

# RECENT DEVELOPMENTS ON THE MEANING OF “HABITUAL RESIDENCE” IN ALLEGED CHILD ABDUCTION CASES

Paul Beaumont\* and Jayne Holliday\*\*

## I. Introduction

At the conference on “Private International Law in the Jurisprudence of European Courts – Family at Focus” held in Osijek, Croatia, June 2014, an overview of the recent developments within European and International Family Law was presented by Professor Beaumont that included analysis of the law of maintenance, surrogacy, same sex relationships, custody issues, child abduction and recognition and enforcement of agreements in family law matters. Drawing from that presentation, this article will focus on the recent developments on the meaning of habitual residence in child abduction cases from the UK Supreme Court and the Court of Justice of the European Union (CJEU), in particular the move by the UK Supreme Court towards a more uniform definition of habitual residence in line with the jurisprudence of the CJEU under the Brussels IIa Regulation.<sup>1</sup>

### 1. Background

A popular choice of connecting factor with the Hague Conference since the 1960’s, the concept of the habitual residence of the child has clearly changed since it was chosen as the sole connecting factor within the 1980 Hague Convention on the Civil Aspects of International Child Abduction (“the Abduction Convention”).<sup>2</sup> The view held at the time of drafting, that a person’s habitual residence was simply a question of fact and therefore a

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\* Paul Beaumont, PhD, Full Professor of European Union and Private International Law and Director of the Centre for Private International Law, School of Law, University of Aberdeen

\*\* Jayne Holliday, Research Assistant and Secretary of the Centre for Private International Law, School of Law, University of Aberdeen

1 EC Regulation No 2201/2003 of 27th November 2003 concerning jurisdiction and recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II a); Case C-523/07 A [2009] ECR I-2805 and Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309.

2 P. Beaumont and P. McEleavy, *The Hague Convention on International Child Abduction* (OUP, 1999) p. 88, 90.

formal definition was of no practical use<sup>3</sup> proved not as simple to apply in relation to the habitual residence of the child as first thought, with the issue of where the child is habitually resident often being contentious.<sup>4</sup> The child's habitual residence for the purpose of the Convention looks to the habitual residence immediately prior to the child's wrongful removal or retention.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> In other situations a child may be found to have more than one habitual residence or none at all.<sup>8</sup> Indeed a question that pushes the concept of habitual residence to its limits will be considered within this article; whether a very young child (a newborn child) can be habitually resident in a country that the child has never been to, arguing that it makes sense that the newborn acquires the habitual residence of the custodial parent(s).

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

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- 3 See the chair of the Special Commission that drafted the Abduction Convention, Sandy Anton, stating that: "Whether the residence is habitual is regarded simply as a question of fact, making a definition otiose." (see Alexander E. Anton, 'The Recognition of Divorces and Legal Separations' in R.H. Graveson, K.M.H. Newman, A.E. Anton and D.M. Edwards, 'The Eleventh Session of the Hague Conference of Private International Law' 18 *International and Comparative Law Quarterly* (1969) p. 618-680, 620 at 629) and the Explanatory Report to the Convention by Elisa Pérez-Vera at para. 66, at <http://www.hech.net/upload/expl28.pdf> (25 August 2015), which says that the Hague Conference regards "habitual residence" as "a question of pure fact".
  - 4 "(...) habitual residence is one of the most litigated issues under the Convention" R. Schuz, *The Hague Child Abduction Convention* (Hart, 2013) p. 175.
  - 5 Article 4 of the 1980 Convention.
  - 6 T. Kruger, *International Child Abduction; The Inadequacies of the Law* (Hart, 2011) p. 21.
  - 7 Beaumont and McEleavy, *op. cit.* n. 2, p. 106. *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562. Newborn acquired habitual residence after only two days *Re J.S. (Private International Adoption)* [2000] 2 FLR 638.
  - 8 Beaumont and McEleavy, *op. cit.* n. 2, p. 90, 91 and 110. For the purpose of jurisdiction in divorce cases an adult can have more than one habitual residence *Ikimi v. Ikimi* [2001] EWCA Civ 873. 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. Under Brussels IIa if a child is found not to have an habitual residence then for the purposes of jurisdiction in parental responsibility cases the court bases its jurisdiction on the presence of the child within the jurisdiction.

children to the State with which they had the strongest connection.<sup>9</sup> The idea being, that the child's habitual residence immediately prior to the abduction would provide the most appropriate forum for a custody hearing.<sup>10</sup> In order to determine the child's habitual residence the courts were to give the concept of habitual residence an autonomous definition. This was wonderfully idealistic, but with the number of contracting States to the Abduction Convention currently standing at a very successful 93, it is not surprising that with the absence of a formal definition, differences in how it should be interpreted have become apparent.<sup>11</sup>

