

CACV 350/2021

[2022] HKCA 489

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

CIVIL APPEAL NO 350 OF 2021
(ON APPEAL FROM FCMC NO 7498 OF 2018)

BETWEEN

JQ Respondent

and

CLH Appellant

Before: Hon Barma and Chow JJA in Court

Date of written submissions: 25 February and 3, 17 & 18 March 2022

Date of Judgment: 8 April 2022

J U D G M E N T

Hon Chow JA (giving the Judgment of the Court):

INTRODUCTION

1. This is the Husband (Respondent)'s appeal against the order of His Honour Judge I Wong dated 27 May 2021, whereby the Judge dismissed

the Husband's challenge to the jurisdiction of the Family Court to entertain the Wife (Petitioner)'s petition for divorce.

2. Pursuant to the court's directions dated 7 March 2022, this appeal is disposed of by way of written submissions.

BASIC FACTS

3. The Husband and Wife were born in Dongguan and Shanghai in 1951 and 1969 respectively, and are Mainland residents. They were married in 2013, and have 4 children ("C3", "C4", "C5" and "C6"). As at the date of the petition (14 June 2018):

(1) The Husband was residing in Dongguan.

(2) The Wife was residing in Shanghai with C5 and C6 (aged 17 and 13 respectively).

(3) C3 (aged 26) lived independently away from the parents.

(4) C4 (aged 19) was living/studying in the United States.

4. The Husband's marriage with the Wife was his second marriage. He had two children ("C1" and "C2") with his former wife, whom he divorced in 2005.

5. According to the Husband, he came to Hong Kong in 1972 when he was 21 years old, and acquired his Hong Kong Identity Card in 1973 (he is currently a Hong Kong permanent resident, and holds a HKSAR passport). In December 1980, the Husband married his former wife in

Hong Kong. In 1984, he set up an electrical company in Hong Kong. His business was successful. In due course, he set up factories in Dongguan and Shanghai. In 1996, his business (“the Listed Company”) went public on the Main Board of the Stock Exchange of Hong Kong.

6. The Wife met the Husband in 1989 in Shanghai. Soon afterwards, she started an intimate relationship with the Husband, and gave birth to C3 in 1992. In 1995, the Wife and C3 moved to the United States with the financial support of the Husband. In 1998 and 2000, the Wife gave birth to C4 and C5, both in the United States. In September 2000, the Wife moved back to Shanghai with her 3 children.

7. At about the same time, in 2000/2001, the Husband and his former wife moved to live in Dongguan in a house (“the Dongguan House”) that he built, until they separated in about 2003/2004 when his former wife moved back to Hong Kong. In August 2004, the Wife gave birth to C6 in Shanghai. In May 2005, the Husband and his former wife divorced. In July 2013, the Husband and the Wife were married in Las Vegas.

8. According to the Husband, the Wife moved to live in the Dongguan House in about 2004, and it was their only matrimonial home where they spent the majority of their marital life. On the other hand, the Wife says that they had lived in a house in Guangdong since 2003. Whatever may be the position, there is no dispute that the family of the Husband and Wife (including their children) never lived, or maintained a regular residence, in Hong Kong prior to the date of the petition, although the Wife would make frequent trips to Hong Kong to attend some social events with the Husband, or for shopping or medical check-ups.

9. As for the Husband, although his regular residence has been in Dongguan since about 2000/2001, his main business and finances have all along been based in Hong Kong ever since he first started his electrical company here in 1984. He ceased to be a shareholder of the Listed Company in May 2010 when he disposed of all his shares in that company. Nevertheless, he has remained as the Chairman, Managing Director and Executive Director of the Listed Company from which he derives what the Judge describes as “a lucrative monthly salary and dividends”. Further, although he oversees and manages his business in Hong Kong remotely from the Mainland, he still travels to Hong Kong frequently for business meetings and to meet his bankers. Thus, in 2018, the Husband spent 43 days in Hong Kong, including 34 same-day returns. For the 3 preceding years, he spent:

- (1) 40 days (including 26 same-day returns) in 2015;
- (2) 83 days (including 71 same-day returns) in 2016; and
- (3) 75 days (including 55 same-day returns) in 2017,

in Hong Kong. In the event that he had to stay in Hong Kong, he would usually stay in a hotel.

