

Comment,
HABITUAL RESIDENCE: PERSPECTIVES
FROM THE UNITED KINGDOM

**I. Cases Interpreting “Habitual Residence”
Under the Hague Convention on
International Child Abduction**

Habitual residence is the key concept when establishing jurisdiction in cases involving child abduction under Brussels II Revised,¹ the Family Law Act 1986,² and the 1980 Hague Convention on International Child Abduction.³

Undefined by statute, it is a question of fact to be determined by reference to all the circumstances of a particular case, according to principles derived from case law. The Court of Justice of the European Union (CJEU) has considered the definition of habitual residence in a number of cases, the most significant of which is *Mercredi v. Chaffe*.⁴ This case established that a child’s habitual residence “corresponds to the place which reflects some degree of integration by the child in a social and family environment.”⁵

In the last three years, five cases have been heard by the UK Supreme Court, all of which dealt with the concept of habitual residence of children and brought some clarity to the application of the test under *Mercredi*.

In *A v. A and Another*,⁶ four children were wrongfully retained in Pakistan. The eldest three children were all born in the UK. Following a trip to Pakistan, the mother and three children were held against their will and the fourth child was born in Pakistan. The mother returned to England and applied to the court

¹ Brussels IIa Regulation (Council Regulation (EC) No. 2201/2003 of Nov. 27, 2003).

² 1986 c.55 (Eng).

³ Hague Convention on the Civil Aspects of International Child Abduction art. 1, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (hereinafter Hague Convention), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>.

⁴ *Mercredi v. Chaffe* (C-497/10 PPU)[2012] Fam 22.

⁵ *Id.* at 9, ¶ 7.

⁶ *A. v. A. and Another* (Children: Habitual Residence) [2013] UKSC 60.

for the return of all four children. The issue before the court was whether it had jurisdiction over the youngest child. Could he be habitually resident in England when he had never set foot there?

The judge at first instance held that the youngest child was habitually resident in England based on the mother's habitual residence in the UK and accordingly the court did have jurisdiction with respect to him. The Court of Appeal allowed the father's appeal in relation to the youngest child and the mother appealed to the Supreme Court.

The Supreme Court allowed the appeal. It found that there was jurisdiction in relation to the youngest child on the basis of the child's nationality, the "*parens patriae*" jurisdiction. Under Article 14 of Brussels II Revised, because no other EU member state had jurisdiction, the court retained an inherent jurisdiction. The Supreme Court did not decide whether it would be appropriate for the Court to exercise that jurisdiction, that being an issue for remittance to and determination by the lower courts.

Lady Hale summarised a number of principles, including that the previously adopted test for habitual residence, that of "ordinary residence" as established in the case of *Shah*,⁷ should be abandoned. The meaning of habitual residence is to be derived from the jurisprudence of the CJEU and the test is that as set out in *Mercredi*, namely that the child's habitual residence will be the place that reflects some degree of integration by the child in a social and familial environment. It is a question of fact in the particular circumstances of each case.

*In re L*⁸ was centred upon conflicting decisions of the United States and UK Courts. The child was taken from the United Kingdom to the United States by the father. The father was initially subject to an order of the U.S. court that he return the child to the UK.⁹ However, the child having been returned to the mother in the UK, the father successfully appealed the decision of the U.S. court. The mother refused to return the child to the father in the United States and the father applied to the English court for the child's return. The father was unsuccessful as the

⁷ [1983] 2 WLR 16.

⁸ *In re L* (A Child) (Habitual Residence) [2013] UKSC 75, [2013] 3 W.L.R. 1597.

⁹ *Id.* at 3-4, ¶ 6.

English court found that, by the time of the U.S. appeal, the child had become habitually resident in England.

The father appealed the English court's decision but his appeal was dismissed by the Court of Appeal. He appealed again to the Supreme Court and the appeal was allowed. The Supreme Court used its inherent jurisdiction to order the return of a child to the United States. However, the Supreme Court was unable to order his return to the United States under the 1980 Hague Convention because his habitual residence had changed.

In re LC,¹⁰ the British father and Spanish mother were parents to four children. The family lived in England but upon the parties' separation it was agreed that the mother and the children would relocate to Spain. The father had contact with the children both in Spain and England. However, following contact with the father over the Christmas holidays, the father failed to return the children to Spain, claiming that they refused to go. The mother applied for the children's return to Spain, and was successful in obtaining a finding that the children were habitually resident in Spain and should be returned. The father appealed this decision on the basis of the children's objections and the Court of Appeal allowed the appeal in respect of the eldest child only. The matter was returned to the lower court for re-hearing.

The Court found that the state of mind of adolescent children may be relevant to the determination of habitual residence. The case establishes that in unusual cases, when applying the test of habitual residence, the court can consider evidence about the child's state of mind during the period of residence in the new environment. This requires enquiry into the child's integration in a social and family environment. Evidence can include photographs, emails, and entries on social networking websites.

In *Re R*¹¹ the court held that parental intention is relevant, but not determinative, in establishing habitual residence. The absence of joint parental intention to live permanently in the relevant country in this case was not decisive, in the same way that an intention to live in a country only for a limited period did not automatically prevent one from becoming habitually resident in that jurisdiction. Accordingly it is possible for a parent to unilat-

¹⁰ *Re LC (Children)* (International Abduction: Child's Objections to Return) [2014] UKSC 1, [2014] 2 W.L.R. 124.

¹¹ *Re R (Children)* [2015] UKSC 35.

erally cause a change in a child's habitual residence by removing the child to another jurisdiction without the consent of the other parent.

