IN THE FAMILY JUSTICE COURTS OF THE REPUBLIC OF SINGAPORE

[2017] SGHCF 12

District Court Appeal No 158 of 2016

Between

TUC

… *Appellant*

And

TUD

… *Respondent*

In the matter of Originating Summons (Family Justice Courts) No 68 of 2016

Between

TUC

… *Plaintiff*

And

TUD

… *Defendant*

JUDGMENT

[Family Law] — [Child] — [Abduction]

[International Law] — [Conventions] — [Articles 3 and 13(a) of the Convention on the Civil Aspects of International Child Abduction]

TUC
v
TUD

[2017] SGHCF 12

High Court — District Court Appeal No 158 of 2016
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Judith Prakash JA
16 March 2017

9 May 2017 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 This appeal stems from an application filed by the appellant ("the Father") under s 8 of the International Child Abduction Act (Cap 143C, 2011 Rev Ed) ("the ICAA") for an order that his two children be returned from Singapore to San Francisco, California, USA, which, according to the Father, is the children's place of habitual residence. His application was based on the ground that the children had been wrongfully retained by the respondent ("the Mother") in Singapore in breach of his rights of custody under US law.

2 The Mother, with whom the children presently reside, opposed the Father's application on two grounds. First, relying on Art 3 of the Convention

on the Civil Aspects of International Child Abduction ("the Hague Convention"), which is set out in the Schedule to the ICAA and has the force of law in Singapore, she argued that by the time of the hearing of the Father's application, the children were no longer habitually resident in the USA, but were instead habitually resident in Singapore; the retention of the children in Singapore was therefore not a breach of the Father's rights of custody and not wrongful. Second, and in the alternative, relying on an exception contained in Art 13(a) of the Hague Convention, she argued that the Father had consented to the retention of the children in Singapore. Specifically, she asserted that he had consented to the family's move from the USA to Singapore for a period of at least two years to support her aspiration to pursue career opportunities here. Therefore, the court was not bound to order the return of the children to the USA.

3 The Father, in response, argued that the habitual residence of the children had not changed and, further, that he had not consented to the children's retention in Singapore. He also argued, in the alternative, that any consent that he had given in this regard had been procured by the Mother's deceit and was therefore devoid of legal force and effect.

4 The application was heard and dismissed by the Family Court. In her grounds of decision (published as *TUC v TUD* [2016] SGFC 146 ("the GD")), the district judge ("the DJ") found that the Father had consented to the relocation of the children to Singapore for two years to support the Mother's career aspirations, and that there was insufficient evidence to warrant a finding that he had been deceived into consenting. The Father filed the present appeal against the DJ's decision.

5 In this judgment, we set out the approach to determining "habitual residence" for the purposes of Art 3 of the Hague Convention. As this is the first occasion on which the exception founded on consent under Art 13(a) has been invoked, we think it useful also to review the legal principles on determining consent. We appointed an *amicus curiae*, Mr Chan Yong Wei, to assist us in resolving these legal issues. We are grateful for his clear and concise submissions, which we have taken into account in the course of our analysis.

6 Having considered the parties' submissions, we find that the children were habitually resident in California, USA immediately before 2 June 2016, the date on which the Mother intimated to the Father that she wanted to end their marriage. In our judgment, the children were thereafter wrongfully retained in Singapore by the Mother. The DJ erred in finding that the Father had consented to such retention; this makes it unnecessary for us to decide whether any consent on his part had been procured by deceit. Accordingly, we allow this appeal. The detailed reasons for our decision follow.

Background

7 We begin with a brief recital of the material facts. We have redacted the names of the various persons and entities involved in order to protect the privacy of the children. The Father and the Mother are naturalised US citizens. The Father graduated with a degree in engineering from a university in India and has lived in the USA since 1995, save for the time he spent in Singapore from February to July 2016, a period which is pivotal to this appeal. He obtained an MBA from the University of California at Berkeley in 2009, and is the co-founder of a technology start-up. The Mother, who was born in India, pursued her pre-tertiary education in Singapore and her undergraduate

education in Australia. She moved to California in 2003 to pursue a Master's degree in statistics at California State University Hayward. Her last employment in the USA was as the chief data scientist of a company. The Father and the Mother were married in India in April 2003. They registered their marriage in California, USA in April 2004.

8 Their marriage was a strained one even before the children were born. According to the Mother, there were frequent spats and disagreements from around 2006. There is evidence to suggest that divorce had been contemplated from time to time. For instance, in an email from the Father to the Mother's mother, [MIL], on 10 November 2014, in which he sought her advice on how to handle his marital problems, he wrote: "[The Mother] threatened me with a divorce today. It's not the first time, not the tenth time, not even the 100th time even. It happens atleast [*sic*] once every month since our marraige [*sic*]".

9 The two children, [FC] and [SC], were born in the USA and are US citizens. [FC] was born in Fremont, California in December 2011. He lived and attended day care schools in California from his birth until November 2015, when he came to Singapore. [SC] was born in August 2014 and lived in California until he came to Singapore in October 2015.

10 In April 2015, the parties bought a home in West Menlo Park, an upmarket residential district in California with good public and private schools in the vicinity. That same month, the family's domestic helper, who had been with them since late 2011, left their employment. At the Mother's request, [MIL], a Singapore permanent resident who has been living here since 1994, flew to the USA on 18 May 2015 to help the Mother run the household and manage the domestic chores.

11 We observe that the key events in this case happened between then and 2 June 2016, over the course of slightly more than a year. This is not to suggest that [MIL]'s appearance on the scene *caused* what eventually happened, although, as will be seen, she did play an important role in the narrative of events which follows. For ease of analysis, we group these events into five distinct phases.

May to October 2015: The Mother explores job opportunities in Singapore

12 The first phase revolves around the Mother's pursuit of job opportunities in Singapore. The Mother had been doing well in her career as a data scientist in the USA, but aspired to start her own financial technology ("FinTech") company. In late July 2015, she was introduced by a former colleague, [FCD], to the co-founders of [PEC], a private equity and advisory firm which was the main investor in [ECC], a FinTech start-up in the Philippines. From July to December 2015, the Mother discussed employment opportunities with [FCD] and the co-founders of [PEC].

13 It is relevant to note that in August 2015, the Father and the Mother each extended a loan to [USC], a Singapore company owned by the Mother's uncle, [UNC]. This is pertinent to the Father's case on deceit: his allegation is that the loans were part of a scheme by the Mother to channel the couple's funds to Singapore. According to the Father, the Mother had represented to him that the loans were to help [UNC] with a lawsuit that [USC] was facing. Under the loan agreements, the Father and the Mother each lent US$100,000 to [USC], which was to repay the loan amounts within 36 months. We mention this for completeness, but do not place much emphasis on it since, as will become apparent, the loan made by the Father was repaid in due course.

October to early December 2015: The family visits Singapore for a holiday

14 The second phase revolves around the holiday that the family planned to take in Singapore at the end of 2015. The Father and the Mother had, since their marriage, taken annual vacations in Singapore and/or India, but this trip which was planned for the end of 2015 appears to be the first occasion on which they were accompanied by their children.

15 On 1 October 2015, [MIL] returned to Singapore with [SC]. This was about five months after [MIL] had come to stay with the family in California. The Father and the Mother signed a letter of consent for [SC] to travel without his parents. This was unremarkable because it was contemplated at that time that the rest of the family would also travel to Singapore shortly after. On 19 November 2015, the Mother and [FC] followed. Due to his work schedule, the Father only arrived in Singapore about a week later, on 27 November 2015. The plan was for the family to fly to Chennai on 12 December 2015 to visit the Father's parents, fly back to Singapore on 1 January 2016 and then return to San Francisco on 9 January 2016. Indeed, in October 2015, they had already booked their return flights from Singapore to San Francisco. The Mother planned to be back in her office on 11 January 2016 and was expecting [FC] to continue schooling in the USA in January; she thus reminded the Father on 6 January 2016 to pay [FC]'s school fees for that month. As things turned out, the family did not go to Chennai and the Father alone returned to San Francisco on 6 December 2015. How this came to be is disputed.

16 According to the Father, during the family's vacation in Singapore, the Mother said that she was keen to join a FinTech start-up in the region. He returned to the USA on his own, expecting that the Mother would follow with their children, but she did not. According to the Mother's version of the

events, on 4 December 2015, the Father had a disagreement with her parents, with whom the family was staying during their vacation here. He left her parents' house, checked into a hotel, and then left for San Francisco on 6 December 2015 of his own accord.

17 While on vacation in Singapore, the Mother continued her pursuit of an employment opportunity with [PEC]. On 1 December 2015, she met a co-founder of [PEC] in Singapore, who offered her a position.

18 However, neither [PEC] nor [ECC] had a presence in Singapore, where the Mother wanted to be based. A compromise solution was eventually worked out: the Mother would work for [ERP], a company of which [UNC] was a director. [ERP] would in turn contract with [PEC] for her to provide it with consultancy services.

Mid-December 2015: The parties discuss the move to Singapore

19 The third phase commences on 12 December 2015 when the Father re-established contact with the Mother by email after his earlier than anticipated return to California. The parties exchanged a number of emails between 12 and 25 December 2015. We will return to these emails in due course, but it suffices to note for now that there was no clear decision by Christmas Day 2015 for the family to relocate to Singapore.

Early January to February 2016: The parties decide to move to Singapore and wind down their affairs in San Francisco

20 The fourth phase is when the parties decided to move to Singapore. On 7 January 2016, [PEC] sent the Mother a consultancy contract. The contract was to be for a year, from 15 February 2016 to 14 February 2017, and could be terminated by either party with three months' notice. On the same day, the

Mother returned the consultancy contract to [PEC] with [ERP]'s details filled in. She also informed [PEC] that she was going to fly back to the USA that weekend to serve out her two-week notice period.

21 It was around this time that a decision was made for the family to relocate to Singapore. On 7 January 2016, several emails were exchanged between the Father and the Mother discussing matters such as the terms of the consultancy contract with [PEC], renting a property in Singapore, the children's education, and their cash flow. The precise terms of the move to Singapore and the parties' motivations are heavily contested, and we will return to this later.

22 The parties then took steps to wind down their affairs in California:

(a) On 11 January 2016, the Father withdrew [FC] from his school in California, explaining that there had been "a recent development during [their] trip to Singapore": the Mother had "just accepted a six month consulting offer there" that required her to be in Singapore, and they preferred "that the children stay with her during the time". He added that this meant that [FC] would not be attending the school "for the near term".