10. Between 2010 and 2012, the Husband purchased a number of properties in Hong Kong and in the Mainland, including 2 properties in Hong Kong in the names of C2 and C1 (which were occupied by their respective families), and 2 properties in Shanghai in the names of C3 and C3/the Wife respectively.

11. According to the Wife, in about 2016/2017, she discovered that the Husband was having an extramarital affair with another woman. Their relationship deteriorated. The Wife moved back to Shanghai in about February 2018. On 14 June 2018, she filed the present divorce petition against the Husband.

THE JUDGMENT

12. Initially, the Husband did not challenge the Family Court's jurisdiction in this case. According to the Husband, when he first consulted his lawyers in this matter, he was already advised that there was a possible issue on the court's jurisdiction in relation to the Wife's divorce petition. However, he did not raise any issue regarding the court's jurisdiction at that time because he did not want a complicated legal process. The divorce petition was thus uncontested, and a *decree nisi* was made on 23 October 2018. However, at a subsequent hearing on 14 June 2019, the issue of jurisdiction was raised by the Judge himself, which eventually led to the Husband's summons dated 10 February 2020 seeking to dismiss the petition on the ground of want of jurisdiction.

13. The Husband's summons was heard on 21 October 2020 by the Judge, who gave a written Judgment (Jurisdiction) ("the Judgment") on 27 May 2021 dismissing the summons.

14. The question of the Family Court's jurisdiction in this case is governed by s 3 of the Matrimonial Causes Ordinance, Cap 179 ("the Ordinance"), which states as follows:

"The court shall have jurisdiction in proceedings for divorce under this Ordinance if -

- (a) either of the parties to the marriage was domiciled in Hong Kong at the date of the petition or application;
- (b) either of the parties to the marriage was habitually resident in Hong Kong throughout the period of 3 years immediately preceding the date of the petition or application; or
- (c) either of the parties to the marriage had a substantial connexion with Hong Kong at the date of the petition or application.”

15. There is no dispute that the conditions in subsections (a) and (b) are not met in the present case, and the Wife did not have a sufficient connection with Hong Kong as at the date of the petition to satisfy the jurisdictional requirement under subsection (c). Hence, the Family Court’s jurisdiction to entertain the Wife’s petition hinges on whether the Husband had a “substantial” connection with Hong Kong as at the date of the petition within the meaning of subsection (c).

16. The Judge considered that the Husband’s connection with Hong Kong as at the date of the petition was sufficient to satisfy the jurisdictional requirement under subsection (c). His reasoning is set out at §§39 to 49 of the Judgment, as follows:

“[39] It seems to me that the thrust of the question is whether the presence of the husband in Hong Kong, mainly for economic reasons, is sufficient to constitute a substantial connection for the purpose of the divorce proceeding.

[40] Mr Chow submits that Hong Kong has always remained the economic and finance hub of the family. In addition to those that I have referred to above, Mr Chow draws upon the following facts.

[41] By 2018, the husband had already been the Managing Director/Chairman and Executive Director of the Listed Business for 2 decades. The husband

remotely controls his companies while physically resides on the Mainland. The objective fact is the husband did not, and does not, have to be physically in the office and monitor his staff on a day to day basis. He oversees and manages his team remotely and comes to Hong Kong for business meetings. Nevertheless, Hong Kong has always been his home base in terms of his finances and business.

[42] The husband said in his Form E (Part 5.5) that he is responsible for the effective running of the board of directors and for planning business strategies and development and overall management of the Listed Business. He had to be present in Hong Kong for business meetings and, according to the husband's affirmation, for meeting bankers: see §21 of the husband's affirmation.

[43] The husband remotely controls his finances, too. He has been conducting all his financing in Hong Kong, where he receives a lucrative monthly salary and dividends as the Chairman and the Managing Director of the Listed Business to support his family. His Form E disclosed that his average income per month is \$848,000 and this is subject to tax in Hong Kong. The husband admitted in Form E (Part 5.5) that the comfortable standard of living that the family enjoyed during the marriage was and is made possible with the support of the perks that he has been enjoying as the Chairman and Managing Director of the Listed Business.

[44] The husband has drawn various loan facilities in Hong Kong for his projects in the Mainland. By way of an example, the husband said he invested a total of \$380 million in a real estate project in the Mainland by raising loans, including mortgage loans secured by the 1st Hong Kong Property and the 2nd Hong Kong Property.