The key issue for the court to determine is whether the residence has the necessary quality of stability, not whether there was an intention for it to be permanent. The stability of the children's lives and that of the primary carer and their integration into the social and family environment were key.

The case of *Re B*¹² concerned two women, AM and RM, who formed a relationship in July 2004. In 2007 the parties began the process, together, of undergoing an assessment as recipients of fertility treatment. RM then underwent fertility treatment and in April 2008 a child, B, was born with RM as her biological mother. The parties co-parented the child until their separation when the child was aged three, after which the child remained living with the biological mother, RM. Initially AM had regular contact with the child but this gradually decreased AM said because of RM, until by April 2013 she was only seeing B for two hours every three weeks.

On February 13, 2014, by which time B was six years old, AM made an application to the court for a shared residence and contact order. However, unbeknownst to her, ten days before her application was issued, on February 3, 2014, RM had taken B to live in Pakistan. This was notwithstanding the fact that there was a mediation session scheduled for February 5, two days after the biological mother took B out of the country. RM's agreement to participate in mediation was described by Lord Wilson during the proceedings before the Supreme Court as "a charade" in circumstances where RM admitted that she had at that stage already made up her mind to relocate with B to Pakistan.

AM was not B's legal parent and did not hold parental responsibility for her. Accordingly, RM's action in taking B out of the country without the knowledge or consent of AM was neither a criminal act (according to schedule 1 of the Child Abduction Act 1984¹³) or "wrongful" for the purposes of Article 10 of Brussels II revised.¹⁴

¹² (A Child) [2016] UKSC 4.[2016] 2 WLR 557.

¹³ Child Abduction Act, 1984 c.1 (Eng.).

¹⁴ Brussels II, *supra* note 1, at art. 10.

It is worth noting that in September 2009, after B was born, sections 42 and 44 of the Human Fertilisation and Embryology Act¹⁵ came into force and created a new category of “other parent” in addition to a mother and placing a female partner or the civil partner of a woman who is undergoing fertility treatment in the same position as a male partner or husband (provided both the birth mother and female partner consented to the treatment). Under these new provisions, the “other parent” can be named as such on the birth certificate and obtain parental responsibility for the child by the same routes available to a father.¹⁶

However, whether by omission or deliberately, AM had taken no formal steps to gain the new status afforded by sections 42 and 44 and as a result she was in a weak position in attempting to secure B’s return to England.

By the time of AM’s application on February 13, she was unaware of B’s whereabouts. As well as her application for a shared residence order and contact, she sought various orders to locate RM and B. In May 2014 RM instructed solicitors and disclosed that she was living in Pakistan. She challenged the jurisdiction of the English court on the basis that by the time AM had issued her application, B was no longer habitually residing in England and Wales.

The key question before the court, and which was ultimately decided by the Supreme Court, was whether B was habitually residing in England at the time of AM’s application or whether she had by that time lost her English habitual residence. The Court had to consider whether, if there had not been sufficient time to acquire a new habitual residence in Pakistan, it was possible for the child to have no habitual residence for a period.

The Supreme Court found by a majority of three to two that: (1) cases where a child has no habitual residence will be highly unusual; (2) A child will not normally lose his habitual residence until a new one has been gained; and (3) the key issue is whether he or she achieved the requisite degree of integration in the new environment to acquire a new habitual residence.

¹⁵ Human Fertilisation and Embryology Act, 1990, c. 37 (Eng.).

¹⁶ *Id.* at §§ 42, 44.

II. Habitual Residence as Jurisdiction for Divorce

All of the above relates to the concept of habitual residence in the context of proceedings concerning children. This is different from the definition of habitual residence in the context of divorce proceedings and the basis for jurisdiction of a particular country to hear those proceedings. By way of brief summary, habitual residence for the purposes of jurisdiction in divorce proceedings is not defined in Brussels II Revised.¹⁷ However, the same definition is used throughout the member states and is taken from a report by Dr Alegria Borrás which accompanied Brussels II Revised. The Borrás definition of habitual residence is as follows: “A person’s habitual residence is the place where the person has established on a fixed basis the permanent or habitual centre of his interests, with all the relevant factors being taken into account.”¹⁸

The party’s intention will form a part of the court’s overall assessment. It is also worth noting that, per *Marinos v. Marinos*¹⁹ it is possible to be habitually resident in one country and resident in another.

III. The Impact of Brexit

As a final post-script, it would be wrong to write about the above issues without mentioning the impact that Brexit and the UK’s decision to leave the European Union will have on the UK’s approach to the concept of habitual residence and its meaning for the purposes of determining jurisdiction. On leaving the European Union, the United Kingdom will no longer be subject to European law, including Brussels II Revised and all that is taken from it. It is likely, although no one knows for sure, that in relation to jurisdiction for matters concerning children, the UK will readopt the 1996 Hague Convention, which is similar – but not identical – to Brussels II. However, it remains to be seen how

¹⁷ Brussels II, *supra* note 1.

¹⁸ OJ 1998 C221/27-64 at ¶ 32, July 16, 1998.

¹⁹ *Marinos v Marinos* [2007] EWHC 2047 20, The Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, Oct. 19, 1996.

our EU neighbours will approach matters of competing jurisdiction following the UK leaving the EU. It is possible that the clarification and uniformity of approach which has so recently been achieved by these significant decisions of the Supreme Court, could be just as swiftly lost with the removal of the jurisprudence of the CJEU.

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