(b) On 12 January 2016, the Mother went back to the USA to formally resign from her company before returning to Singapore on 2 February 2016.

(c) On 17 January 2016, the Father put the West Menlo Park property up for rent on CraigsList. The couple later approached [REA], a realtor, for help. In her affidavit, [REA] said that the couple approached her in January 2016 instructing her that they wanted to

lease out the property for two years, that their move was likely to be for a minimum period of two years, and that she was to find a tenant who was prepared to rent the property for a year. [REA] secured a one-year tenancy for the property in March 2016.

(d) The parties sold their two cars in the USA.

(e) The Father withdrew the Mother and the children from the healthcare benefits scheme provided by his start-up.

(f) After obtaining permission from his start-up to work remotely from Singapore for six months, the Father left for Singapore on 20 February 2016.

February to July 2016: The family's stay in Singapore

23 We turn now to the fifth phase of the events. As part of their move to Singapore, the parties took steps to settle in:

(a) On 1 February 2016, [MIL] signed a tenancy agreement for the condominium unit where the Mother now resides. The tenancy was for a period of 24 months. According to the Mother, she asked [MIL] to sign the agreement as she did not have an Employment Pass at that time.

(b) On 4 February 2016, the Mother was issued her Employment Pass along with Dependant's Passes for the children.

(c) On 25 February 2016, the parties signed a contract with an international school in Singapore for [FC] to be enrolled there. [FC]'s school term was to commence on 1 March 2016. As for [SC], he was enrolled in a playschool.

24 On 15 February 2016, as planned, the Mother joined [ERP]. However, on 14 April 2016, just two months later, [PEC] terminated its consultancy contract with [ERP]. According to the Mother, this was an amicable split. She had recommended that [PEC] withdraw its investment from [ECC]; [PEC] had agreed, which meant that the project for which she was to provide consultancy services came to an end. The Mother continued to work for [ERP] after the consultancy contract with [PEC] was terminated. Between April and June 2016, she was allegedly in talks with a number of companies in a bid to obtain fresh contracts for [ERP].

25 As far as the children were concerned, the period from February to June 2016 was an enjoyable one. There are, in the evidence, pictures of the children playing with their maternal grandparents, attending birthday parties at school, and visiting the Singapore Zoo. In addition, the parties and the children went on two short vacations during their stay here: one to Chennai in March, and one to Hong Kong in April. As between the parties, however, there does not appear to have been any easing of their marital tensions. According to the Mother, the period after the termination of the consultancy contract with [PEC] was a trying one: she had to balance caring for the children with searching for business deals for [ERP], while the Father was an unhelpful parent and unsupportive of her efforts on the career front. On the Father's account of things, he did help with parenting duties, such as by preparing [FC] for school and playing with [SC] in the evenings, but at the same time, the Mother's parents made it difficult for him to spend time alone with the children.

26 On 2 June 2016, the Mother told the Father that they should file for divorce. The Father was naturally distressed by this. He asked [CF], the co-

founder of his start-up, for recommendations on divorce attorneys and told him, "I'd like to ensure the kids are returned to California".

27 The Father took a number of preparatory steps in the lead-up to his application under s 8 of the ICAA. On 8 June 2016, being in need of money to seek legal advice, he asked [UNC] to return the US$100,000 which he had lent to [USC]; [UNC] did so on 2 July 2016. On 15 June 2016, he spoke to a US consular officer asking for advice on what he could do if the Mother retained the children in Singapore against his wishes. He also spoke to a US attorney on 16 June 2016. On 3 July 2016, the Father returned to the USA. On 11 July 2016, he requested the Office of Children's Issues, US Department of State, to place his children on a travel alert system.

28 The following legal proceedings were then set in motion:

(a) On 4 July 2016, the Mother filed an originating summons under the Guardianship of Infants Act (Cap 122, 1985 Rev Ed) asking that the parties be granted joint custody of the children, with the Mother having care and control and the Father having reasonable access.

(b) On 8 July 2016, the Mother filed for divorce in California.

(c) On 20 July 2016, the Father filed his application under s 8 of the ICAA, from which this appeal arises, in the Family Justice Courts.

The decision below

29 The DJ did not address the issue of habitual residence in the GD. It is, however, implicit from her findings on consent that she accepted that the habitual residence of the children was the USA. Had she thought otherwise, there would have been no wrongful retention of the children in Singapore to

begin with and, thus, no need to consider whether the Father had consented to the retention.

30 The parties' arguments on consent in the court below were as follows (see the GD at [31]–[34]). The Father argued that: (a) he had only agreed to a move to Singapore for a duration of between six months and a year; and (b) in any event, the relocation was contingent on the consultancy contract with [PEC] being alive. The Mother countered that: (a) the move to Singapore was intended to be for a period of two years; and (b) the move was to support her career advancement in the field of data science generally, and was not premised solely on her continuing to provide consultancy services to [PEC].

31 The DJ found that the Father had consented to the relocation to Singapore for two years. Her reasons were as follows (see the GD at [35]):

> (a) First, the Father had, in a number of communications both with the Mother and with other people, used words which showed that he contemplated such a move to Singapore. For instance, the Father had sent an email to the Mother on 7 January 2016, the day on which she received the consultancy contract with [PEC], saying that they should "make the best of it" – this suggested that the Father was prepared for a long-term stay. The Father had made a number of similar references to a long-term stay in Singapore in conversations with the Mother, a close friend, and the parties' real estate agent, [REA]. For example, he had talked about returning to the USA "a couple [of] years later" and relocating to Singapore on a "temporary basis for two years".
>
> (b) Second, the Father's conduct showed that he was prepared for such a move. He wound down the family's affairs in the USA, took steps to put the West Menlo Park property on the market for rent

(indicating that he wanted to lease it out for two years) and sold some of the family's possessions in the USA.

32 The DJ next found that the Father's consent to the relocation to Singapore was not contingent on the Mother's continued provision of consultancy services to [PEC] (see the GD at [36]–[37]). She rejected the Father's submission that following the termination of the consultancy contract with [PEC], he had repeatedly asked the Mother to return with their children to the USA. Given the frequency with which the parties had communicated by text messages or email, the absence of any written evidence of such requests was, in the DJ's view, "striking". Furthermore, after the termination of the consultancy contract with [PEC], the Father had continued to live in and run his business from Singapore without protest.

33 As to whether the Father's consent had been vitiated by deceit, the DJ noted that the Father had relied on three main facts in this regard: (a) the Mother had already formed the intention to divorce him in mid-2015; (b) the loans which the parties gave to [UNC]'s company, [USC], were but an attempt by the Mother to channel the family's savings to Singapore so as to facilitate her relocation; and (c) the Mother's employment with [ERP] was a sham arrangement.

34 The DJ found that the Father had not proved any of these three facts and had therefore failed to show that his consent had been vitiated by deceit. In particular:

(a) The DJ was not convinced that the Mother had formed a firm intention to divorce the Father in mid-2015, noting in particular that all that the Father had relied on was the testimony of three of their

common friends. Those friends had filed an affidavit stating that at a party on 16 October 2015, the Mother told them that she had a long-term plan to move to Singapore permanently, but did not want the Father to find out. That evidence had not, however, been tested in cross-examination (see the GD at [41]–[43]).

(b) The Mother had not deceived the Father into providing the loans to [USC]. The Father himself had structured the loans and would have been sufficiently sophisticated and knowledgeable not to have been deceived into providing the money. There was, in any case, no reason for the Mother to contrive the loan arrangements to facilitate her relocation to Singapore (see the GD at [47]–[48]).

(c) The Mother's employment with [ERP] was not a sham. After the consultancy contract with [PEC] was terminated, the Mother continued to work for [ERP] and pursue career opportunities in the FinTech industry (see the GD at [51]–[52]).

The law

Overview

35 As we have mentioned earlier, the Father's application was brought pursuant to s 8 of the ICAA, the material part of which provides:

> **Application for return of child**
>
> **8.**—(1) A person who claims that, in breach of rights of custody attributed to a person, either jointly or alone, under the law of a Contracting State, a child has been wrongfully removed to or retained in Singapore within the meaning of the Convention may apply to the Court for an order that the child be returned.
>
> …

36 The Hague Convention establishes a summary procedure for the return of children who have been wrongfully removed to or retained in a Contracting State. Its objective is, as specified in Art 1, to secure the "prompt return" of such children. Upon proof of the wrongful removal or retention of a child, the court of the Contracting State in which the application under the Hague Convention is filed ("the Requested State") is concerned only with the return of the child to his or her country of habitual residence, subject to the limited exceptions in Art 13, and not with the merits of any dispute over the custody and/or care and control of the child (see *BDU v BDT* [2014] 2 SLR 725 ("*BDU (CA)*") at [26]). The limited exceptions in Art 13 are that the Requested State is not bound to order the return of the child if it is established that the parent making the application "was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention". In the present case, we are concerned only with the exception founded on "consent".

37 According to Art 3 of the Hague Convention, the removal or retention of a child is "wrongful" if it is in breach of the rights of custody attributed to a person (here, the Father) under the law of the State in which the child was habitually resident immediately before the removal or retention.

38 There is wrongful "removal" when one parent takes a child from the country of habitual residence to another country in breach of the other parent's rights of custody; there is wrongful "retention" when the parent takes the child to another country lawfully, but fails to return the child to the country of habitual residence in breach of the relevant rights of custody. As explained by the House of Lords in *In re H (Minors) (Abduction: Custody Rights)* [1991] 3 WLR 68 ("*In re H (Custody Rights)*") at 78:

> … [R]emoval occurs when a child, which has previously been in the state of its habitual residence, is taken away across the frontier of that state; whereas retention occurs when a child, which has previously been for a limited period of time outside the state of its habitual residence, is not returned to that state on the expiry of such limited period. …

Similarly, it was explained in *In re H and others (Minors) (Abduction: Acquiescence)* [1998] AC 72 ("*In re H (Acquiescence)*") at 84 that:

> … [T]here is "retention" of the child for the purposes of the Convention only where the child has been lawfully taken from one country to another (e.g. for staying access for a defined period) and there has then been a wrongful failure to return the child at the expiry of that period. …

39 The Hague Convention treats wrongful "removal" and wrongful "retention" as events occurring on specific dates (see *In re H (Custody Rights)* at 77–78). That is why Art 12 clearly envisions there being a specific date of either wrongful removal or wrongful retention: it provides that upon proof that a child has been wrongfully removed or retained within the meaning of Art 3, and that at the date of the commencement of judicial or administrative proceedings in the Requested State, "a period of less than one year has elapsed from *the date* of the wrongful removal or retention" [emphasis added], the judicial or administrative authority of the Requested State is to order the return of the child forthwith. It is therefore important, for the purposes of any application under s 8 of the ICAA, to identify the specific date on which the allegedly wrongful removal or retention is supposed to have taken place. As we will explain, the identification of this date is also critical because the habitual residence of the child concerned must be assessed with reference to that date.