[45] Thus, I agree with Mr Chow that the present case is clearly not one where the husband holds some companies and bank accounts in Hong Kong 'offshore'. Given his superior position in the Listed Business, the husband was able to afford (and for that matter, the wife as well) to live in the Dongguan House that offered enviable living environment hard to find in Hong Kong. The House is about 3,000 m²,

and is built on a piece of land that measures 40,000 m² and offers great opening space and gardening area with 10 live in helpers and drivers. While the husband had already been living in Dongguan for a substantial period of time when the wife petitioned for divorce, the husband's 'economic' presence here, if I may so term it, ensured generous financial provision for the benefit of the family. It cannot be emphasized more that this is the arrangement that this particular family adopted.

[46] On a personal level, the husband returned to Hong Kong to visit [C1] and [C2] and for regular medical check-ups. He also holds executive position as the Honorary President for Life of an Association and participates in various charitable and social events in Hong Kong. He was interviewed more than once by local newspapers.

[47] I am aware that while two properties (ie the 1st Hong Kong Property and the 2nd Hong Kong Property) were bought here, the husband bought more properties in Shanghai. I consider it is not helpful to look at just the numbers or the values. The fact that the husband may have a substantial connection with the Mainland does not necessarily mean he does not have a substantial connection with Hong Kong.

[48] Lastly, I think it is important to note that the husband has never ceased to maintain a presence in Hong Kong. On the evidence before me, I am sure he ceased to be domiciled in Hong Kong at least as from moving back to live in the Dongguan House but he continued to maintain a consistent 'economic' and 'social' presence in Hong Kong. Leaving aside the fact that he needed to visit his two children from the previous marriage, he had to return to Hong Kong for business meetings, medical check-ups and social events... The husband in the instant case is certainly not a tourist to Hong Kong. If one looks at the history of this husband, his presence in Hong Kong is an unbroken continuity. The cessation of the husband being domiciled in Hong Kong did not cause his obliteration in the territory. This is not a case where the husband vanished and then resurfaced years later. Instead, he has consistently maintained a presence in Hong Kong that was / is financially significant for the wife and their children. Such

presence was certainly not of transitory in nature; nor was it one of ‘fly-in’ and ‘fly-out’.

[49] Hence, I consider there are exceptional circumstances in this case where even without the presence of his family here the husband had a substantial connection with Hong Kong.”

THE PRESENT APPEAL

17. On 9 July 2021, the Judge granted the Husband leave to appeal.

18. In the Notice of Appeal dated 15 July 2021, the Husband contends that the Judge’s finding that he had a sufficient connection with Hong Kong for the purpose of s 3(c) of the Ordinance “went beyond the scope and ambit supported by the evidence, and the inferences drawn by the learned Judge were not reasonably supported by the evidence”. The Husband’s appeal is based principally upon the argument that the Judge was wrong to find that “the Husband (without the presence of any family members) fell within the ‘exceptional’ category of cases where his own sole connections with Hong Kong were so substantial that jurisdiction for divorce in Hong Kong ought to be found”, arguing that “[t]he Husband was and is not exceptional – and the fact patterns relied upon by the Wife and the learned Judge are commonly to be found amongst businessmen with interests across the wide ‘Greater Bay Area’, or indeed Shanghai or Beijing or any other substantial centre in the Mainland”.

19. The suggested need to find “exceptionality” lies at the heart of the Husband’s appeal. In Mr Chan’s Skeleton Submissions for the Husband dated 25 February 2022, at §10, he argues that the Judge “could not possibly find substantial connection without first finding exceptionality”,

and the Judge “erred in finding exceptionality where there was none”. At §18, Mr Chan says that “[w]hat the Husband did and how he conducted himself was by no means exceptional in terms of substantially connecting himself to Hong Kong. The learned Judge was wrong to have found exceptionality (and without exceptionality), the learned Judge could have not found substantial connection”.

