"HABITUAL RESIDENCE" IN CHILD ABDUCTION CASES: HYBRID APPROACH IS NOW THE NORM BUT HOW MUCH WEIGHT SHOULD BE GIVEN TO PARENTAL INTENTION?

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1. Introduction

It is a privilege to write this chapter in recognition of the major contribution made by Monika Pauknerová to private international law. She has been a faithful supporter of the *Journal of Private International Law* and its biennial global conferences, since the launch of that Journal at the first conference in Aberdeen in March 2005, making her first contribution to the Journal in April 2008.[1] She saw the value of the Journal and of meeting with other academics from all over the world, particularly encouraging the career development of postgraduate students and early career academics. This chapter focuses on the meaning of habitual residence under the Hague Child Abduction Convention 1980 (Abduction Convention). That Convention requires uniform interpretation if it is to be successful. The recent convergence of the world's leading courts taking a hybrid approach to interpreting habitual residence is encouraging but much remains to be done to agree on how much weight should be given to parental intention(s) in determining the habitual residence of an allegedly abducted child.

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[1] PAUKNEROVÁ, M. Private International Law in the Czech Republic: Tradition, New Experience and Prohibition of Discrimination on Grounds of Nationality. *Journal of Private International Law*. 2008, No 1, p. 83–105.

2. Background

A long-time favoured connecting factor at the Hague Conference on Private International Law (HCCH), the habitual residence of the child was chosen as the sole connecting factor within the Abduction Convention.[2] The view held at the time of drafting, that a person's habitual residence was simply a question of fact and therefore a formal definition was of no practical use,[3] has not proved simple to apply in relation to the habitual residence of a child and is often contentious.[4] The child's habitual residence for the purpose of the Convention is their habitual residence immediately prior to their wrongful removal or retention.[5] Without the identification of the child's habitual residence at the time of the allegedly wrongful act it is not possible to work out whether the child's removal or retention was lawful or not.[6] Children may acquire a new habitual residence in the country they have been abducted to or retained in due to the passing of time or more speedily if their relocation there was lawful at the time they moved there.[7] In other situations a child may be found to have more than one habitual residence or none at all.[8] One question that pushes the concept of habitual residence to its limits will be considered within this chapter; whether a new born child can be habitually resident in a country that the child has never been to, arguing that it makes sense that the new born should normally acquire the habitual residence of the custodial parent(s).

[2] BEAUMONT, P., MCELEAVY, P. *The Hague Convention on International Child Abduction*. Oxford: OUP, 1999, p. 88, 90.

[3] See the PÉREZ-VERA, E. Explanatory Report to the Convention at para. 66, available at https://www.hcch.net/en/publications-and-studies/details4/?pid=2779 (cit. 2021-04-13), saying that the HCCH regards "habitual residence" as "a question of pure fact".

[4] "habitual residence is one of the most litigated issues under the Convention" SCHUZ, R. *The Hague Child Abduction Convention*. Oxford: Hart, 2013, p. 175.

[5] Art. 4 of the Convention.

[6] KRUGER, T. *International Child Abduction; The Inadequacies of the Law.* Oxford: Hart, 2011, p. 21.

[7] BEAUMONT, P., MCELEAVY, P. *The Hague Convention on International Child Abduction*. Oxford: OUP, 1999, p. 106. *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562. A new born acquired habitual residence after only two days in *Re J.S. (Private International Adoption)* [2000] 2 FLR 638.

[8] BEAUMONT, P., MCELEAVY, P. *The Hague Convention on International Child Abduction*. Oxford: OUP, 1999, p. 90, 91 and 110. Twins born to a surrogate mother were found to have no habitual residence for the purpose of the Abduction Convention *W. and B. v. H. (Child Abduction: Surrogacy)* [2002] 1 FLR 1008. In *CL v AL* [2017] EWHC 2154 (Fam) [27] Mr Justice Keehan said "It is unlikely and unusual that a child will be found to have lost habitual residence in one country but not yet acquired habitual residence in another country: unlikely but not impossible."