40 The present case is potentially one of wrongful retention rather than wrongful removal. The children were not wrongfully removed from the USA

since both parties agreed that they should be brought from the USA to Singapore for a family holiday. The Father's case is not that he did not agree at all to the children leaving the USA for Singapore. Rather, as his counsel, Mr Yap Teong Liang, explained, his case is that his agreement to the children's stay in Singapore was for a limited period of time and, as Mr Yap developed his arguments in the course of this appeal, for the limited purpose of saving the marriage and keeping the family together, a purpose which expired when the Mother indicated her intention to divorce him on 2 June 2016; accordingly, the children were wrongfully retained on that date.

41 It is not disputed that the Father had rights of custody under the law of the USA, which is a Contracting State to the Hague Convention, and that the retention of the children in Singapore without his consent would be in breach of those rights and therefore wrongful if the children were indeed habitually resident in the USA. It is also not disputed that if, on the other hand, the children were habitually resident in Singapore, their retention here would not be in breach of any rights of custody under Singapore law.

42 We are therefore bound to order a return of the children to the USA unless: (a) the habitual residence of the children immediately before their allegedly wrongful retention was Singapore rather than the USA; or (b) the Father consented to the retention of the children in Singapore.

Habitual residence

The relevant date for assessing habitual residence

43 Turning to the question of habitual residence, as mentioned at [39] above, this is to be assessed with reference to the date on which the allegedly wrongful retention (or removal) of the child concerned is said to have taken

place. It is thus critical to ascertain the date of wrongful retention because the place of habitual residence can change over time, and particularly where proceedings in court take place, a different result may ensue depending on which date is taken to be the date of wrongful retention.

44 Where the parents have agreed that the child should move to a different country for a defined period of time, the children's wrongful retention in that country would usually begin after the expiry of the agreed period. *John Paul Balev v Catharine-Rose Baggott* [2016] ONCA 680 ("*Balev v Baggott*"), a decision of the Ontario Court of Appeal, illustrates this. The parents in that case were Canadian citizens residing in Germany. The father signed a letter consenting to the mother going to Ontario with their two young children from 5 July 2013 to 15 August 2014 for the children to spend some time studying in Canada on an exchange programme. The mother refused to return the children to Germany after the expiry of that period, whereupon the father filed an application under the Hague Convention for the children's return. The court found that the mother had wrongfully retained the children in Canada on 15 August 2014, the date on which the father's consent to the children's stay in Canada expired; that was also the relevant date for assessing the children's habitual residence. The court stated (at [38]):

> The critical question in this appeal is: where was the children's habitual residence immediately before the expiry of the father's time-limited consent in August 2014, following which the mother refused to return the children to Germany? …

45 However, even in cases where the parents have agreed that the child may be brought to another jurisdiction for a fixed period of time, it does not follow that the relevant date of wrongful retention will always be at the expiry of that period. If the parent who brought the child away pursuant to the agreement intimates prior to the end of the agreed period that the child will not

be returned at the expiry of that period, that can convert an initially consensual arrangement into a contentious one.

46 This can be seen from the UK Supreme Court decision of *In re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2015] 2 WLR 1583 ("*In re R*"). There, the father agreed to the mother taking their children from France, where the family lived, to stay with her parents in Scotland for a year from July 2013 until July 2014. During that one-year period, the mother discovered the father's infidelity, and on 20 November 2013, she served him with a notice seeking a residence order in respect of the children. The father contended that on the date on which the mother initiated those proceedings, the agreement ceased to apply and the retention of the children in Scotland became wrongful. The court approached the issue from the perspective of determining where the children were habitually resident immediately before 20 November 2013, although there appeared to be no dispute over that being the relevant date (see [6]–[7] of the judgment).

47 A similar approach was taken in *LCYP v JEK* Civil Appeals Nos 98 and 125 of 2015 (27 August 2015), a decision of the Hong Kong Court of Appeal. There, the mother, with the father's consent, moved with their children from New Jersey, where the family lived, to Hong Kong in July 2013. The move was supposed to be for a period of between one and two years, expiring at the latest by June 2015, at the end of the children's school term. In the interim, the mother discovered the father's infidelity and petitioned for divorce in the Family Court of Hong Kong in April 2014. On 4 February 2015, she also filed an application under the Guardianship of Minors Ordinance (Cap 13) (HK) for the custody, care and control of the children; and on 6 February 2015, she filed an affirmation in support of this application. The

father argued (and the judge at first instance agreed) that the filing of the affirmation by the mother evinced her intention not to abide by the agreement to return the children to New Jersey at the expiry of the agreed period, and that therefore constituted the act of retention. The judge proceeded to determine the habitual residence of the children immediately before the date on which the mother filed her affirmation. The Hong Kong Court of Appeal upheld (at [8.6]) the judge's conclusion that the retention occurred once the mother filed the affirmation (although it reached a different conclusion on whether the children's habitual residence had changed).

48 It is evident, therefore, that retention of a child contrary to an agreement can occur even before the end of the agreed period of relocation once the parent in question intimates a clear intention not to return the child at the end of that period. As the next two cases show, such an intimation can be conveyed by means other than the commencement of legal proceedings for the custody of the child.

49 In *Re H-K (Children)* [2011] EWCA Civ 1100 ("*Re H-K*"), the parties, who lived in Australia, went to England with their two children on 6 February 2010 for a year, and were due to return to Australia on 6 February 2011. By agreement, the father agreed that the mother and the children could stay on in England until 6 June 2011. The father returned to Australia on 6 February 2011, expecting the rest of the family to join him in due course. However, the mother told the father in early May 2011 that she would not return to Australia with the children, and the Father then began proceedings under the Hague Convention for the children's return. The date on which the mother announced that she would not return to Australia with the children was taken to be the date on which retention contrary to the agreed terms occurred, and the

children's habitual residence fell to be determined as at that date (as the court noted at [1] of its judgment).

50 A similar conclusion was reached in *In the matter of BA (A Minor) (Hague Convention: habitual residence: consent: acquiescence)* [2016] NIFam 8 ("*BA (A Minor)*"), a decision of the High Court of Northern Ireland. There, the parents, who were resident in Australia, agreed that the father and the child would stay in Northern Ireland, where the father's parents lived, for approximately six months starting from January 2016. On 16 May 2016, however, a series of text messages from the father showed that he did not intend to abide by the agreement to bring the child back to Australia at the end of the agreed period. That date, 16 May 2016, was taken to be the date of retention contrary to the agreement (at [41]), and the court assessed whether the child's habitual residence had changed as at that date (at [47]).

51 The question in each case is whether, as a matter of fact, the child is being retained in a jurisdiction without the consent of both parents, and if so, at what point this has become the case. That point can be deduced from the conduct of the parties as long as it is clear that the conduct in question is no longer consistent with the terms of the agreement which formed the basis of the child's consensual removal in the first place. The determination of the date of the allegedly wrongful retention is the precursor to the next step in the analysis, which is to determine where the child was habitually resident immediately before that date.

The test for determining habitual residence

52 The term "habitual residence" is defined neither in the ICAA nor in the Hague Convention. The reason for this was explained by Dr Vivian Balakrishnan, the Minister for Community Development, Youth and Sports,

during the second reading of the International Child Abduction Bill (Bill 22 of 2010) as follows (see *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 [the Court's] 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 [to] hard-code all the different permutations or factors which the Court would have to take into account.

53 The approach to determining habitual residence was examined by the High Court in *TDX v TDY* [2015] 4 SLR 982, albeit in a slightly different context as that case concerned an application to stay custody proceedings on the ground of *forum non conveniens*. It is nonetheless instructive because the habitual residence of a child is a significant factor in stay applications based on *forum non conveniens* just as it is in applications under the ICAA. Of course, in the case of a stay application based on *forum non conveniens*, habitual residence is but one factor pointing towards the jurisdiction which is best placed to decide matters relating to the custody of the child; whereas in applications under the ICAA, it can be conclusive, given that the entire purpose of the Hague Convention is to secure the prompt return of abducted children to the country where they were habitually resident.

54 In *TDX v TDY*, having reviewed a number of cases brought under the Hague Convention, Debbie Ong JC stated the relevant test for habitual residence as follows (at [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.

55 But for one qualification, we endorse this approach. The qualification is that we do not think the habitual residence of a child can be affected by the intentions of *one* parent as opposed to the intentions of both. We elaborate on this below; but subject to this, we agree that habitual residence is a question of fact and should not be conflated with legal concepts such as "domicile" or "citizenship". The test for habitual residence requires the court to look at a range of factors which cluster around two main concerns: the degree to which the child is settled or integrated in a country, and the intention of the parents as to whether the child is to reside in that country. This is broadly consistent with the position taken in various common law jurisdictions that are also signatories to the Hague Convention, such as the UK (see *In re R* at [12]), Australia (see *LK v Director-General, Department of Community Services* [2009] HCA 9 ("*LK*") at [44]–[45]), New Zealand (see *Punter v Secretary for Justice* [2007] 1 NZLR 40 at [88]) and Hong Kong (see *LCYP v JEK* at [7.7]). Further, these two concerns, namely, the factual question of the child's integration and the separate question of the parents' intention, may not bear equal weight and may even pull in different directions. The weight to be given to each will depend on the circumstances. Here again, we agree with the views of Ong JC in *TDX v TDY*, where she noted (at [44]–[45]) that:

(a) Where older children are concerned, the inquiry into habitual residence should include objective factors such as the length of their stay in the new country, their living conditions there and whether they had attended school or worked there, as well as subjective factors such as their reasons for and perceptions of being in the new country.

(b) In contrast, where the child is very young, the objective factors and the parents' intentions and place of residence take on greater significance; much less, if any, weight is placed on the subjective factors (specifically, the child's perceptions and intentions).

56 Indeed, in the case of very young children, there are unlikely to be any "subjective" factors to speak of. Such children are likely to have relocated entirely because of their parents' decisions; it is therefore the intentions of the parents in relocating the children which will be significant in determining whether the children's habitual residence has changed.