20. Mr Chan reminds the court that “the facts of the present case took place prior to COVID... We now live in a different world – where travel restrictions may mean that being inside or outside Hong Kong might not be a matter of ‘choice’ for some, and ‘presence’ in Hong Kong might have to take on a more nuanced meaning for the purposes of the substantial connection test. While nowadays ‘conducting business remotely’ has become a part of life that is taken for granted and sometimes indispensable with no other option (e.g. due to travel restrictions); this was not the case with the Husband and this was not the world that he lived in before the Petition was issued” (§11). He says that the Husband made his own choice in how to conduct his life and how to run his businesses (in 2018 and before), and argues that where a person voluntarily chooses not to come to Hong Kong or to be physically present here, but instead conducts “remote control” of Hong Kong companies and/or Hong Kong businesses from another jurisdiction or “remotely controlling” financial matters in Hong Kong from another jurisdiction (as the Husband did in this case), such remote action in and of themselves do not give rise to “(exceptional) substantial connection” with Hong Kong (§§12 and 20). He further argues that far from being exceptional, the Husband is quite unexceptional and really just one amongst many in a rising trend of persons being employed by Hong Kong companies, having economic presence in Hong Kong,

remotely controlling Hong Kong companies, business and financial matters, but in fact and reality residing in and working from another jurisdiction and rarely being physically present in Hong Kong. The number of such persons will grow even more as Hong Kong integrates with the Greater Bay Area (§21). Lastly, Mr Chan argues that to find exceptionality based upon such unexceptional facts, the implications of the Judgment has “great floodgate potential”, and with the already growing demands upon the Family Court of Hong Kong, there are also policy concerns if “presence” in Hong Kong (for the purpose of substantial connection) is taken to include “economic presence” and/or “remote control” and/or other abstract forms of presence but without physical presence (§§25-26).

DISCUSSION

21. The principles for determining whether a person has a “substantial” connection with Hong Kong for the purpose of s 3(c) of the Ordinance are well established. The leading authority on this topic in Hong Kong is the judgment of the Court of Appeal in *ZC v CN (Divorce: jurisdiction)* [2014] 5 HKLRD 43, where Cheung JA (with whom the other two members of the Court of Appeal agreed) considered in depth the statutory requirement of substantial connection under that section:

“[9.1] In line with the modern approach of statutory interpretation, one should not simply look at the natural and ordinary meaning of the words ‘substantial connection’ but also the context and purpose of this term.

[9.4] Whether a person has a substantial connection with Hong Kong is clearly a question of fact. No definition for this term will be succinct or comprehensive enough. What one may do is to look

at the surrounding factors to see whether that person is substantially connected with Hong Kong at the time of the petition. As a starting point, one begins to see if that person has connection here and then decide whether that connection is a substantial one, see *S v S* [2006] 3 HKLRD 751 paragraph 15. In terms of connection, there must be physical presence in Hong Kong, this must be the ground rock of invoking the divorce jurisdiction. But because of the requirement of ‘substantial’, the presence cannot be of a transitory nature otherwise this will encourage ‘fly in’ and ‘fly out’ divorces, a theme that the Court has consistently emphasised, see, for example, *Griggs (nee Sharp) v Griggs* [1971] HKLR 299, *Ta Tran Thi Thanh v Ta Van Hung and Another* [1981] HKDCLR 37 and more recently *S v S, B v A* [2008] 1 HKLRD 43.

[9.5] In the majority of cases, where a married couple is in Hong Kong, the Court will have no difficulties in ascertaining whether they have a substantial connection here. Thus in *RI v SSH* [2010] 4 HKC 588, this Court held that:

‘4. Hence in order to see whether the proceeding has a real and substantial connection to Hong Kong one must, first of all, ascertain whether at the time of its commencement the parties have substantially conducted their matrimonial life in Hong Kong. Hong Kong being an international commercial city, the identification of this issue is most acute for expatriate families who live in Hong Kong. The relevant considerations are, for example, whether the parties’ matrimonial home is here, what is their past pattern of life; do they regard Hong Kong as their home for the time being even if their life style may indicate that they may not take root in one place for too long a time. Related to the issue are matters such as the place of work of the spouses: do they choose to work here; even if one of them has to ‘commute’ overseas to work, is Hong Kong still treated as their home base. Likewise for the children of the family: are they studying here or spending their vacations here even if they are studying abroad.’

See also *LN v SCCM* (CACV 62/2013), Judgment dated 4 June 2013 and *DGC v SLC (née C)* [2005] 3 HKC 293.

[9.6] While the discussion in *RI v SSH* was in the context of *forum non conveniens*, the question of forum is dependent on the place where the parties have the most real and substantial connection with the action. Hence the suggested factors are clearly applicable to the present discussion.

