and October 2014, and has continued to make orders in respect of B. Her welfare has been the paramount consideration in these proceedings.

66 No proceedings have been taken out under the HCCA regime (which has been implemented in Singapore under the ICAA). The House of Lords in the landmark decision of *In re J (A Child) (Custody Rights: Jurisdiction)* [2006] 1 AC 80 ("*In re J*") held that it was not open to the court to apply quasi-HCCA rules in non-HCCA cases; instead, courts must apply the principle of the individual child's welfare as the paramount consideration. In the present case, it is observed that Hong Kong is a contracting state of the HCCA which has accepted Singapore's accession. It is noteworthy that the present circumstances are different from the facts in *In re J* which involved a non-HCCA state: the English court in that case had to decide the matter which involved Saudi Arabia, a non-HCCA state. Nevertheless, this is not a case brought under the HCCA regime and it has been determined outside the HCCA, using the doctrine of *forum non conveniens* and the welfare principle. However, the decision reached, that is, to have the Hong Kong court decide the matter, is consistent with the likely position which would have been reached under the HCCA, which entrusts the country of habitual residence prior to the child's removal to determine the matter. The Father has been declared by the Hong Kong court to have parental rights over B and it is possible for him to make an application under the HCAA against the wrongful retention of B. These are merely observations to clarify the context against which these facts are set.

67 For these reasons, I allowed the appeal and granted a stay of proceedings. I also set aside the orders made on 27 September, 4 December 2014 and 9 January 2015. I ordered that the Mother shall pay the Father costs fixed at $2,000.