57 Of course, this can present a difficulty where, as is not uncommonly the case, the parents do not share the same intention. One parent may intend to move with the settled purpose of relocating, if not permanently, then for a significantly long period of time, while the other parent's intention may be less definite. This has prompted consideration of whether one parent can unilaterally change the habitual residence of a child. We return here to the point that we alluded to earlier (see [55] above). It is a matter on which there appears to be a divergence of judicial opinion.

58 On the one hand, the position in Canada, Australia and New Zealand is that one parent cannot unilaterally change a child's habitual residence. It follows from this that in these jurisdictions, the court will only have regard to

parental intentions in determining whether a child's habitual residence has changed if it is satisfied that both parents had the intention to change the child's habitual residence. In *Balev v Baggott*, the Ontario Court of Appeal recognised a long and well-established line of authority in Canada to the effect that "one parent cannot unilaterally change a child's habitual residence under the Hague Convention", and therefore held that the habitual residence of the children in that case would remain unchanged unless the mother could establish a "shared parental intention" to change it (at [39]). Similarly, in *LK*, the High Court of Australia observed that "the general rule is that neither parent can unilaterally change [the] place of habitual residence. The assent of the other parent (or a court order) would be necessary" (at [34]). And in *SK v KP* [2005] 3 NZLR 590, the New Zealand Court of Appeal (*per* Glazebrook J) recognised that "there has been almost universal approval for the proposition that the unilateral purpose of one of the parents cannot change the habitual residence of the child" (at [76]). The effect of these cases is to make parental intention relevant to the question of whether there has been a change of the child's habitual residence only if it is a shared intention.

59 This also appears, in broad terms, to be the position taken by the US Court of Appeals for the Second Circuit, although its position arguably goes further than regarding shared parental intention as *relevant*. Specifically, the test for habitual residence applied in the Second Circuit requires the court to look at the last "shared intent" of the parents, which would be *determinative* of the child's habitual residence *unless* the child had acclimatised to a new location notwithstanding any conflict in the parents' shared intent (see *Gitter v Gitter* 396 F 3d 124 (2nd Cir, 2005) at 130–131, followed in *Hoffman v Sender* 716 F 3d 282 (2nd Cir, 2013)). In short, once there is a shared intention to relocate on the part of both parents, this can be determinative of the child's

habitual residence unless the objective factors of acclimatisation and integration override this.

60 As against this, a slightly different approach emerges from the jurisprudence of the English and the Hong Kong courts. We refer again to the UK Supreme Court case of *In re R*, where Lord Reed said that the test for habitual residence "focuses on the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors" (at [17]). Further, the court noted (also at [17]) that there was no rule that one parent could not unilaterally change the habitual residence of a child. In *LCYP v JEK*, the Hong Kong Court of Appeal adopted the present English position. It should be noted that on the actual facts of both *In re R* and *LCYP v JEK*, the courts concerned found that there was indeed a shared parental intention to move to a new country, at least for a defined period of time. Hence, the question of what weight should be given to the unilateral purpose of one parent to change a child's habitual residence as against other factors was not in issue. But, it appears that the courts in these jurisdictions would, in principle, treat the intentions of even one parent as possibly relevant to the question of whether a child's habitual residence has changed, although this would only be one among a basket of factors that must be taken into consideration. This thus appears to be a point of departure between the English and Hong Kong approach and that of the other jurisdictions referred to above.

61 We prefer the view that the unilateral intent or purpose of one of the parents *cannot* be a factor to be considered in determining the habitual residence of a child. Our principal reason for taking this view is that where the parents are at odds on the issue and there is no shared intention, the intention of the one parent that *could* be relevant to a *change* of the child's habitual residence will be the intention of the abducting parent. To accord weight to

this as a relevant consideration seems to us to be contrary to the purpose of the Hague Convention and, indeed, to good sense. In the words of the New Zealand Court of Appeal in *SK v KP*, to hold that the unilateral purpose of one of the parents can change a child's habitual residence "would not accord with the [Hague Convention] and would provide an encouragement to abduction and retention" (at [76] *per* Glazebrook J). The purpose of the Hague Convention is to prevent parents from acting unilaterally and engaging in, as it were, self-help remedies.

62 This consideration becomes particularly significant where, as in this case, one parent has agreed to a relocation of the children in the context of attempting a reconciliation with the other. That parent may have consented to a temporary relocation in an effort to be constructive by taking a less adversarial and more conciliatory approach. The abducting parent, on the other hand, may by then have formed a settled intention to relocate permanently with the children. In such a situation, it would be especially unsatisfactory, in our judgment, if the court were to ascribe any weight to the abducting parent's unilateral intention in determining whether the children's habitual residence has changed. In this particular context, we find the observations in *SK v KP* (at [20]–[21] *per* McGrath J) compelling:

> 20 … [A] principle of particular importance is that the Court having jurisdiction should be slow to infer that there has been a loss of habitual residence arising from the prolonging of a child's stay in a new state beyond original expectations without protest or countering action because of the desire to achieve a reconciliation or reach an agreement between parents on arrangements for custody. Otherwise there will be disincentives to parents consenting to children travelling to stay with family members in other states, and correlative incentives on parents to take precipitate action when stays are extended or sought to be extended in circumstances such as the present.
>
> 21 A relatively short period of extension in the course of attempted reconciliation, with a view to reaching agreement,

> in general should not change habitual residence as to allow it to do so would not serve the policies of the Convention. …

63 That said, we stress that we are not holding that there must be evidence of a joint intention on the part of both parents to relocate for a sufficiently long duration before a court will find that a child's habitual residence has changed. In our judgment, this would be incompatible with the test for habitual residence being ultimately a question of fact to be determined in the light of all the circumstances of the case. Of course, where there is such a joint parental intention, it would often carry significant weight. But, this must still be assessed in the light of the other factors, particularly the objective factors such as the degree to which the child has integrated into the new environment. We also reiterate the point that we made at [55(b)] above, which is that the weight to be placed on the objective factors as well as the parents' intentions and place of residence will generally be greater in the context of very young children.

64 If the evidence shows the parents have a joint intention to relocate permanently, that may support a finding that the child's habitual residence has changed even if the length of stay in the new country has been fairly short. Conversely, even if there is no shared intention to relocate permanently (with only one parent unilaterally having such an intention), "a very lengthy period of residence … could eventually change a child's habitual residence" (see *SK v KP* at [76]; referred to in *TDX v TDY* at [42]). We turn to consider a number of cases which elucidate the relationship between the presence or absence of a shared parental intention to relocate and the length of stay in the new country, the latter being treated as a proxy indicator of integration.

65 The clearest situation where habitual residence would *unlikely* be found to have changed is where there is a short period of stay in the new

country and no shared parental intention to relocate even temporarily. The decision of the District Court in *BDT v BDU* [2012] SGDC 363 is an example. The issue of whether the child's habitual residence had changed was only contested at first instance, but not on appeal either to the High Court or, subsequently, to the Court of Appeal. In that case, the mother, a Singapore citizen married to a German citizen, brought the child from Germany, where the family resided, to Singapore to celebrate the Lunar New Year on 18 January 2012; she was due to return to Germany with the child on 17 February 2012 but did not. In resisting the father's application under the ICAA for the return of the child to Germany, the mother argued that the child's habitual residence had changed in that single month after leaving Germany. The district judge rejected this argument, holding that "there could not be any doubt that the parties did not have any shared intention to reside in Singapore" (at [60]).

66 In the next two cases, *In re R* and *Halaf v Halaf* [2009] WL 454565, there was a short period of stay in the new country, but a clear intention on the part of both parents to relocate. At the hearing before us, counsel for the Mother, Ms Poonam Mirchandani, relied heavily on these two cases to argue that the habitual residence of a child could change in as short a period of time as three to four months, and that we should similarly be prepared to find that [FC]'s and [SC]'s habitual residence had changed in the few months that the family stayed in Singapore. We will come to our findings on the children's habitual residence in due course. At this juncture, it is only necessary to point out that these two cases must be understood in their context. Significantly, in both cases, there was a joint intention on the part of both parents to move to a new country.

67 We begin with *In re R*. The two children in that case were born in France, where their parents resided, in August 2010 and June 2013 respectively. In July 2013, with the father's consent, they were taken by the mother to live with her parents (the children's maternal grandparents) in Scotland. The stay was intended to be for a year, which was the duration of the mother's maternity leave (at [3]). In August 2013, the family home in France was sold, and the older child started attending school in Scotland (at [4]). The father visited the mother and the children in Scotland for several days each month, and sometime in October 2013, the family moved into a rented house in Scotland next to the home of the mother's parents. In November 2013, the parents' relationship broke down and the father applied for the return of the children to France, arguing that they had been wrongfully retained in Scotland. The UK Supreme Court affirmed the decision of the court below that the stay of four months was sufficient to make Scotland the children's new place of habitual residence: their social and family lives were there, their residence in Scotland had the necessary quality of stability, and they had become deeply integrated into their environment in Scotland (at [23]). In our judgment, a critical fact which underlies the result in this case is that the children had moved to Scotland because of the joint intention on the parents' part to relocate there for at least a year. The fact that the parties sold their home in France attested to this (see [4] of the judgment). What was disputed was only whether the stay in Scotland was meant to be for only a year, as the father contended, or whether it was meant to be permanent, as the mother submitted (see [3] of the judgment). Against that backdrop, the other objective indicia of the children having formed connections with Scotland assumed greater significance.

68 We turn to *Halaf v Halaf*, a decision of the New York District Court. There, as far back as February 2006, even before the child was born on 1 May

2007, the child's Israeli father and American mother had discussed the prospect of relocating to New York. Following the child's birth, the father decided that the family would relocate to New York, although this was conditional on his finding work there. The parents sold most of their belongings in Israel and resigned from their jobs in Israel, declaring to their employers their intention to move to New York. The family moved to New York in January 2008, and the father found work at a local deli. The father returned to Israel for a holiday in April 2008. While he was there, the mother told him that she had decided to remain in the USA permanently and had no wish to be married to him any longer. In June 2008, the father filed an application under the Hague Convention for the return of the child to Israel.

69 The court found, applying the test in *Gitter v Gitter* (see [59] above), that based on the last shared intent of the father and the mother, they had "intended for the Child to reside in the United States", and therefore, the child's habitual residence was the USA. The effect of the decision was that the habitual residence of the child changed within the three months that the family stayed in New York after leaving Israel. In our judgment, it was critical that, first, the child was very young and, second, the move to New York took place in the context of the parties having formed a joint intention to relocate there permanently. We would also add that there was a high degree of disengagement from Israel, and that the condition of the move to New York (the father's securing employment there) had been met. In essence, the parties had relocated to New York permanently even though, as matters developed, the father might have changed his mind about this subsequently.