3. Convergence on the Hybrid Approach to Interpreting "Habitual Residence"

The use of the connecting factor of the child's habitual residence within the Abduction Convention was originally designed to protect children from harm in cases of wrongful removal or retention by securing the prompt return of children to the State with which they had the strongest connection.[9] The idea being, that the child's habitual residence immediately prior to the abduction would provide the most appropriate forum for a custody hearing.[10] In order to determine the child's habitual residence the courts should give the concept of habitual residence an autonomous definition. Three main approaches to interpreting the child's habitual residence for the purpose of the Abduction Convention have been identified.[11] The first favours the intention of the person or persons exercising parental responsibility to determine the child's habitual residence.[12] The second approach values the child as an "autonomous individual" and uses the child's connection with the country to determine the habitual residence.[13] The third and most recent approach, taken as we will see by the CJEU, the UK Supreme Court, the Canadian Supreme Court and the US Supreme Court, is a combined method, which looks at all the circumstances of the case in order to see where the child's centre of interests are but recognises as one factor in doing so the relevance of the intention of those holding parental responsibility for the purpose of ascertaining where the child is habitually resident.[14]

In *Re A* the CJEU opined that the parental intention to settle with the child in a new State if manifested by some tangible evidence (like purchasing or leasing a residence there or applying for social housing there) should be seen as a piece of evidence indicative of where the child is habitually resident.[15] That evidence should be weighed by the court alongside all the circumstances of the case to see which residence of the child reflects "some degree of integration in a social and family environment."[16]

With regards to the aspect concerning family and social relationships, the CJEU considered that the relationships to be considered vary according to the child's age.[17] If the child is very young and dependent on the custodial parent(s) then the court

[9] Abduction Convention's preamble. There are 101 Contracting States to this Convention, see http://www.hcch.net/index_en.php?act=conventions.text&cid=24 (cit. 2021-04-13).

[10] BEAUMONT, P., MCELEAVY, P. *The Hague Convention on International Child Abduction*. Oxford: OUP, 1999, p. 90 and the PÉREZ-VERA Explanatory Report to the Convention, para 66.

[11] SCHUZ, R. *The Hague Child Abduction Convention*. Oxford: Hart, 2013, Chapter 8.

[12] *Ibidem* p. 186.

[13] *Ibidem* p. 189.

[14] *Ibidem* p. 192.

[15] Case C-523/07 *Re A* [2009] ECR I-02805 [40].

[16] *Ibidem* [38].

[17] Case C-497/10 PPU *Barbara Mercredi v Richard Chaffe* [2010] ECR 1-4309 [53].

needs to consider the social and family relationships of the parent(s) with lawful custody in order to determine the habitual residence of the child.[18]

The CJEU's combined approach has influenced child abduction cases from the UK Supreme Court, the Canadian Supreme Court and the US Supreme Court. In 2020, the US Supreme Court in *Monasky v Taglieri*,[19] shows the internationalist approach to arriving at the uniform interpretation of "habitual residence" in the Abduction Convention. Ginsburg J (giving the judgment of 8 of the 9 members of the Court) refers to the Perez-Vera report on the Convention to conclude that "habitual residence" necessitates a "fact-sensitive" inquiry. Ginsburg J crucially supports a key proposition by reference to the case law of three leading courts in the world (the CJEU, Canadian Supreme Court and UK Supreme Court):

"What makes a child's residence "habitual" is therefore "some degree of integration by the child in a social and family environment." *OL v. PQ*, 2017 E. C. R. No. C-111/17, ¶42 (Judgment of June 8); accord *Office of the Children's Lawyer v. Balev*, [2018] 1 S. C. R. 398, 421, ¶43, 424 D. L. R. (4th) 391, 410, ¶43 (Can.); *A v. A,* [2014] A. C., ¶54 (2013) (U. K.)."

Ginsburg J went on to pay attention to academic commentary on the meaning of "habitual residence" in the Abduction Convention to conclude that it refers to the child's "home":

"The Conference deliberately chose "habitual residence" for its factual character, making it the foundation for the Convention's return remedy in lieu of formal legal concepts like domicile and nationality. See Anton, The Hague Convention on International Child Abduction, 30 Int'l & Comp. L. Q. 537, 544 (1981) (history of the Convention authored by the drafting commission's chairman). That choice is instructive. The signatory nations sought to afford courts charged with determining a child's habitual residence "maximum flexibility" to respond to the particular circumstances of each case. P. Beaumont & P. McEleavy, The Hague Convention on International Child Abduction 89–90 (1999) (Beaumont & McEleavy). The aim: to ensure that custody is adjudicated in what is presumptively the most appropriate forum—the country where the child is at home."