These differences in approach can be attributed to the lack of agreement on the weight to be given to the intentions of the custodial parent(s) in determining the habitual residence of their child. Overall three main approaches have been identified.<sup>12</sup> The first favours the intention of the person or persons exercising parental responsibility to determine the child's habitual residence.<sup>13</sup> The second approach values the child as an "autonomous individual" and uses the child's connection with the country to determine the habitual residence.<sup>14</sup> The third and most recent approach, which is the approach taken by the CJEU, 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 recognizes 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.<sup>15</sup>

When the CJEU came to consider the habitual residence of a child under the Brussels IIa Regulation, in the context of jurisdiction for parental responsibility cases, in *Re A* they moved away from the more general interpretation of habitual residence that focused on the intention of the party whose habitual residence was in question, as it was felt that this definition was not suitable

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9 Hague Convention on the Civil Aspects of International Child Abduction 1980 (1980 Convention) preamble; There are 93 Contracting States to this Convention. For comprehensive information on the Convention see [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=24](http://www.hcch.net/index_en.php?act=conventions.text&cid=24) (24 August 2015). The 1980 Convention applies to children that are habitually resident in a contracting State (Article 4).

10 Beaumont and McElevay, *op. cit.* n. 2, p. 90 and the Pérez-Vera Explanatory Report, *op. cit.* n. 3, para 66.

11 Schuz, *op. cit.* n. 4, Chapter 8; L. Silberman, 'Brigitte M. Bodenheimer Memorial Lecture on the Family. Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence' 38 *University of California Davis Law Review* (2005) p. 1049 at 1064.

12 For an analysis of the development of the concept of habitual residence for the purpose of the Hague Abduction Convention see Schuz, *op. cit.* n. 4, Chapter 8.

13 Schuz, *op. cit.* n. 4, p.186.

14 *Ibid.*, p. 189.

15 *Ibid.*, p. 192.

for determining the habitual residence of the child and they moved towards the combined method.<sup>16</sup> In their view 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 only be seen as a piece of evidence indicative of where the child is habitually resident.<sup>17</sup> 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.'<sup>18</sup>

The current test for the habitual residence of a child that was developed by the CJEU under the Brussels IIa Regulation in *Re A* and in *Mercredi* is:

(...) the place which reflects some degree of integration by the child in a social and family environment. In particular, duration, regularity, conditions and reasons for the stay on the territory of the Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State should all be taken into consideration obviously appropriate to the child's age.<sup>19</sup>

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.<sup>20</sup> If the child was very young and was dependent on the custodial parent(s) then the court needed to consider the social and family relationships of the parent(s) with the lawful custody in order to determine the habitual residence of the child.<sup>21</sup>

Prior to these cases from the CJEU, the definition that was initially used by the UK Supreme Court for determining habitual residence for the purpose of the Abduction Convention followed the parental intention approach. Drawing from *R v Barnet London Borough Council, Ex p Nilish Shah*, the UK equated the concept of habitual residence with that of ordinary residence, placing emphasis on the residence having a settled purpose.<sup>22</sup>

However the recent developments on the meaning of habitual residence in

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16 The Borràs Report on the Brussels IIa Regulation refers to habitual residence as being defined by the CJEU for other areas of law as the place where, '(...) the [person] concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests'; Case C-523/07, *Re A* [2009] ECR I- 02805 [36].

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

18 *Ibid.*, [38].

19 View of Advocate General Cruz Villalón delivered on 10<sup>th</sup> December 2010 Case C-497/10 PPU *Barbara Mercredi v Richard Chaffe* [2010] ECR I-4309 [65].

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

21 *Ibid.*, [55].

22 *R v Barnet London Borough Council, Ex p Nilish Shah* [1983] 2 AC 309.

child abduction cases from the UK Supreme Court demonstrate a move from the parental intention model towards the combined model. Unfortunately, the very recent decision in *C v M* highlights that the CJEU is capable of losing sight of its own jurisprudence when faced with the difficulties of assessing the habitual residence of the child. This paper will consider two recent UK Supreme Court cases before analysing the latest CJEU case.

## II. In the matter of A (Children) [2013] UKSC 60

### 1. Background

In certain extreme situations, the UK courts had previously held the view that a new-born child could take the habitual residence of the parent with parental responsibility with immediate effect, even if the child had never been to that country.<sup>23</sup> In the case of *B v H* it was considered that where there had been coercion of the mother, who was habitually resident in England, and was made to remain in Bangladesh under duress, where she later gave birth to a child, that the child had the same habitual residence as its mother.<sup>24</sup> However, the decision *In the Matter of A* clearly demonstrates how difficult it is to determine the habitual residence of an infant in this situation, to the extent that four out of the five Supreme Court judges avoided doing so.<sup>25</sup>

Following the CJEU cases on habitual residence in child custody cases and demonstrating a willingness to aim for uniform interpretation, the Supreme Court discussed the issue of presence as a necessary factor to habitual residence and whether an infant could be habitually resident in England without the child ever having been there.