70 *BA (A Minor)* stands in contrast to these two cases. There, a relatively short five-month relocation was involved, and the court found that there was no change of the child's habitual residence. The parents in that case were

living in Australia at the time of their child's birth in June 2014. In December 2015, the father brought the child to Northern Ireland to visit his parents (the child's paternal grandparents). The mother joined them in Northern Ireland on 13 January 2016. The intention initially was for the whole family to return to Australia on 31 January 2016. The parents then agreed that the father would stay on in Northern Ireland with the child for a further six months. The father subsequently informed the mother in May 2016 that he would not be returning to Australia with the child. The court found that the habitual residence of the child had not changed during the five-month period from January to May 2016. Keegan J noted that the father had wanted to stay on in Northern Ireland with his family (that is, with his own parents), but that was "not with the agreement" of the mother; and that the case was a classic one of "over holding after a temporary move" (at [45]). In our judgment, this was a clear case where the only premise on which the child had been taken to Northern Ireland was that the stay there would be for a relatively short period. Substantial evidence of strong connections with Northern Ireland having been formed would have been required to establish a change in the child's habitual residence in such circumstances.

71 At the other end of the spectrum, there are cases where there was no shared intention by the parents to relocate to another country, but a relatively long period of stay (more than a year) in the new country. Again, the outcome depends on all the circumstances of the case, as the following two cases show.

72 In *Hoffman v Sender*, the children's habitual residence was held not to have changed. The father in that case was a Canadian citizen and the mother was a Canadian permanent resident. Their two children were born in Canada in January 2009 and July 2011 respectively. The parties agreed that the mother should go to New York so that her parents could help with caring for the

children. The mother left for New York with the children on 15 August 2011. The father remained in Canada to work and made regular trips to New York to visit them. In September 2012, the mother initiated divorce proceedings. In that same month, the father filed an application under the Hague Convention for the return of the children to Canada. The US Court of Appeals for the Second Circuit found that the last shared intention of the parents was for the children to reside in Canada. There was no shared intention for the children to reside in New York because the father intended the children to reside there only if he too was resident there with his children and his wife as a family, a condition which was clearly not fulfilled given his continued employment in Canada, whereas the mother's intention was to reside with the children in New York without the father. The court then found that the children had not acclimatised to New York despite having resided there for over a year – it was significant that they had moved and changed communities within New York recently, and had maintained ties with friends in Canada. Hence, the children remained habitually resident in Canada. We view this as a case where, notwithstanding the longer period of the children's stay in the new country, the indicia of integration into their new community were not strong enough, such that the shared intention of the parents remained the decisive factor in determining the children's habitual residence.

73 In contrast, in *Re H-K*, which we referred to earlier (at [49] above), the children's habitual residence was held to have changed. In that case, the relationship between the parents, who lived in Australia, had been under some strain. They went to England with their two children in February 2010 in an attempt to overcome the homesickness of the mother, who was British. The mother was hoping to settle permanently in England, but the father, who was Australian, was adamant that he would only agree to a stay of a year until February 2011. In late December 2010, the mother told the father that she

would not return to Australia. An "ugly scene" ensued (see [9] of *Re H-K*), but subsequently, the father agreed to let the mother stay on in England with the children for a further period of six months. In early May 2011, the mother informed the father that she would not return to Australia with the children. As mentioned at [49] above, the date on which she communicated this to the father was held to be the date of wrongful retention. The total period of residence in England was appreciably more than a year. The parties did not have the same intention: the father's consent to the move to England was clearly for the limited purpose of overcoming the mother's homesickness and, in turn, saving the parties' relationship. The court nonetheless found in all the circumstances that the children's habitual residence had changed to England, noting in particular that there were "all the indicia of integration into the social and family environment in England" (at [22]).

74 In our judgment, it is possible to distil some general principles from these cases as follows:

(a) The question of habitual residence is ultimately a question of fact to be determined having regard to all the circumstances of the case including the joint intentions of the parents, the child's reasons for and perceptions of being in the new jurisdiction (in the case of older children), as well as the objective "indicia of integration into the social and family environment" in the new jurisdiction. As Ong JC put it in *TDX v TDY* at [43], this is a broad-based inquiry that will extend to a consideration of "how integrated [the child] is to the country in terms of the environment, education system, culture, language and people around [him or her] in that country".

(b) In general, in the case of the relocation of younger children and in the case of relatively short periods of residence in the new jurisdiction, the joint or shared intentions of the parents can be a significant factor in pointing towards whether there is any change in the habitual residence of the child.

(c) The longer the period of residence in the new jurisdiction, and the greater the evidence of integration into the social and family environment there, the less relevant will be the parents' original reasons, purposes and intentions (even shared ones) for the relocation in determining whether the child's habitual residence has changed.

(d) An intention on the part of only one parent for the child to change his or her habitual residence will seldom, if ever, have weight in this analysis.

(e) The principles at sub-paras (b) to (d) above do not derogate from the general point that the search for the child's habitual residence depends on all the circumstances of the case.

Consent under Art 13(a) of the Hague Convention

75 We turn now to consider the principles on consent.

76 In the court below, the DJ, after reviewing a number of cases concerning proof of consent for the purposes of Art 13(a) of the Hague Convention and the vitiation of such consent by deceit, summarised the applicable legal principles as follows at [29] of the GD ("the DJ's summary"):

> (a) Consent is not relevant to Art 3 but to establish a defence under Art 13(a), i.e. if a child is removed in prima facie breach of a right of custody, the removing parent has the

> burden of proof to justify the removal and establish that the removal was done with consent;
>
> (b) Consent must be proved on the balance of probabilities, but the evidence in support of it needs to be clear and cogent. If the court is left uncertain, then the defence under Art 13(a) fails;
>
> (c) The consent must be for a stay of sufficient duration or quality properly to be regarded as habitual and where the consent had been given for a purpose which has changed, the parent must have agreed to the continued stay based on the new purpose;
>
> (d) If there is ostensible consent and the party seeking the return of the child alleges that there are circumstances vitiating the consent, it is for that party making that claim to prove it on the balance of probabilities;
>
> (e) Proof of deceit or dishonesty in relation to a material aspect of the consent, going to the root of the consent, is one such circumstance that would vitiate a consent outwardly given; and
>
> (f) The court should, in summary proceedings such as Hague [Convention] applications, be cautious about finding dishonest conduct without having enjoyed the advantage of hearing oral evidence.

We analyse this summary of principles below.

The onus and standard of proof

77 With regard to the onus of proof, principle (a) of the DJ's summary is correct. As was held in *BDU (CA)*, it is the parent seeking to invoke one or more of the exceptions in Art 13 of the Hague Convention who bears the onus of proof (at [38]).

78 As for principle (b), which concerns the standard of proof, it is uncontroversial that the parent who seeks to rely on the "consent" exception under Art 13(a) of the Hague Convention must show on the balance of probabilities that the parent alleging wrongful removal or retention of the child (also referred to hereafter as "the left-behind parent" or "the wronged parent")

had positively and unequivocally consented to the child's removal or retention (see *Re K (Abduction: Consent)* [1997] 2 FLR 212 at 217).

79 The test for consent has been said to be a subjective one. In *P v P* [1998] 2 FLR 835, a case concerning the "consent" exception under Art 13(a), Ward LJ observed: "The task of the court is to find as a fact whether the father subjectively intended to and did give unconditional consent to the removal of the child" (at 836). He relied for this proposition on the test for acquiescence (another exception under Art 13(a)) set out in *In re H (Acquiescence)*, where Lord Browne-Wilkinson observed that in determining whether there had been "acquiescence" within the meaning of Art 13(a), the court should be "looking to the subjective state of mind of the wronged parent" (at 87), and that "[a]cquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions" (at 88).

80 We have no quarrel with the proposition that the test for acquiescence/consent requires the court to look at the subjective intention of the wronged parent. But, in *In re H (Acquiescence)*, Lord Browne-Wilkinson went on to add a qualification to this: the wronged parent could be held to have acquiesced to the child's removal or retention if his or her conduct led the other parent to believe that he or she had so acquiesced – for example, by signing a formal agreement that the child was to remain in the country to which he or she had been taken (at 89). The wronged parent would not be allowed to go back on a stance which he or she had unequivocally adopted. However, Lord Browne-Wilkinson also noted that in the ordinary case, such behaviour would lead to the conclusion that the actual intention of the wronged parent was to acquiesce in the child's removal or retention. It would be an exceptional case where a judge could be satisfied that the wronged

parent did not in fact so acquiesce, but nonetheless still find him or her to have acquiesced based on his or her outward behaviour.

81 We agree with the *amicus curiae*, Mr Chan, that the above approach (as articulated in the context of acquiescence) to the "consent" exception under Art 13(a) of the Hague Convention is unnecessarily complicated. It seems to us unhelpful to divide the inquiry into whether there has been consent into two steps: whether the left-behind parent subjectively consented to the child's removal or retention; and if he or she did not, whether consent should nonetheless be found on the basis that he or she had given the impression of having consented. For the purposes of determining whether the "consent" exception is applicable, there should only be one question: whether, on a balance of probabilities, the left-behind parent has unequivocally consented to the removal or retention of the child. It is true that in answering this question, the court must look at the subjective intention of the left-behind parent, but this will often, if not invariably, depend on that parent's outward behaviour and other objective signs which indicate whether he or she has in fact consented. Ultimately, consent is a matter of inference to be assessed "viewing a parent's words and actions as a whole and his state of knowledge of what is planned by the other parent" (see *Re C (Abduction: Consent)* [1996] 1 FLR 414 ("*Re C*") at 419). It might, of course, be possible that the left-behind parent leads the other parent to think or believe that there has been consent when in fact there is none, and to change his or her position in reliance on that mistaken belief. That might well raise issues that we leave for another occasion because they do not arise in this case.

82 It has also been said that "there must be clear and compelling evidence of a positive consent to the removal of the child from the jurisdiction of his habitual residence" (see *Re W (Abduction: Procedure)* [1995] 1 FLR 878 at

888–889). In a similar vein, Holman J held in *Re C* held that "the evidence in support of [consent] needs to be clear and compelling. If the court is left uncertain, then the defence under Art 13(a) fails" (at 419). This statement from *Re C* was quoted by the DJ at [25] of the GD.