The US Supreme Court's use of the child's "home" to identify their habitual residence has much to commend it even in the difficult cases where the child has a residence in more than one country.

Beaumont and McEleavy say:

"The ability of habitual residence to identify the most appropriate forum in any given case has traditionally emanated from its largely factual emphasis… it is now accepted that a court may have regard to the intentions of the person concerned. In so doing, it will look for hard evidence that the individual intends to remain, while not indefinitely, for a certain period in the jurisdiction in question."[20]

[18] *Ibidem* [55].

[19] 140 S. Ct. 719.

[20] BEAUMONT, P., MCELEAVY, P. *The Hague Convention on International Child Abduction*. Oxford: OUP, 1999, p. 90.

Ginsburg J in *Monasky* wisely opined that:

"Because children, especially those too young or otherwise unable to acclimate, depend on their parents as caregivers, the intentions and circumstances of caregiving parents are relevant considerations."

4. Weight to be Given to Parental Intention in a Hybrid/Combined Approach to Determining Habitual Residence

Of course, the problematic issue in determining the habitual residence of a child is how much weight should be given to the intention(s) of those having custody rights in relation to the child?

No attempt will be made in this short chapter to answer this question comprehensively but there are two scenarios where the answer seems clear. When we are dealing with a young child it is widely accepted that the intention of the custodial parent is the key, see *Mercredi*[21] and subsequent cases like *Monasky* above. One other idea that has gained the consensus of the HCCH's Experts' Group on Family Agreements is that where both of the custodial parents have recently reached a formal agreement on the custody of the child their decision as to where the child should be habitually resident should be determinative at least where the child is present there:

"given that a child does not have any autonomy in determining where he or she lives (and therefore the adult or adults looking after the child at a given time are in fact determining where the child is living) it is important for courts in 1980 Hague Convention cases to give as much effect as possible to the recently established shared wishes of the parents at least where the child is present at the relevant date in the jurisdiction which according to the parents' agreement is and should remain the child's habitual residence. In a hybrid approach particular weight should be given to shared parental intention to encourage parents to agree about where their child should live and to avoid one parent being able to effectively unilaterally determine the habitual residence of the child in violation of that parent's recent agreement with the other parent."[22]

It is also worth remembering that a key part of the uniform interpretation of the Abduction Convention is to give effect to the requirement in Article 11 that judicial authorities "shall act expeditiously in proceedings for the return of children." In *Monasky* Ginsburg J gives the US Supreme Court's support to the idea that the

[21] [2010] ECR 1-4309.

[22] See Revised draft Practical Guide: Cross-border recognition and enforcement of agreements reached in the course of family matters involving children, Preliminary Document No 4 of January 2019, available at https://assets.hcch.net/docs/97681b48-86bb-4af4-9ced-a42f58380f82.pdf at Explanatory Note, 27 (cit. 2021-04-13).

Abduction Convention proceedings can achieve the requirement to be "expeditious", when determining where the child is habitually resident, by:

"providing courts with leeway to make "a quick impression gained on a panoramic view of the evidence." Beaumont & McEleavy 103 (internal quotation marks omitted)."

It is worth noting that Beaumont and McEleavy go on to say immediately after this quote that:

"To engage in a prolonged assessment of the material facts would be to defeat one of the primary objectives of the Convention. However, given that the assessment of intention might be of significant importance in the determination of whether or not a habitual residence exists, a superficial investigation cannot be regarded as sufficient."[23]

In the past, a UK court held that a new born child took the habitual residence of the parent with parental responsibility with immediate effect, even though the child had never been to that country,[24] because there had been coercion of the mother. The mother was habitually resident in England, and was made to remain in Bangladesh under duress, where she gave birth to the child.[25] However, in the later case of *In the Matter of A Children*, four out of the five UK Supreme Court judges avoided determining the habitual residence of a new born but made significant *obiter* remarks on the point.[26] The critical factor in determining whether the child in this case would be found to be habitually resident within the UK focused on the issue of presence. The question that was considered by the court was which approach supported the view that habitual residence was a question of fact.[27] Was it an approach that called for "(…) presence [as] a necessary pre-cursor to residence and thus to habitual residence or an approach which focuses on the relationship between the parent and the child?"[28] The Supreme Court supporting the first option, trying to follow the case law of the CJEU, argued that a child that had never been brought to a country by their parent(s) and was not socially integrated in that country could not, based on the facts, be habitually resident there, making presence, at some point in a country, an essential element of habitual residence.[29]

Yet a child's habitual residence, especially the habitual residence of a new born, is not best perceived as simply a question of fact but rather as a mixed question of fact and law. A very young child has no control over where he or she is living and

[23] BEAUMONT, P., MCELEAVY, P. *The Hague Convention on International Child Abduction*. Oxford: OUP, 1999, p. 103.