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23 *B v H (Habitual Residence; Wardship)* [2002] 1 FLR 388. In this case it was considered that where there had been coercion of the mother, who was habitually resident in England, to remain in Bangladesh where she later gave birth to a child under duress, that the child had the same habitual residence as its mother; A. Fiorini, 'Habitual Residence and the Newborn – A French Perspective' (2012) 61 *International and Comparative Law Quarterly* p. 530-540. It should be noted that the CJEU has not yet faced such an extreme case as that of *B v H* or *In the Matter of A*.

24 *B v H (Habitual Residence; Wardship)* [2002] 1 FLR 388. A. Fiorini, 'Habitual Residence and the Newborn – A French Perspective' 61 *International and Comparative Law Quarterly* (2012) p. 530-540.

25 In *In the matter of A*, Lady Hale, Lords Wilson, Reed and Toulson all questioned the necessary connection for the habitual residence of the newborn child in this situation. They considered an approach which "holds that presence is a necessary pre-cursor to residence and thus to habitual residence or an approach which focuses on the relationship between the child and his primary carer" and erred on the side of the former.

### 1.1. The facts

The mother, who was considered to be habitually resident in England, had become pregnant and given birth to a child in Pakistan against her will.<sup>26</sup> The child in question was born in 2010 and was the youngest of four children to the mother and father.<sup>27</sup> The father had been born in England and the mother in Pakistan. They had married in Pakistan in 1999 and moved to England in 2000. The father and the eldest three children that were born in 2001, 2002 and 2005 had both British and Pakistani nationality.<sup>28</sup> The mother had indefinite leave to remain in the UK.<sup>29</sup> In 2008 the mother left the family home in England with the three eldest children to move into a refuge claiming domestic abuse.<sup>30</sup> In October 2009 the mother travelled to visit her father for a period of three weeks in Pakistan with the three children.<sup>31</sup> She was unaware that her estranged husband would also be in Pakistan at the same time.<sup>32</sup> Whilst in Pakistan she was coerced by her father and her husband and his family to reconcile the marriage.<sup>33</sup> Her passport and the children's passports were taken from her.<sup>34</sup> She then became pregnant with the fourth child in February 2010 and at that point contacted the refuge in the UK in an attempt to get help to return to England with the children.<sup>35</sup> In May 2011 her father helped her retrieve her passport and she returned to the UK alone.<sup>36</sup> On her return she began proceedings to get the children returned to the UK.<sup>37</sup> The court accepted that all four children were habitually resident in the UK and ordered their return on the basis that the eldest three had not lost their habitual residence and the youngest, following *B v H*, acquired its habitual residence from the mother.<sup>38</sup> The children's father challenged the court's jurisdiction in January 2013.<sup>39</sup> The father's appeal was allowed by the English Court of Appeal in relation to

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26 *In the Matter of A (Children)*[2013] UKSC 60.

27 *Ibid.*, [2].

28 *Ibid.*, [2].

29 *Ibid.*, [2].

30 *Ibid.*, [4].

31 *Ibid.*, [4].

32 *Ibid.*, [4].

33 *Ibid.*, [5].

34 *Ibid.*, [5].

35 *Ibid.*, [6].

36 *Ibid.*, [6].

37 *Ibid.*, [6].

38 *Ibid.*, [7].

39 *Ibid.*, [10].

the youngest child on the basis that habitual residence was a question of fact and that ‘(...) a rule that a newly born child is presumed on birth to take the habitual residence of his parents “would be a legal construct divorced from actual fact”’ and not only that but would also ‘(...) be inconsistent with the approach of the CJEU’.<sup>40</sup> The mother appealed this decision.

## 2. Decision

This case did not turn on the issue of habitual residence as the Supreme Court unanimously upheld the mother’s appeal on the basis that the court had inherent jurisdiction as the child was a British national.<sup>41</sup> However prior to that decision, the Supreme Court did consider whether the child was habitually resident within the UK for the purpose of Article 8 of the Brussels IIa Regulation thereby giving the court jurisdiction to order the “return” of the child on the basis of parental responsibility.<sup>42</sup>

Giving the leading judgment, Lady Hale summarised the position of the Supreme Court with regards to habitual residence by stating that in her view;

The test adopted by the European Court is preferable to that earlier adopted by the English Courts, being focused on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from *R v Barnet London Borough Council, ex p Shah* should be abandoned when deciding the habitual residence of a child.<sup>43</sup>

This is a clear statement by the Supreme Court of their intention to follow the jurisprudence of the CJEU. Highlighting the point that habitual residence is ‘(...) essentially factual’ and ‘(...) should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.’<sup>44</sup> Lady Hale referred to *Mercredi* for guidance when identifying the habitual residence of the very young child.<sup>45</sup> She pointed out that ‘(...) in addition to the *physical presence* of the child in a member state’ that where the child was an infant then the ‘(...) social and family environment is shared with those upon whom he is dependent. Hence it is

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40 *Ibid.*, [10].