83 Subsequently, in *Re H (Abduction: Habitual Residence: Consent)* [2000] 2 FLR 294 ("*Re H*") at 301, Holman J clarified that by his statement in *Re C* that the defence of consent under Art 13(a) would fail if the court was "left uncertain", he had not intended to suggest that the standard of proof was that of "certainty". He went on to say (also at 301):

> … On the facts of a particular case a court may consider that evidence of consent needs to be cogent before it can overcome the degree of improbability of consent having been given on those particular facts. But in the end there is only one question, namely has consent been established? And only one standard, namely the balance of probabilities.

84 In our judgment, that is correct. There is only one standard of proof in this context, and it is proof on the balance of probabilities. That said, it is useful for the court to remind itself that this standard of proof is directed at establishing whether the left-behind parent has in fact unequivocally consented to his or her child being removed to or retained in a different country. The emphasis on the need for "clear and compelling" evidence is simply a reminder to the court to avoid loose reasoning and analysis. It does not change the standard of proof.

85 This reminder can be especially important when it comes to drawing inferences. In our judgment, inferences of consent should not be lightly drawn in this context, and they must be the only ones that can reasonably be drawn. This can be significant, for instance, in circumstances where the left-behind parent appears to have *conditionally* consented to the child's relocation (for

example, as part of an attempt to effect a reconciliation with the other parent). In such a situation, it is inherently unlikely that the left-behind parent would have consented to the child remaining in the new jurisdiction even if the attempted reconciliation failed, and it would be right for the court to remind itself that the question is whether, on a balance of probabilities, the left-behind parent did indeed give such unconditional consent, and whether there is a clear and compelling basis to find such consent.

86 In this specific context, we find persuasive the observation of Lord Browne-Wilkinson in *In re H (Acquiescence)* at 88, in relation to the "acquiescence" exception under Art 13(a), that "judges should be slow to infer an intention to acquiesce from attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child". This observation was also relied on by McGrath J in *SK v KP* as support for the view that the court should be slow to infer a change of habitual residence in circumstances where one parent has agreed to a relocation for the purpose of seeking reconciliation or reaching an agreement on custody arrangements (see [62] above). We think there is much sense in this general observation since the policy of the law in this setting must be to advance the prospects of reconciliation (or, as the case may be, agreement on custody arrangements) in so far as it is possible to do.

87 The difficulty with drawing inferences in this context is compounded by the tendency of each parent to put conflicting slants on the accounts of the events in their respective affidavits. It is for this reason that we find constant reminders of the need for "clear and compelling" evidence. Hence, in *KMA V The Secretary for Justice* [2007] NZCA 223 (a case on leave to appeal), the New Zealand Court of Appeal said that the court could "infer the necessary consent from conduct, as occurs often enough in other contexts", but the

evidence had to be "clear and cogent" (at [47]). In a similar vein, the Family Court of Australia held that although consent could be inferred from conduct, "the consent must be real and unequivocal and can only be made out by clear and cogent evidence" (see *Wenceslas & Director-General, Department of Community Services* [2007] FamCA 398 at [264]).

88 We turn to principle (c) of the DJ's summary. With respect, we think that here, the DJ conflated the issues of habitual residence and consent. The statements from *R v A (Abduction: Habitual Residence)* [2014] 1 FLR 969 (*per* Parker J) that the DJ relied on for this principle were made in the context of the test for habitual residence and, in particular, the relevance of parental intention. Parker J held that it would be artificial to ask whether a parent had intended or consented to a change of the child's "'*habitual residence*' as a concept: as a quasi-status" [emphasis added] given that "habitual residence" was a legal term of art. He therefore preferred to frame the inquiry in terms of whether the parent had voluntarily agreed to the child being in another country for "a stay of sufficient duration (and quality) properly to be regarded as habitual" (see [90]–[91] and [101]). Admittedly, there will be some unavoidable overlap between the two stages of the analysis given that the same facts that are invoked to show the parents' intentions as to the habitual residence of the child can and often will also bear on the "consent" exception under Art 13(a). But, they should be kept analytically distinct. For the purposes of the "consent" exception, there is no logical reason to insist that the consent must be for a stay that is of sufficient duration and quality as to count as "habitual". We therefore disagree with principle (c).

Deceit

89 It remains for us to deal with principles (d) to (f) of the DJ's summary, which address the issue of deceit and how it impacts consent. It is well accepted that consent under Art 13(a) of the Hague Convention will be vitiated if it was obtained by deceit, fraud, misrepresentation or non-disclosure (see *Matthews v Matthews* [2007] BCSC 1825 at [15], and *T v T (Abduction: Consent)* [1999] 2 FLR 912 at 917).

90 But, as observed by Ward LJ in *In re P-J (Children) (Abduction: Consent)* [2010] 1 WLR 1237 at [48]:

> … Consent, or the lack of it, must be viewed in the context of the realities of family life, or more precisely, in the context of the realities of the disintegration of family life. It is not to be viewed in the context of nor governed by the law of contract. …

91 The contractual analogy of outward consent being "vitiated" may perhaps be more appropriate in situations where there is formal written consent, such as an agreement on custody and parental responsibility, as was the case in *M v T (Abduction)* [2000] 1 FLR 1309, or a consent order, as was the case in *Re B (A minor) (Abduction)* [1994] 2 FLR 249. In both cases, the consent given was ostensibly valid, and so the only issue was whether there was deceit vitiating that consent; in both cases, it was held that there was deceit as the abducting parent had signed the agreement in question despite having no intention of complying with its terms.

92 In other cases, where consent is left to be inferred from the course of the parties' communications and conduct, it may not be easy to point to a particular instant when consent was given. The more difficult preliminary issue would be to establish the *scope* and *terms* of such consent. It is conceivable, therefore, that attempts to invoke the "consent" exception under

Art 13(a) may fail simply because the retention of the child falls outside the scope and terms of the consent given. It is only where the retention is ostensibly within the scope and terms of the consent given that it would be necessary to ask whether the consent was vitiated. Subject to this gloss, we generally agree with principles (d) and (e) of the DJ's summary. However, we do not agree with principle (f). Applications under the Hague Convention will be summary in nature, and within the limits and constraints of that setting, if the court is satisfied on a balance of probabilities that there has been deceit or dishonesty, it should make the finding accordingly. Any other approach would favour and thus incentivise those who might otherwise be inclined towards such behaviour, and that would plainly not be desirable. For the same reason, we think it was wrong of the DJ to disregard the affidavit evidence that we touched on earlier (at [34(a)] above) on the basis that it was not tested in cross-examination, although, for the reasons that follow, that turned out not to be material in this case.

Application to the present facts

93 We turn now to the facts of the present appeal. We are mindful that an appellate court will not overturn the judgment of the court below unless it is satisfied, whether by reference to the law or the evidence, that it was not open to the lower court to arrive at that judgment (see *BDU (CA)* at [48]).

94 In our judgment, appellate intervention is warranted on at least two grounds in this case arising from errors by the DJ in her application of the law. The first is that the DJ did not make a finding on the habitual residence of the children immediately before the date of their wrongful retention even though this was a contested issue. The second, which is perhaps linked to the first, is that, as mentioned at [88] above, the DJ appeared to conflate the issues of

habitual residence and consent by stipulating a legal requirement that consent for the purposes of Art 13(a) had to be "for a stay of sufficient duration or quality properly to be regarded as habitual" (see [29(c)] of the GD). We thus turn to consider afresh the issues of habitual residence and consent in the present case.

The habitual residence of the children

The relevant date of the wrongful retention

95 We earlier set out the principle that a child's habitual residence is to be assessed with reference to the date of the wrongful removal or retention (see [39] and [43] above). Before us, Mr Yap submitted that the relevant date of the wrongful retention in this case was 2 June 2016. That was the date on which the Mother unequivocally indicated an intention to end the parties' marriage (see [6] and [26] above).

96 We accept that submission. To begin with, this was a case where the wrongful retention occurred before the expiry of any agreed period of stay. This was because:

(a) The relocation to Singapore, according to the Father, was premised on the family staying together, and was tied to his efforts to rehabilitate the marriage. The length of the intended stay, according to the Father, was at least six months.

(b) The family initially came to Singapore for a holiday and only later decided to remain here after the Mother secured the consultancy contract with [PEC]. Even then, the Mother and the Father took some time to wind down their affairs in San Francisco; they came to Singapore only on 2 and 20 February 2016 respectively.

(c) Thus, the relocation to Singapore commenced either on 2 or 20 February 2016, and the earliest expiry of the agreed period of stay could only have been sometime in August 2016.

97 However, on 2 June 2016, even before that period was over, the Mother intimated that she would be filing for divorce, and this meant that the purpose for which the Father had moved to Singapore – namely, salvaging the marriage and keeping his family together – was no longer alive. There was no indication that the Father would have agreed to the children continuing to stay on in Singapore beyond 2 June 2016 in such circumstances. In the course of the oral arguments, we put it to Ms Mirchandani, and she eventually agreed, that the Father had moved here only because he wanted to try to save the marriage once it became clear that the Mother wanted to pursue her career here and would not return to the USA. In Ms Mirchandani's words, the move to Singapore gave the parties the chance of "reinventing the marriage".

98 In fact, consistent with this analysis, on 3 June 2016, the very next day after the Mother indicated her intention to file for divorce, the Father informed [CF], the co-founder of his start-up, that he thought it best for the family to return to the USA, and said that he would like to "ensure the kids are returned to California" (see [26] above). Also on 3 June 2016, the Father emailed the Mother imploring her to "try out other options" to save their marriage. The Mother's reply on 4 June 2016, however, was that she had "suffered … for too long in [the] marriage" and had "chosen this way out finally … [e]specially when both kids are also vulnerable". She also told the Father "please do visit whenever you want and stay with us", and that he could "have the children on holidays". In our judgment, this email confirms that the Mother was resolute in filing for divorce. This was also, in our view, an unambiguous signal to the Father that she wanted the children to continue living with her in Singapore

and did not contemplate their returning to the USA. All this is consistent with our view that the Mother's decision on 2 June 2016 to file for divorce meant that there was no longer any possibility of saving the marriage, and thus, the purpose for which the Father had moved to Singapore with the children no longer subsisted.

99 We thus find that the retention of the children in Singapore occurred on 2 June 2016. That being the relevant date, the question is whether the habitual residence of the children had changed from the USA to Singapore by that date.