[9.7] Traditionally, the discussion of this topic mainly centred on the foreign expatriate community who are present in Hong Kong because of business commitments or to avail themselves of the opportunities in this international commercial city, see, for example, *S v S*, *B v A*, *G v G* [2005] 1 HKFLR 182 and *Z v Z (Substantial Connection and Forum)* [2012] HKFLR 346. Increasingly in recent years this issue is extended to many of the Hong Kong and Mainland China families who have homes or businesses both here and in the Mainland. Examples can be found in this and other cases such as *LS v AD (Forum; Discovery in the PRC)* [2012] HKFLR 376 and *YS v TTWD (Substantial Connection: Forum)* [2012] HKFLR 129. The focus of discussion in these cases is not about mainlanders who came here on visitors' two way permit but those who have resident status in Hong Kong. Needless to say, the same approach of looking at the surrounding circumstances in order to ascertain the presence of substantial connection is to apply to these parties as well.

[9.8] The fact that a party has resident status which allows him or her to live here legally is only a factor to be taken into account. He or she may not be living here on a long term basis and only comes here occasionally. No doubt one has to look at other factors such as the party's past pattern of life, the frequency of his visit to Hong Kong, the length and purpose of the stay, whether the party is engaged in business or work here, whether the rest of the family is here and whether a home has been established here and whether the children are at school here. It is also important to bear in mind that since the legislation only requires the party to establish a substantial connection in Hong Kong, he or she at the same time

may have a substantial connection elsewhere, see *S v S*. In my view, if a party is shown to have substantial connection elsewhere by reason of his home or work, this may be used to contrast with the connecting factors he has in Hong Kong to see whether the Hong Kong connection is a substantial one.

[9.9] It is said in *Savournin* at page 184 (and also *B v A* at paragraph 20) that a meaning must be given to substantial connection wider than domicile or three years' ordinary residence. But this is not intended to be interpreted so loosely as to encourage residence of passage (*Indyka v Indyka* [1969] 1 AC 33 at 105) or divorce of convenience. At the same time it will be unduly restrictive if one confines the connecting factors solely to that of a family context, namely, accommodation in a matrimonial home and presence of spouses and children. While in the majority of cases, family context is the focus of the inquiry and a material factor, there may well be situations where a party is in Hong Kong without the presence of his family, but nonetheless is able to show that he has a substantial connection here. It really depends on the circumstances of the case. Such cases, however, must be regarded as exceptional."

22. Further valuable guidance on the meaning of substantial connection for the purpose of s 3(c) of the Ordinance can be found in the judgment of Hartmann J (as he then was) in *S v S* [2006] 3 HKLRD 751:

"[11] The first reported authority concerning the meaning and extent of s.3(c) of the Ordinance appears to be *Savournin v Lau Yat Fung* [1971] HKLR 180, a judgment of Briggs J. Having identified the origins of the phrase 'substantial connection' in English family law, the judge confirmed that s.3(c) had established a new basis for determining the personal law of the parties to a marriage; in short, a new and additional ground of jurisdiction. He said:

'Domicile in a country is obviously a substantial connexion with that country: so may three years ordinary residence be so considered. Paragraph (c), a substantial connexion with Hong Kong, is in addition to those two requirements. It is not substituted

for them. *A meaning must be given to the phrase wider than domicile or three years ordinary residence.*’ [my emphasis]

[12] As to the meaning of the phrase, Briggs J said that it was to be given its ordinary meaning; in short, it was not a term of art. Whether or not a party to a marriage had a substantial connection with Hong Kong has to be decided therefore within the factual context of each case.

[13] In my view, when considering the meaning and extent of the phrase, it is important to recognise that the legislature saw fit to qualify it with the indefinite article ‘a’. It is not therefore necessary for a petitioner to demonstrate that his substantial connection with Hong Kong is the only substantial connection he has with any jurisdiction or that his connection with Hong Kong is the most substantial connection he has with any jurisdiction. No exercise of comparisons is required. It is sufficient if he demonstrates that, among others perhaps, he has ‘a’ substantial connection with Hong Kong.