41 *Ibid.*, [68].

42 *Ibid.*, [34].

43 *Ibid.*, [54(v)].

44 *Ibid.*, [54(vii)]

45 *Mercredi v Chaffe* (Case C-497/10 PPU) [2012] Fam 22 [55].

necessary to assess the integration of that person or persons in the social and family environment of that country concerned.<sup>46</sup> Lady Hale, along with Lords Wilson, Reed and Toulson, agreed that ‘presence’ was a necessary factor for habitual residence and therefore the majority agreed that the child was not habitually resident within England and Wales as he had not been brought to the UK.<sup>47</sup> However, Lord Hughes took a different view on habitual residence, providing an additional explanation as to why presence was not necessary.<sup>48</sup>

### 3. Is presence essential to habitual residence?

Although the discussion was obiter, the critical factor in determining whether the child in this case was 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.<sup>49</sup> 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?’<sup>50</sup> 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.<sup>51</sup>

Yet although the UK is in line with the current jurisprudence of the CJEU, the situation is not as simple as this. A child’s habitual residence, especially the habitual residence of a newborn, is not best perceived as simply a question of fact but rather as a mixture of fact and law.<sup>52</sup> A very young child has no control

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46 *In the Matter of A (Children)(AP)* [2013] UKSC 60 [54(vi)].

47 *Ibid.*, [58].

48 *Ibid.*, [69]-[94].

49 *Ibid.*, [55].

50 *Ibid.*

51 *Ibid.*

52 Beaumont and McEleavy, *op. cit.* n. 2, p. 46, 91-92 and 112-113; A. Fiorini, ‘II. Habitual Residence and the Newborn – A French Perspective’ 61 *International and Comparative Law Quarterly* (2012) p. 530, 538 “The preparedness of the *Cour de cassation* to treat a newborn’s intended place of residence as his habitual residence should not be taken to apply to other children in other circumstances.”; Schuz, *op. cit.* n. 4, p. 202 notes that courts have avoided applying the parental intention approach, preferring to avoid the question of the habitual residence of the newborn when the child is born in a country where the parents are not habitually resident.

over where he or she is living and by his or her very nature is a 'dependent'. If this was a Hague Abduction Convention case the court would be asked to make an assessment of the habitual residence(s) of the legal custodian(s) in order to determine the habitual residence of the child.<sup>53</sup> The question as to who has legal custody is a legal question. For the purpose of the Abduction Convention, the issue of who has legal custody of the child depends upon the law of the habitual residence of the child, creating a 'circularity of logic'.<sup>54</sup> Determining which parent's habitual residence will be used to determine the dependent child's habitual residence, if the habitual residences of the parents differ, can affect the outcome as to who has legal custody of the child and whether a removal or retention will be considered unlawful.<sup>55</sup> 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 favour. It is an illusion to focus on where the child happens to be living because that simply plays into the hands of the parent or other person who happens to have 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,<sup>56</sup> he put forward the view that the presence of the newborn 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

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53 Beaumont and McEleavy, *op. cit.* n. 2, p. 46, '(...) custody rights are determined in accordance with the law of the child's State of habitual residence, but the child's habitual residence will in most instances be derived from his or her custodian(s).'; Case C-397/10 PPU *Mercredi v Chaffe* [2012] Fam. 22 [55] 'An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent.'

54 Beaumont and McEleavy, *op. cit.* n. 2, p. 46.

55 An example of this would be where an unmarried couple, an English mother and Italian father, leave their two-week-old newborn infant 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 an 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.

56 *Ibid.*, [72]-[73]. But later he had the honesty to admit that 'the concept of habitual residence is necessarily to some extent a legal one' [92].

the habitual residence of the siblings and the mother should be taken into consideration when determining the habitual residence of the infant.<sup>57</sup>

#### 4. Summary

*In the matter of A* it is clear that the UK Supreme Court has moved away from the parental intention model to the combined model in determining the habitual residence of the child, advocating that the test used by the CJEU should be adopted even outside the scope of EU law.<sup>58</sup> On the question of whether presence is a necessary element it was stated that presence is required for habitual residence in order to support the point that it is a fact-based concept.<sup>59</sup> However there was an element in this case that caused the court concern when it came to the assessment of habitual residence and that was the issue of coercion on the mother. Four of the judges, in obiter comments, could not ultimately decide whether presence was a necessary prerequisite for habitual residence in cases as stark as this one. They noted that the CJEU had not had to deal with such an extreme case as this and had the Supreme Court not been able to dispose of the case on the basis of the child’s British nationality, then it should have referred the case to the CJEU to determine whether the child was habitually resident within the UK.<sup>60</sup>

### III. *Re L (A Child) (Habitual Residence)* [2013] UKSC 75

#### 1. Background

‘How should the courts react when the child is brought to the UK pursuant to a legal order made abroad in proceedings under the Abduction Convention, which are then overturned on appeal?’<sup>61</sup> This case highlights that the issue of habitual residence is a question of fact and that the initial judge in each country dealing with the case has a wide discretion as how to interpret the facts.