The intention of the parents

100 As we have said, given that the children were very young at the time of the relocation, greater weight should be placed on the parents' intention in assessing their habitual residence. At this stage, it is necessary to retrace the chronology of events in some detail, but this time, with an emphasis on the parties' intentions. We are somewhat aided in this effort by the fact that the parties communicated frequently through lengthy emails.

101 Starting with the second phase of the events, we note that when the children were first brought to Singapore in late 2015, it was purely for a temporary stay. The plan at that stage was for the family to return to San Francisco on 9 January 2016 after their vacation here (see [15] above). Whatever caused the change in the expected course of events took place in the short ten-day period between 27 November 2015, when the Father arrived in Singapore to join the family on their holiday, and 6 December 2015, when the Father left Singapore and returned to San Francisco without the Mother and the children.

102 There are emails between the Father and his in-laws which help to explain why the Father left Singapore on 6 December 2015:

(a) The Father emailed his in-laws on 3 December 2015. This email covers a number of topics, but it ends off with a number of "requests" from the Father: for example, for his in-laws to give him and the Mother "more space" once [SC] started pre-school. He noted that his in-laws had been visiting them in the USA fairly frequently. He commented: "If we move to Singapore, your presence will only be further increased … Is it okay if we stay in a separate house away from you?" He said that [SC] was, at that point in time, in Singapore "against [his] wishes".

(b) [MIL] responded the next day stating that [SC] was not in Singapore against the Father's wishes; she also alluded to the Father's abusive behaviour and "poor anger management".

(c) The Father replied on 5 December 2015 saying that [MIL]'s response had been "inconsiderate, unhelpful and hurtful". He said: "I don't intend staying here any longer. I am leaving for Chennai today or at the earliest possible".

103 These emails show that it was likely that the Father did indeed have a disagreement with his in-laws on 4 December 2015, and then moved into a hotel before leaving Singapore on 6 December 2015, which is the Mother's account of the events (see [16] above).

104 More importantly, it appears from these emails that sometime during the family's vacation in Singapore, the *possibility* of a long-term move here was discussed. The Father, it appears, having come to Singapore thinking that

it was for a vacation, found himself presented with the possibility of a move to Singapore, which was supported by [MIL]; hence his observation that his in-laws' presence would be "further increased" if the family did indeed move here. The Father's email of 3 December 2015 to [MIL] shows that he was willing to try and find a compromise by proposing that he and his family live in a separate house in Singapore. Notwithstanding these preliminary and exploratory discussions, however, it is clear to us that at this stage, the stay in Singapore was still a temporary arrangement and there was no intention on the Father's part to change the children's habitual residence. Nor, at this stage, is there any evidence of the Father and the Mother discussing any potential relocation to Singapore.

105 We turn to the third phase of the events covering the period from 12 to 25 December 2015.

106 On 13 December 2015, the Mother informed the Father that she would be joining [ERP] and providing consultancy services to [PEC]. She also said that she would be helping to extend [ECC's] business "in 6 months based out of Singapore". On the same day, the Father said, "About Singapore move, guess you've unilaterally made a decision. Okay."

107 On 14 December 2015, the Mother replied:

> As for Singapore, it was not a unilateral decision, we had decided that I would further explore the job offer made to me. You said you had already spoken to [[CF]] and it is okay for you to work from Singapore. Please don't use the blaming tactics with me once again.

108 On the same day, the Father wrote:

> … [I]f you want to move to Singapore, that's fine too … don't assume that I will prevent you from taking the kids if we separate. I'd do whatever's best for the children. If it means

> me being only able to see the children during summer vacation, that's okay. It sucks, but it is what it is … I'll deal with it.
>
> *What's not okay, is for us to be dishonest with ourselves – pretend that we're interested in each other as a couple, pack bags[,] move to another country … only for this saga to continue there. That will serve zero purpose. It will be an even most* [*sic*] *expensive (financial, emotional) fallout.*
>
> [emphasis added]

109 In our judgment, it is evident from this email that by 14 December 2015, matters had reached a critical stage between the parties. The Father was somewhat ambivalent about moving to Singapore. On the one hand, he seemed to be suggesting that he might be willing to separate from the Mother, remain in the USA and see the children only during their summer vacation; this would have meant that he would not move to Singapore. But, on the other hand, it is also evident that the Father was concerned with reconciliation with the Mother. He was prepared to move to Singapore, but if he was going to do so, it would have to be for some "purpose", and that purpose evidently was to work on repairing the parties' relationship because, as he put it, it would serve "zero purpose" if they moved to Singapore without any interest "in each other as a couple".

110 The Mother replied on 15 December 2015 saying that she needed time to mull over the Father's words. On 23 December 2015, she wrote back. She started by saying that she now had "an offer from [PEC]". She then proposed a move to Singapore:

> This means we need to move to Singapore. *We can take a separate house, my parents will be there in the same apartment complex to help with the kids extensively.* Now, if that move puts your job at risk, I would say don't move now. We'll give it maybe a 6-month tryout period. Afterwards you can move here in 6 months. As you know when you took the plunge into entrepreneurship, I held onto a steady job. Hopefully you can

> do the same for me. That would mean we put the Menlo Park house for rent regardless. [emphasis added]

111 The Father's reply on the same day was: "It sounds like a great opportunity for you personally, for us as a family and I will do everything I can to support you."

112 On 24 December 2015, the Father sent an email to the Mother outlining a number of things that they needed to "think about": finding "good international preschools in Singapore", looking for "an apartment in a central location", making arrangements for furniture for their new home in Singapore, refinancing their mortgage on the West Menlo Park property, and selling their cars in the USA.

113 The Mother replied on the same day saying:

> It is a tough haul to move out of a country. But can be done. Housing and kids [*sic*] schooling are being taken care of. I can't move out of … [the condominium complex where the Mother was residing] as my parents live there and the kids love it. …
>
> At this point I want to establish a few base lines:
>
> 1. Our move to [S]ingapore.
>
> 2. My parents and family will be involved in my life, as I have returned to them for protection, mainly emotional. So please don't bother with all these logistics and directions about housing and schooling and other stuff. Please don't pretend that nothing has happened and all things are rosy. …
>
> …

The Mother then added that she did not want the Father to be without a job and thus suggested that he "stay on in USA for 6 months".

114 From this email, the Mother's position now appeared to be that, contrary to what she stated in her email of 23 December 2015 (see the

italicised portion of the email excerpted at [110] above), she and the children would be living in Singapore with her parents but *without* the Father – hence her suggestion that he not "bother" with the logistics of the move to Singapore. At least, that is how the Father understood it. He responded on 24 December 2015 saying:

> I cannot be away from the children (and you) for six months. There is no way that is feasible. If you don't want to live with me, okay, I will take a separate apartment in Singapore and live by myself and periodically see the kids. But can you imagine how confusing it will be for the kids? …

115 On the same day, before the Mother had replied to this email, the Father wrote another email to the Mother saying that he might have misunderstood her earlier email. He clarified that he was agreeable to the family living together "in a different apartment" of the same condominium complex as his in-laws so that the latter could be "close by for emotional support". However, the Mother's "suggestion of [his] being away in a different country from the kids and [her] for six months" was "not an option".

116 On 25 December 2015, the Father wrote again. He spelt out his frustrations at the Mother's unreceptiveness to his attempts to be involved in the move to Singapore. At one point in the email, he said:

> Here I am willing to put my professional future, financial future, children's future all at stake and move to [a] different country. Because you want to pursue a new job and be around your parents and now you want me to stay away from my own children? That's not fair. I can't be a party to being physically away from my own family and children.

117 In our judgment, it emerges from the tenor of these emails that by late December 2015, the Father and the Mother were already viewing the potential move to Singapore differently. The Father saw this as a chance to attempt to rehabilitate the marriage and begin a new chapter of their family life in

Singapore; hence his unhappiness (expressed in his emails of 24 and 25 December 2015) over the possibility of having to live apart from the family, especially his children. It was crucial to him that the family lived together, not just in the same country but also under the same roof – he might have briefly entertained the idea of living in a separate apartment apart from the Mother and the children in one of his emails on 24 December 2015 (see [114] above), but he quickly dismissed it in the next line of that email and confirmed his opposition to it in his subsequent emails on 24 and 25 December 2015 (see [115]–[116] above). The Mother, on the other hand, was focused on her career and seemingly determined to remain in Singapore for the foreseeable future. She also preferred having her parents play the care-giving role in relation to the children.

118 At the end of this phase of the events, there was still no settled decision for the family to relocate to Singapore. There was certainly no definite decision as to whether the move would take place, and if so, when it would take place and how long it would be for. Indeed, in his last email on 25 December 2015, the Father expressed his unhappiness at the Mother's refusal to share with him "what … the intended dates of [the] move [were]". It was only in the next phase of the events (the fourth phase), commencing on 7 January 2016, that a decision was made to relocate to Singapore.

119 As mentioned at [20] above, the Mother received the consultancy contract from [PEC] on 7 January 2016. On the same day, she and the Father exchanged a number of emails:

(a) The Father informed the Mother of the steps which he would take to withdraw [FC] from his school in the USA. He said that he would rather part with the school on good terms in case the family

were to "return a couple years later and [SC] needs to attend preschool".

(b) The Mother told the Father that she had applied for an Employment Pass. She also told the Father that "in the next three months you can plan your move", and that it was important for him to hold on to his job "for the next one year till [she] settle[d]".

(c) The Father responded saying that he did not understand the Mother's reference to "'three months' for move" – he did not intend to stay alone in the USA without the family.

(d) The Father then suggested: "we can do a short-term lease to rent the house [in West Menlo Park] (say six months). So if we decide to come back (for whatever reason), we can do that relatively painlessly." He also noted that there were "lots of furnished apartments available for short-term lease in Singapore". He said that these logistical matters could be taken care of, but pleaded: "please don't have me stay away from you guys". He asked the Mother to reassure him that she wanted to live with him as a family. He added that "[a]s a very last option, if you want me to live alone in Singapore", he would "take a cheap apartment, so I can periodically look up the kids and you".

(e) In response, the Mother said that she wanted the family to stay together. She said that they could sell everything they had in the USA except, perhaps, the cars, which they might need when they "travel[led] back".

(f) The Father then asked the Mother to send him a copy of the consultancy contract with [PEC] so that he could "look over the terms carefully". He gave his thoughts on the terms of the contract and ended by saying:

> Now that you've made the decision, lets [*sic*] make the best of it. It's probably worth putting all our stuff in storage with this kind of contract … I thought it's a full-fledged long-term move. Based on the contract, doesn't look like it.