[14] Increasingly we are living in a world without borders. Capital sums are moved in moments from one side of the world to the other with little or no regard for national boundaries. The internet is universal. It is commonplace for even the modestly affluent to have homes in two countries. It is no longer only in the world of fiction that successful business people may at the same time live and work in two countries. S.3(c) is not at odds with this new reality. The subsection recognises that a petitioner who asserts a substantial connection with Hong Kong may also have a substantial connection with one or more other jurisdictions.

[15] But, of course, if the Hong Kong courts are to exercise jurisdiction, it must be shown on a balance of probabilities that a petitioner not merely has a connection with Hong Kong but that, bearing in mind the scope and purpose of the Ordinance, the connection is ‘substantial’.

[16] ‘Substantial’ is a plain enough English adjective. We all understand what it means – at least in substance (if I may be excused the play on words). I say that because it is not a word that lends itself to precise definition or from which precise deductions can be drawn. To say, for example, that ‘there has

been a substantial increase in expenditure’ does not of itself allow for a calculation in numerative terms of the exact increase. It is a statement to the effect that it is certainly more than a little but less than great. It defines, however, a significant increase, one that is weighty or sizeable.

[17] It speaks for itself, I think, that an artificially constructed connection will not be a substantial one. A connection must be real in the sense, for example, that it has not been engineered for temporary tactical advantage. It was not the intention of the legislature (in passing s.3(c) into law) to create a convenient off-shore divorce jurisdiction. As it has been said in an earlier authority, the subsection is not intended for ‘birds of passage’.

[18] As the jurisdiction looks to the determination of matrimonial proceedings, a material factor will be whether both parties to the marriage have lived in Hong Kong and, if so, how long they have lived here as man and wife. But those factors will not necessarily be determinative. In each case the factors to be considered will be different and the weight to be given to them, in the factual context of each case, will no doubt be different too.

[19] In summary, whether – for the purposes of the Ordinance – a connection is substantial or not can only be determined on the basis of a broad objective assessment, taking all relevant factors into account.”

23. In the Judgment, at §19, the Judge summarized the applicable principles, with which Mr Chan expressly agrees¹, as follows:

“(1) What is statutorily required under section 3(c) of the Ordinance is not just a ‘substantial connection’ in any ordinary sense but a connection with Hong Kong of substantial substance that warrants the Hong Kong Court to assume jurisdiction to adjudicate *on matters going to the dissolution of a marriage* (see *B v A* at [22] – [23], per Hartmann J; and *ZC v CN*, *supra* at [53] – [55]).

(2) For the purposes of establishing (1) above, one should look at factors such as (a) whether the

¹ See §8 of the Skeleton Submissions for the Appellant (Husband) dated 25 February 2022.

parties' matrimonial home is in Hong Kong; (b) what is their past pattern of life; (c) do the parties regard Hong Kong as their home for the time being; (d) do the parties choose to work in Hong Kong; (e) are the children of the family studying in Hong Kong (see *ZC v CN* at [9.5] & [9.8], per Cheung JA).

(3) Physical presence in Hong Kong is necessary to the establishment of a connection but because of the requirement of 'substantial', the presence must be real and not merely transitory (see *ZC v CN* at [9.4], per Cheung JA).

(4) The fact that a party has resident status which allows him or her to live here legally is only a factor to be taken into account and is clearly not conclusive (see *ZC v CN* at [9.8], per Cheung JA).

(5) Whilst a party may have a substantial connection with more than one place, if a party is shown to have a substantial connection elsewhere by reason of his home or work, this may be used to contrast with the connecting factors he has in Hong Kong to see whether the Hong Kong connection is a substantial one (see *ZC v CN* at [9.8], per Cheung JA).

(6) It is only in *exceptional* circumstances that a party who is in Hong Kong without the presence of his family will nonetheless be able to show that he has a substantial connection here (see *ZC v CN* at [9.9], per Cheung JA; and *LCYP v JEK* at [42], per Kwan JA)."