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<sup>57</sup> *Ibid.*, [88][90][91]; *Ibid.*, [57] Lady Hale noted that “(...) there is judicial, expert and academic opinion in favour of the child acquiring his mother’s habitual residence in circumstances such as these.”

<sup>58</sup> *Ibid.*, [35]-[39], [54] and [81].

<sup>59</sup> *Ibid.*, [55].

<sup>60</sup> *Ibid.*, [58] and [93] – [94].

<sup>61</sup> *Re L (A Child) (Habitual Residence)* [2013] UKSC 75[1].

### 1.1. The facts

The father was a US citizen and a Lieutenant Colonel in the US Air Force.<sup>62</sup> The mother, originally from Ghana had indefinite leave to remain within the UK.<sup>63</sup> The parents married in Texas in December 2005.<sup>64</sup> The child was born in August 2006.<sup>65</sup> From May to September 2007 the mother looked after the child in the family home in Texas while the father was in Iraq.<sup>66</sup> On the father's return the mother took a job in England and the father looked after the child in the family home.<sup>67</sup> The marriage broke down in 2008 and the father began divorce proceedings in the Texas State court in March 2008.<sup>68</sup> The parents then agreed to temporary custody orders in the Texas court which stated that the mother could remain in the family home while the father was on duty in Iraq and gave the mother authority to determine residence "without regard to geographic location".<sup>69</sup> The mother subsequently took the child to the UK in July 2008 and stayed in England with the children until February 2010. In the autumn of 2008 the mother applied for indefinite leave to remain for the child and resisted the agreement for the child to have contact with his father during the Spring break in March 2009.<sup>70</sup> The divorce was finalised in July 2009 in the Texas court with the mother being given custody.<sup>71</sup>

In March 2010 at a welfare hearing the Texan court decided that the child should live with his father,<sup>72</sup> and the child remained with the father from March 2010 to August 2011 and had contact with his mother during the holiday periods.<sup>73</sup> In a "bizarre" twist, the mother then applied in the US for the return of the child under the Abduction Convention, on the basis that the child was habitually resident in England in March 2010 and therefore the father in the US was wrongfully retaining the child.<sup>74</sup> This application was

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62 *Ibid.*, [2].

63 *Ibid.*, [2].

64 *Ibid.*, [3].

65 *Ibid.*, [2].

66 *Ibid.*, [3].

67 *Ibid.*, [3].

68 *Ibid.*, [4].

69 *Ibid.*, [4].

70 *Ibid.*, [4].

71 *Ibid.*, [5].

72 *Ibid.*, [5].

73 *Ibid.*, [6].

74 *Ibid.*, [6].

successful before the US Federal District Court and the mother and child returned to the UK in August 2011.<sup>75</sup> The father then appealed against the decision and was successful on 31<sup>st</sup> July 2012 before the US Court of Appeals for the Fifth Circuit which held that the child was habitually resident in the US in March 2010 and on 29<sup>th</sup> August 2012 the US Federal District Court ordered that the child should be returned to the US.<sup>76</sup> The mother did not return the child.<sup>77</sup> The father then issued proceedings under the Abduction Convention in England and Wales in September 2012 that were rejected at first instance by Sir Peter Singer (January 2013) and in the Court of Appeal (July 2013).<sup>78</sup> The UK Supreme Court decided the case in December 2013 and therefore the Abduction Convention case in England and Wales took 15 months from start to finish. This is too long.

## 2. Decision

In *Re L* the child had been brought to the UK from the US after the Texas court of first instance had said it was lawful to do so. The question in the UK Supreme Court turned on whether the child was habitually resident in the US on either 31<sup>st</sup> July or 29<sup>th</sup> August 2012 because ‘the mother’s disobedience of the Texan order became wrongful’ only if the child was still habitually resident in Texas at that time.<sup>79</sup> On the facts of the case the UK Supreme Court decided that the child had been resident in the UK for a period of 11 and a half months at the relevant time. The Court applied the test within *Mercredi* to determine where the child was habitually resident.<sup>80</sup> In its view Sir Peter Singer “was entitled to hold” that the child was by the relevant date(s) habitually resident in England and Wales.<sup>81</sup> The child was integrated in England and Wales, and it was not a new environment for the child as the child had lived there for 20 months prior to living in the US and then over 11 months after the lawful return.<sup>82</sup>

Treating habitual residence as a question of fact but acknowledging the relevance of parental intent Lady Hale, giving the unanimous judgment of the Court, stated that:

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75 *Ibid.*, [6].