(g) The Father also expressed some reservations about the Mother's decision to take up the consultancy contract with [PEC]. He was surprised that it was "a mere consulting gig at $100/hour". He observed: "This has major life impact (severe financial impact) … we're going to lose atleast [*sic*] $50k over the next 6 months – and that'd be true regardless of whether I stay back here or move to [S]ingapore. Our cash flow will be much worse if I stay back in the US …". He continued: "It's not too late yet. Give it some thought. … I know people who've had to turn down offers after accepting because of extenuating circumstances. It's not out of the question. Left to you. I'll support you no matter what."

(h) The Mother told the Father that she was keen on taking up the consultancy contract with [PEC]. She stressed that it was important for the Father to have a steady income: "That's why I've been constantly harping on don't move for 6 months."

(i) In his reply, the Father said: "Don't worry about my salary for [the] next six months. It'll be there."

120 The flurry of emails exchanged on 7 January 2016 suggests that the eventual arrangement to move to Singapore was put together rather hastily

without too much resolution, clarity or definition. The Mother was determined to stay on here once the consultancy contract with [PEC] was confirmed. She also stressed her wish that the Father remain in the USA for the time being, ostensibly in order to ensure that the family had a steady income. The Father, it seems, accepted that the Mother was going to move to Singapore. Facing resistance from her about his moving to Singapore to join her and the children, he tried to make the best of the situation. In his own words, "[his] hands were tied at this point, since the two children were already in Singapore and it had been two and a half months since [he] last saw them". Consistent with his emails of December 2015, his priority seemed to be to ensure that he was not separated from the Mother and the children. It is fair to say that he was hoping that the move to Singapore would be at most a temporary arrangement, as is evident from his suggestion that they get a "short-term lease" in Singapore and, further, from the fact that he opted to keep his position in his start-up in the USA and sought permission to work remotely from Singapore for six months (see [22(f)] above). In fact, he tried to dissuade the Mother from taking up the consultancy contract with [PEC] by telling her that it was "not too late yet" and to "[g]ive it some thought". Eventually, however, when the Mother stood firm, he gave in and assured her that he would have at least six months of his salary available for the family.

121 It was against this backdrop that the Father (as well as the Mother) proceeded to wind down the family's affairs in San Francisco. He also informed some others about the move to Singapore. Again, it did not seem to be clear in his mind how long the move here was to be for. He told [FC]'s school that the Mother had accepted a "six month" consulting position, whereas in an email to a friend on 4 February 2016, he said that the parties were moving to Singapore and that they hoped to return "in a year or two". The inference to be drawn from all this, in our view, is that the Father was

anxious not to be separated from his family and was unclear about the duration of the family's stay in Singapore. As far as he was concerned, it was a temporary arrangement and he contemplated that the family would return to the USA eventually. Most importantly, what is clear, in our judgment, is that *the only reason* the Father agreed to the move was to try to rehabilitate the marriage and to be with the children while he was doing so. It is evident that there was no way of knowing how long this situation would last.

122 As against this, from the Mother's perspective, she had moved to Singapore primarily to pursue career opportunities here and, perhaps secondarily, to be close to her parents. What had seemed to be a family vacation in Singapore at the end of 2015 had the appearance of being the first step in a plan to effect a long-term move here from her point of view. There is nothing in the evidence to indicate that after coming here in November 2015, she actively contemplated returning to the USA in the foreseeable future. Taking matters at face value, she was looking for a job here and was either opposed, or at least indifferent, to the Father coming to Singapore to join the family, at least until six months after she had moved here.

123 That the parties never had any common ground as to the purpose of the move to Singapore is confirmed by one exchange of emails between them late into their stay here, in May 2016. On 17 May 2016, [CF], the co-founder of the Father's start-up, asked the Father when he was returning to the USA; the Father replied saying that it did not look like he would be moving back anytime soon – the Mother wanted "to stick around for another year at least". The Father then forwarded this email to the Mother. On 18 May 2016, the Mother replied saying that they needed to "get some things straight": she wanted to develop her business here for "the next *5 years*" [emphasis added]. She insisted that Singapore was a good place because she had a "help and

support system". She would not mind if the Father went back to the USA to secure his job since it was normal for fathers to be away from their children. The Father replied on the same day saying, "You represented that you are here for six months (then you changed it to two years … now [you] are saying five years)". He was clearly exasperated because their savings were running out, and yet, the Mother was unconcerned about whether he was here with her and the children. He ended by rebutting the Mother's assertion that it was alright for fathers to be absent from their children's lives: "No one in my family voluntarily stays away from their family. To me, my kids and their future is paramount." This exchange is consistent with the theme of the earlier emails: the Father's lack of clarity as to the duration of the move to Singapore (even at this late stage), the Father's focus on staying together with the children, and the Mother's determination to remain here, ostensibly to pursue career opportunities.

124 In the circumstances, we are satisfied that there was no shared intention on the part of the parties to relocate to Singapore. Whatever the Mother's intentions might have been, we are satisfied that the Father agreed to move to Singapore only because he was trying to save the marriage and be with the children while doing so.

The objective circumstances

125 We then turn to examine the objective circumstances. In our view, these do not support a finding that the habitual residence of the children had changed during their stay in Singapore.

126 In particular, the length of the children's stay in Singapore was not significant. As we mentioned at [96(c)] above, the effective period of the children's relocation to Singapore for the purposes of assessing their habitual

residence was only from sometime in February 2016, when the stay in Singapore clearly changed from an extended, if unexpectedly long, holiday here to a relocation for diverse reasons and the parties returned here after winding down their affairs in the USA, to 2 June 2016. This was a total of about four months.

127 As we have explained, the two cases cited by Ms Mirchandani to suggest that the habitual residence of children can change even in as short a period of time as three to four months can be distinguished – in those two cases, there was clearly a joint intention on the part of the parents to relocate, at least for a year (in *In re R*), if not permanently (in *Halaf v Halaf*). In the present case, the Father did not share the Mother's intention to move here for any fixed period of time. In his mind, the move here was always one that was temporary and of a somewhat uncertain duration. Moreover, it is clear that he moved here in the hope of saving the marriage and keeping the family together. As we mentioned earlier (at [62] above), a court should be slow to conclude that the habitual residence of a child has changed in circumstances where one parent acquiesces to a move to another country as part of an effort to attempt a reconciliation with the other parent and where only a short period of time has passed in the new country. The position in this case might well have been different if the parties had gone on to stay in Singapore for a sufficiently long period of time because then, at some stage, the children would have become so settled in Singapore that their habitual residence would have changed regardless of what their parents' intentions were when they first came here. On the facts before us, however, we are satisfied, given the brief duration of the children's stay in Singapore coupled with the absence of any joint parental intention to move here for a definite period of time, that the habitual residence of the children remained the USA and had not changed to Singapore by 2 June 2016.

Whether the Father consented to the retention of the children in Singapore

128 It follows from our analysis of the Father's intentions under the previous section on habitual residence that we also do not think the Father consented to the children being retained by the Mother in Singapore after 2 June 2016 when she indicated her intention to divorce him.

129 In finding that the Father had consented to the children's relocation to Singapore, the DJ relied on a number of statements by him to the effect that the family was moving to Singapore for two years, along with conduct consistent with those statements. What is important here, however, is not the length of the move that the Father consented to (which, in any case, was uncertain), but *why* he did so. As we have already said, it is clear from the evidence that the Father agreed to move to Singapore in the context of his attempt at reconciliation with the Mother and to try to keep his family together. Hence, the crucial question is this: did the Father consent to the children remaining in Singapore even if he and the Mother were to be divorced? There is some support for this in his email on 14 December 2015 in which he told the Mother that he could accept seeing the children only during their summer vacation if he and the Mother separated. But, he immediately went on to say that "[i]t sucks" (see [108] above). This is a far cry from establishing consent on a balance of probabilities. Indeed, it seems to us that this was a last resort on the Father's part, for he quickly continued by expressing his wish that the "saga" between the parties not continue in another country.

130 The Father's tone grew more anxious and despairing in his later emails: he said that it would not be fair if he had to stay away from his own children (see [114]–[116] above), and pleaded with the Mother for some

reassurance that they would live together as a family (see [119(d)] above). A day after the Mother informed him that she wanted a divorce, the Father confided to [CF] that he would like to "ensure the kids are returned to California" (see [26] and [98] above). He then promptly took steps to seek advice on filing an application for the return of the children pursuant to the Hague Convention. All of this establishes, in our judgment, that the *purpose* for which the Father came to Singapore, and in the context of which he consented to the children remaining here, was that of reconciliation with the Mother. He never consented to the children remaining in Singapore even if he and the Mother were to be divorced. With respect, the DJ assumed that the Father's consent to relocate to Singapore for the Mother to pursue career opportunities here was unconditional, in that notwithstanding the Mother's desire to file for divorce, the Father had nonetheless consented to his children living in Singapore. We see no basis at all for making such a finding. The premise of the Father's consent to the children being here no longer existed on 2 June 2016 once the Mother indicated her wish to file for divorce. The swiftness with which the Father sought advice on and then filed his application under s 8 of the ICAA (see [27]–[28] above) also undermines any suggestion that he had consented to the retention of the children in Singapore after 2 June 2016.

131 Our finding that the Father did not consent to the children's retention in Singapore stands quite apart from any allegation that such consent (had it been given) had been procured by deceit. It is hence unnecessary to determine whether the Father had indeed been deceived into consenting, although it seems to us that on the evidence, this was certainly a point that would have merited investigation had it been necessary for us to do so.

Conclusion

132 For these reasons, we allow the appeal and order that [FC] and [SC] be returned to San Francisco, California, USA within 30 days of the date of this judgment. We also order that the Mother is to hand over the children, as well as their passports and all relevant travelling documents, to the Father within 14 days of the date of this judgment, unless she furnishes an undertaking to this court within that 14-day period that she will herself return the children to their habitual residence in the USA within 30 days as aforesaid. We will hear the parties on costs, with submissions to be made by letter (limited to six pages each) within seven days of the date of this judgment.

133 In closing, we state again our deep appreciation for the assistance of the *amicus curiae*, Mr Chan, whose submissions we found most helpful.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Yap Teong Liang and Tan Hui Qing (T L Yap & Associates) (instructed), and Rina Kalpanath Singh (Kalco Law LLC) for the appellant;
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Chan Yong Wei (Drew & Napier LLC) as *amicus curiae*.