24. Mr Chan's argument on "exceptionality" is based on sub-paragraph (6) of the Judge's summary, which is itself based on §9.9 of Cheung JA's judgment in *ZC v CN*. It is important to emphasise, however, that there is only one statutory test, or question, for determining whether the jurisdictional requirement under s 3(c) of the Ordinance is satisfied, namely, whether a party to the marriage had a substantial connection with Hong Kong at the time of the petition. There is not a separate category of parties without the presence of family in Hong Kong who have to satisfy the requirement of "exceptionality" before jurisdiction under s 3(c) can be

established. We do not read the judgment of Cheung JA in *ZC v CN* as seeking to lay down any such principle. It seems to us to be clear, from reading §9.9 of his judgment in *ZC v CN* as a whole, that the learned judge was merely emphasising that in the majority of cases, the family context is the focus of the inquiry and a material factor for determining the question of substantial connection, while recognising that there could be cases where, without the presence of his/her family here, a substantial connection with Hong Kong can nonetheless be established. Such case may not be frequent, and thus may be regarded as “exceptional”. It is, however, wrong to elevate “exceptionality” as the test for determining substantial connection. A test based on “exceptionality” is not useful either, because it would only lead to further, fruitless debates on what may or may not be exceptional, or sufficiently exceptional. Ultimately, each case must be looked at on its own facts to determine whether a person had a substantial connection with Hong Kong at the material time. Thus, in *LCYP v JEK (Children: Habitual Residence)* [2015] 4 HKLRD 798, at §42, Kwan JA (as she then was) made the following observation:

“... And as stated in *ZC v CN* at [9.9], it will be unduly restrictive if one confines the connecting factors solely to that of a family context (matrimonial home and the presence of spouse and children), and while in the majority of cases family context is the focus of enquiry and a material factor, there may be *exceptional* situations where a party is in Hong Kong without the presence of his family and nonetheless has a substantial connection here.”

25. In our view, the Husband’s repeated submissions that his case is “unexceptional”, or “not exceptional”, in the current social and/or economic situation in Hong Kong, or that the Judge is wrong to find “exceptionality” on the facts of the present case, is off-focus. The pertinent, and only, question to ask is whether the Husband had a

substantial connection with Hong Kong as at the date of the petition within the meaning of s 3(c) of the Ordinance. This is a question of fact, which has been said to be “highly fact sensitive”, *per* H H Judge Sharon Melloy in *Z v K* [2019] HKFC 68, at §24.

26. In the present case, the Husband regularly or frequently came to Hong Kong to conduct business. He plainly had a close connection with Hong Kong prior to disposing of his shares in the Listed Company founded by him in 2010, and remained closely connected with Hong Kong thereafter by virtue of his position as its Chairman, Managing Director and Executive Director. In the words of the Judge, Hong Kong remained the “home base” of his finances and business². His “lucrative” income was also derived from such business in Hong Kong. As found by the Judge, the Husband had never ceased his presence in Hong Kong after moving back to Dongguan in 2000/2001, but continued to maintain a consistent “economic” and “social” presence here. On the totality of the facts of this case, we consider that it was open to the Judge to find that the Husband still had a substantial connection with Hong Kong in June 2018 for the purpose of founding jurisdiction under s 3(c) of the Ordinance.

27. It has not been shown that the Judge erred in principle, or took into account irrelevant matters, or failed to take into account relevant matters, in reaching his conclusion that the Husband had a substantial connection with Hong Kong at the material time. It has also not been shown that the Judge made any palpable error, or that the Judge was plainly wrong, in his conclusion. Effectively, the Husband’s appeal comes down to a

² §41 of the Judgment.

disagreement with the Judge's finding of fact on the issue of substantial connection. This is not a valid basis to interfere with the Judge's finding.

28. We do not consider the fact that there are, or may be, many persons in a situation similar to the Husband in Hong Kong, and may be many more in the foreseeable future in view of the increasing integration of Hong Kong within the Greater Bay Area, to be relevant to the outcome of this appeal. We are also not impressed by the floodgates argument, or the argument that this case would impose further pressure on the already growing demands upon the Family Court. As earlier mentioned, the question of whether a person has a substantial connection with Hong Kong for the purpose of s 3(c) of the Ordinance is fact sensitive. We do not see that this judgment creates any precedent. It is, instead, a decision on the particular facts and circumstances of the present case.

DISPOSITION

29. The Husband's appeal is rejected, and his Notice of Appeal is dismissed with costs (including the costs of the application for leave to appeal before the Judge) to the Wife, to be taxed if not agreed with certificate for one counsel. The above order as to costs is an order *nisi*, which shall become absolute unless there is an application to vary it within 14 days after the date of the order.

(Aarif Barma)
Justice of Appeal

(Anderson Chow)
Justice of Appeal

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Mr Jeremy S K CHAN instructed by M/s Rita Ku & Solicitors for the Appellant