76 *Ibid.*, [7]-[8].

77 *Ibid.*, [8] and [17].

78 *Ibid.*, [16].

79 *Ibid.*, [17].

80 *Ibid.*, [20].

81 *Ibid.*, [27].

82 *Ibid.*, [26].

(...) it is clear that parental intent does play a part in establishing or changing the habitual residence of a child: not parental intent in relation to habitual residence as a legal concept, but parental intent in relation to the reasons for a child's leaving one country and going to stay in another. This will have to be factored in, along with all the other relevant factors, in deciding whether a move from one country to another has a sufficient degree of stability to amount to a change of habitual residence.<sup>83</sup>

However, the Supreme Court made the decision to return the child to his father on the basis of inherent jurisdiction as this was in the best interests of the child.<sup>84</sup>

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83 *Ibid.*, [23]. In the later case of *AR v RN* [2015] UKSC 35 the UK Supreme Court decided that two very young children were habitually resident in Scotland four months after they arrived there lawfully with their mother for her maternity leave for 12 months even though the original intention was to return to France at the end of the 12 month period. The family had lived in France and the father agreed to the mother taking the children to Scotland for a 12 month period. After 4 months the mother started legal proceedings in Scotland for custody. The father brought return proceedings under the 1980 Hague Convention but the Inner House of the Court of Session (upheld by the UK Supreme Court) decided that there was no wrongful retention by the mother in Scotland because the two children were already habitually resident there 4 months after they had left France. It seems unnecessarily controversial for the Supreme Court to decide that the children were already habitually resident in Scotland after only four months residence in Scotland (including two trips to France during those 4 months) when they could have arrived at the same result simply by deciding that after 4 months in Scotland the children were no longer habitually resident in France. It is interesting to note that the UK Supreme Court did not even discuss the question of whether it was obliged to refer the case to the CJEU for a preliminary ruling. It was of course dealing with a case on the interpretation of Article 3 of the 1980 Hague Convention after the CJEU had already ruled on the EU's exclusive external competence in relation to that Convention (see Opinion 1/13, EU:C:2014:2303. Analysed by P. Beaumont in "A Critical Analysis of the Judicial Activism of the Court of Justice of the European Union in Opinion 1/13", Centre for Private International Law Working Paper No 2015/1, at [http://www.abdn.ac.uk/law/documents/Opinion\\_on\\_Child\\_Abduction\\_-\\_Judicial\\_Activism\\_by\\_the\\_CJEU\\_-\\_By\\_Beaumont.pdf](http://www.abdn.ac.uk/law/documents/Opinion_on_Child_Abduction_-_Judicial_Activism_by_the_CJEU_-_By_Beaumont.pdf)) (21 August 2015).

84 *Re L (A Child) (Habitual Residence)* [2013] UKSC 75 [36]. This aspect of the decision is outside the scope of this article but it seems extraordinary that the UK Supreme Court could regard it as being in the best interests of the child to send the child back to the US after he had been with his mother in the UK for such a long time. Surely a Family Court judge in England and Wales should have exercised jurisdiction to determine issues of parental responsibility and access in this case.

## IV. C v M (C-376/14 PPU)

### 1. Background

On 9<sup>th</sup> October 2014 the Third Chamber of the CJEU gave a ruling clarifying that its case law on habitual residence in the context of parental responsibility decisions under Brussels IIa is also applicable to child abduction cases. Unfortunately this ruling, at least in part, contradicts the CJEU's own case-law set out in *Mercredi*.

In this case a mother lawfully removed her child from France to Ireland.<sup>85</sup> The French courts at the time of the removal had given her permission to move to Ireland with the child.<sup>86</sup> The French court had refused an injunction by the father to prevent the removal and identified the child's habitual residence as being with the mother.<sup>87</sup> At this point in the proceedings the French courts were clearly upholding the mother's fundamental right to move from one EU Member State to another as the only custodial parent of the child.

Fast forward two years and the French courts have reversed their decision and have ordered the return of the child to France which the Irish High Court rejected on the basis that the child was habitually resident in Ireland at the material time.<sup>88</sup> On appeal the Irish Supreme Court requested a preliminary reference from the CJEU to bring clarity to the matter.<sup>89</sup> However instead of the CJEU looking to *Re A* and *Mercredi*, '(...) that habitual residence is always a question of fact and that the reasons for being in the territory should be accounted for',<sup>90</sup> it incorrectly places weight on the provisional nature of the French court's permission to the mother to remove the child and the effect of this on the child's habitual residence.