[24] *B v H (Habitual Residence; Wardship)* [2002] 1 FLR 388; FIORINI, A. Habitual Residence and the Newborn—A French Perspective. *International and Comparative Law Quarterly*. 2012, No 3, p. 530–540.

[25] *B v H (Habitual Residence; Wardship)* [2002] 1 FLR 388.

[26] In *In the matter of A (Children)* [2013] UKSC 60, Lady Hale, Lords Wilson, Reed and Toulson all questioned the necessary connection for the habitual residence of the new born child in this situation.

[27] *Ibidem* [55].

[28] *Ibidem*.

[29] *Ibidem*.

by his or her very nature is a "dependent". In an Abduction Convention case the question as to who has legal custody is a legal question but the issue of who has legal custody of the child depends upon the law of the habitual residence of the child, creating a potential "circularity of logic".[30] Determining which parent's habitual residence will be given the most weight in determining the child's habitual residence can affect the outcome as to who has legal custody of the child and whether a removal or retention will be considered unlawful.[31] The only way this cycle can be broken is by the courts making what amounts to an arbitrary decision as to whose habitual residence they give the most weight. It is a poor solution to focus on where the child happens to be present because that simply plays into the hands of the parent or other person who has "possession" of the child at the relevant time.

Lord Hughes in his dissenting opinion found that the child was habitually resident in England. Agreeing that habitual residence was a question of fact,[32] he put forward the view that the presence of the new born infant in a country was not a necessary factor for habitual residence when coercion towards the mother had prevented her from returning to her habitual residence. He also put forward the view that if the court were to correctly follow *Mercredi* then the integration into the family unit was an important factor when considering the habitual residence of the child and the natural conclusion would be that the habitual residence of the siblings and the mother should be taken into consideration when determining the habitual residence of the infant.[33]

In *OL v PQ* in 2017 the Fifth Chamber of the CJEU ruled as follows in a case where a new born baby was kept by the mother in Greece, even though prior to the birth of the child she had agreed that she would return some time after the birth of the child to the family home in Italy where she and the father had been habitually resident before the birth of the child:

"where a child has been born and has lived continuously with her mother for several months, in accordance with the joint wishes of her parents, in a Member State other than that where those parents were habitually resident before her birth, the initial intention of the parents with respect to the return of the mother, together

[30] BEAUMONT, P., MCELEAVY, P. *The Hague Convention on International Child Abduction*. Oxford: OUP, 1999, p. 46.

[31] An example of this would be where an unmarried couple, an English mother and Italian father, leave their two-week-old baby in England with its maternal grandparents while they are temporarily residing in Italy deciding where to live as a family. It can be argued that the child is too young to have gained a habitual residence of its own in England and that the intentions of the parents have yet to determine a habitual residence. The mother then takes the child to Sweden without the father's consent. If the mother's habitual residence of England is applied to the child then under English law the mother would have sole legal custody and the removal would be lawful. If the father's habitual residence is applied then under Italian law he would have joint custody and the removal would be unlawful.

[32] *In the matter of A (Children)* [2013] UKSC 60 [72]-[73]. But later he said that "the concept of habitual residence is necessarily to some extent a legal one" [92].

[33] *Ibidem* [88][90][91].

with the child, to the latter Member State cannot allow the conclusion that that child was "habitually resident" there".[34]