#### 1.1. The facts

The mother who was a British national had married the father of the child in France in May 2008.<sup>91</sup> The child was born in July 2008.<sup>92</sup> The relationship between the mother and father deteriorated quickly and the mother filed for

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85 Case C-376/14 PPU [22].

86 *Ibid.*, [20].

87 *Ibid.*

88 *Ibid.*, [26][27].

89 *Ibid.*, [32].

90 *Ibid.*, [31].

91 Case C-376/14 PPU 9 October 2014 [19].

92 *Ibid.*

divorce in November 2008.<sup>93</sup> The divorce was finalised in the French court in April 2012 and the court gave both parents joint parental responsibility for the child and determined that the responsibility for the habitual residence of the child lay with the mother from 7<sup>th</sup> July 2012.<sup>94</sup> The father was given access and accommodation rights. The court also stated that the mother had permission to go to Ireland to 'set up residence' and laid out contact arrangements for the father to meet both circumstances as to whether the mother remained in France or moved to Ireland.<sup>95</sup>

The father appealed the decision in April 2012.<sup>96</sup> The French court refused to stay the provisional enforceability of the judgment allowing the mother to move to Ireland.<sup>97</sup> The mother lawfully moved to Ireland with the child in July 2012.<sup>98</sup> In March 2013 the French court, the Bordeaux Court of Appeal, upheld the father's appeal and ordered that the child should reside with the father.<sup>99</sup> As the mother did not return the child, in May 2013 the father sought an order for the return of the child from the Irish High Court under the Hague Abduction Convention and the Brussels IIa Regulation.<sup>100</sup> The Irish High Court, in August 2013, dismissed the father's application for the return of the child on the basis that the child had been habitually resident in Ireland at the time of the alleged wrongful retention.<sup>101</sup> In its view the child had acquired habitual residence in Ireland probably at the point when the mother had arrived with the settled intention to reside in Ireland.<sup>102</sup> The father appealed this decision in October 2013 citing that a lawful removal neither changed the habitual residence of the child from being France, nor prevented a wrongful retention.<sup>103</sup> In December 2013 the father requested a declaration of enforceability in Ireland of the March 2013 Bordeaux Court of Appeal judgment.<sup>104</sup> This was accepted in the first instance Irish court but in January 2014 the mother appealed to the French

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93 *Ibid.*

94 *Ibid.*, [20].

95 *Ibid.*

96 *Ibid.*, [21].

97 *Ibid.*

98 *Ibid.*, [22].

99 *Ibid.*, [23].

100 *Ibid.*, [26].

101 *Ibid.*, [27].

102 *Ibid.* See para 54 of the Irish High Court judgment reported at para 48 of the Irish Supreme Court judgment in *G v G* [2015] IESC 12.

103 Case C-376/14 PPU [28].

104 *Ibid.*, [25].

Court of Cassation against the Bordeaux Court of Appeal judgment and in May 2014 successfully asked the Irish High Court to stay the enforcement proceedings, by which time it was almost two years after the mother and child had moved to Ireland.<sup>105</sup> The child was at that point six years old.

In July 2014 the Irish Supreme Court stayed the return proceedings and asked the CJEU for a preliminary ruling on three questions.<sup>106</sup>

## 2. Decision of the CJEU

The CJEU ruled that the Irish court when determining the child's habitual residence needed to take into account that the 'judgment authorizing the removal could be provisionally enforced and that an appeal had been brought against it' and that they should ascertain 'whether the child was still habitually resident in the Member State of origin immediately before the alleged wrongful retention.'<sup>107</sup> This unfortunate approach taken by the CJEU suggests that a lawful removal can too easily lead to an unlawful retention if the lawfulness of the removal is based on an enforceable judicial order that happens to be the subject of an appeal.

The judges in the Third Chamber appeared to view the move to Ireland as temporary, as the courts had only given the mother a provisional order, which was subject to appeal.<sup>108</sup> The judges therefore believed this was relevant for determining the habitual residence of the child on the basis that as the mother knew that the French court could reverse the decision she could not be sure whether she was able to settle in Ireland and therefore the provisional nature of the judgment was pivotal.

A more accurate viewpoint is presented within Advocate General Szpunar's opinion.<sup>109</sup> He notes that the French court had said the mother could move. The French court clearly stated that the habitual residence of the child was with the mother from 7<sup>th</sup> July 2012. The French court even made access and accommodation rights for the father depending on whether the mother made the decision to move to Ireland or remain in France. The move by the mother to Ireland was a lawful move. She had the right to move. So why should the fact that the judgment was subject to appeal be relevant? The ability to

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105 *Ibid.*, [25].

106 The actual questions are recorded in *G v G* [2015] IESC 12 [15].

107 Case C-376/14 PPU [57].

108 *Ibid.* The UK Supreme Court had noted in *Re L* above n 61, that the fact the child's residence in England came about as a result of a judicial decision in the US that was subject to appeal made the residence "precarious" and on different facts may have prevented it from acquiring the "necessary quality of stability "to become habitual" [26].