This decision may be defensible on the facts,[35] given that the parents had not formally addressed the question of the habitual residence of their child and in this case the father's consent for the mother to go to Greece was not just for the birth of the child but for some time thereafter. Had the agreement between the parents been formalised in a way that made it clear that they intended their child to be habitually resident in Italy from the date of his or her birth, and that the mother's trip to Greece to have the child was only temporary and would not create the habitual residence of the child in Greece, then one would hope that the courts would decide that for a new born child the joint formally agreed will of its parents as to where the child should have its "home" after its birth should constitute its habitual residence even though the child was never present in that country (except while in the womb). Of course, it seems highly unlikely that many couples would enter into such a formal agreement when expecting the birth of their child. In order to protect the child's relationship with both parents and the putative custody rights of both parents, at least in cases where the parents are married or in a civil partnership, it should be presumed that the child's habitual residence at birth is at the place of the family home—no matter where the mother gives birth to the child—unless the parents have agreed otherwise or a substantial period of time has elapsed since the birth and the child has not been taken back to the country of the marital home and no return application under the 1980 Convention has been lodged by the left-behind parent. Such a presumption would need to be created as part of a mixed question of fact and law and should ideally be endorsed by an HCCH Special Commission on the Abduction Convention.

Such "quasi-legislative" intervention seems necessary, at least for the EU, because the CJEU has elevated the requirement of the "presence" of the child in the jurisdiction as being a precondition of the child being habitually resident there in all cases. In *UD v XB* the First Chamber of the CJEU ruled that:

"a child must have been physically present in a Member State in order to be regarded as habitually resident in that Member State… Circumstances such as those in the main proceedings, assuming that they are proven, that is to say, first, the fact that the father's coercion of the mother had the effect of her giving birth to their child in a third country where she has resided with that child ever since, and, secondly, the breach of the mother's or the child's rights, do not have any bearing in that regard."[36]

This kind of absolutism by the CJEU is not helpful. It is a product of "elevating" the "factual" nature of "habitual residence" into the highest norm even if that is at

[34] Case C-111/17 PPU *OL v PQ* [70].

[35] The father consented to the mother leaving Italy to go to Greece when she was 8 months pregnant and to not returning to the marital home in Italy until the baby was 3 months old. The mother asserted that he had consented to her staying with the child in Greece for several more months, see *ibidem* [16]-[18].

[36] Case C-393/18 PPU *UD v XB* [70].

the expense of human rights of a parent coerced into being present in a jurisdiction they don't want to be in (or presumably at the expense of ignoring the freewill of parents who agree that a child should be habitually resident in their home State rather than the State where the child is present temporarily in order to be born). It is important to note that this was not an Abduction Convention case and it is our contention that it should not be followed by courts in that context.

In a very recent and very welcome decision of the CJEU, the President, Koen Lenaerts, took the unusual step of sitting in a Chamber judgment as a judge and the Chamber gave an excellent internationalist judgment. It does not allow the former habitual residence in an EU State to continue to exercise jurisdiction under Article 10 of the Brussels IIa Regulation when the child has been abducted to a third State. The Chamber carefully interpreted the Hague Child Abduction Convention to acknowledge that habitual residence can transfer to the country where the child has been abducted to when that court refuses to make a return order within the terms of that Convention:

"Further, the interpretation of Article 10 of Regulation No 2201/2003 in such a way as to result in retention of jurisdiction for an unlimited period would also disregard the logic of the mechanism of prompt return or non-return established by the 1980 Hague Convention. If, in accordance with Article 16 of that convention, it is established that the conditions laid down by that convention for return of the child are not satisfied, or if an application under that convention has not been made within a reasonable time, the authorities of the State to which the child has been removed or in which the child has been retained become the authorities of the State of habitual residence of the child, and should, as the courts that are geographically closest to that place of habitual residence, have the power to exercise their jurisdiction in matters of parental responsibility. That convention remains applicable, in particular, in relations between the Member States and the other contracting parties to that convention, in accordance with Article 60(e) of that regulation."[37]

5. Conclusion

In *Mercredi* the CJEU reached a careful balance where parental intent of a child's custodial parent(s) is particularly significant in determining the habitual residence of young children. If enough weight is given to parental intention of the custodial parent(s) of a new born child then physical presence should not be required to establish habitual residence. The CJEU has wedded itself to an absolute requirement of "presence" of the child in a country before that child can be habitually resident there. The courts in the rest of the world do not need to follow this approach, at least in relation to new born children and where all the holders of custody are agreed about

[37] Case C-603/20 PPU *SS v MCP* [61].

where their child should have their home (their habitual residence). The next HCCH Special Review Commission on the Abduction Convention could recommend the appointment of an Experts' Group comprising a mixture of judges, lawyers and academics to prepare a Good Practice Guide on the Meaning of Habitual Residence under the Abduction Convention.