109 View of Advocate General Maciej Szpunar delivered 24<sup>th</sup> September 2014 *C v M* Case C-376/14.

acquire a new habitual residence after a lawful move occurs quickly. AG Szpunar notes that there is no definition for habitual residence and that it is determined by facts.<sup>110</sup> In the *Mercredi* decision the mother could claim a new habitual residence very quickly and a young child can gain habitual residence very quickly if the move is legitimate.<sup>111</sup>

The ruling by the Third Chamber in *C v M* is clearly focusing on the wrong element. If the CJEU had emphasised the lawful nature of the removal, considered how quickly habitual residence can be gained and taken a child centric approach then it would be clear that the child was habitually resident in Ireland and that the Irish courts should consider the future of this child.

By suggesting that the Irish Court can work out whether the child was habitually resident in the state of origin at the moment when the French court took its decision to overturn its original decision, months after the child had lawfully arrived in Ireland, begs the question as to whether there was wrongful retention at the moment at which that judgment was issued?<sup>112</sup> The CJEU stated that it depended on whether the child was habitually resident in France at that point. This should turn on the facts. But instead of looking to *Mercredi* for guidance, which would have resulted in the child being found to be habitually resident in Ireland, the CJEU attempts to steer the Irish court by giving great weight to the provisional nature of the relocation order.

AG Szpunar is correctly not willing to give weight to the fact that the mother moved to Ireland at the time when the judgment authorizing the move was the subject of an appeal. He is clear in his interpretation that habitual residence is a factual concept.<sup>113</sup> In his view, where a child has been moved from one Member State to another with a parent who, at that time, had rights of custody in relation to the child and was permitted by a court of the Member State of origin to move to the other Member State, the child can in principle acquire habitual residence in the other Member State. The fact that the proceedings relating to the child's custody are still pending in the Member State of origin does not alter this finding, as habitual residence is a factual concept and is not dependent on whether or not there are legal proceedings.<sup>114</sup>

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110 View of Advocate General Maciej Szpunar delivered 24<sup>th</sup> September 2014 *C v M* Case C-376/14 [74][75].

111 *Mercredi v Chaffe* [2011] EWCA Civ 272.

112 Case C-376/14 [57].

113 View of Advocate General Maciej Szpunar delivered 24<sup>th</sup> September 2014 *C v M* Case C-376/14 [83].

114 View of Advocate General Maciej Szpunar delivered 24<sup>th</sup> September 2014 *C v M* Case C-376/14 [85].

Unwilling to take this view the CJEU said that in the alternative, whatever was the outcome on the return issue, the French court order which stated that the child should be in the custody of the father, should be recognised and enforced under the Brussels IIa Regulation as per custody orders and not under the fast track abolition of exequatur route. However, if the child's habitual residence was in fact no longer in France by the time the French appeal court gave its decision on the 5<sup>th</sup> March 2013 and the child is habitually resident in Ireland at the time when the Irish court is seised of parental responsibility proceedings, then it is for the Irish courts to determine the best interests of the child and they do not need to enforce the French judgment.<sup>115</sup>

The recognition of a parental responsibility order is not and should not be permanent. When children move lawfully, what constitutes their best interests may change and it is not necessarily the right thing to automatically recognise and enforce a judgment from another country once a court in the new habitual residence is seised of a dispute on parental responsibility (see the delicate balance arrived at by Article 23(e) of Brussels IIa). This case is therefore highly controversial and highlights the difficulty faced by the legislators in how to reform the Brussels IIa Regulation. Indeed the abolition of exequatur is not necessarily the right outcome in these cases. This is not a commercial judgment where the commercial judgment should not change. This case deals with children where lives change and custody orders given in one country should not necessarily be automatically enforced in another country. This is too simplistic a notion and may not be in the best interests of the child, which is the underlying and indeed the overriding principle. It is therefore suggested that in the review of Brussels IIa and in the case law of the CJEU the national courts should continue to have the flexibility provided by Article 23 of Brussels IIa when dealing with the recognition and enforcement of classic custody orders and should not treat them like an Article 11(8) Brussels IIa Regulation order.

### 3. Summary

The emphasis in this case on the importance of the so called 'provisional nature' of the French judgment is dangerous. It appears to introduce an unhelpful legal element into the determination of habitual residence and

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115 The Irish courts would be exercising their jurisdiction under Article 8 of Brussels IIa to decide on the merits of parental responsibility and give priority to their own ruling, including perhaps an immediate provisional order that the child remains in Ireland with the mother pending a full welfare hearing, on such matters over the earlier French judgment (see Article 23(e) of Brussels IIa).

allows a defeated party to continue to control the habitual residence of their child simply by appealing a judgment that has taken that control away. The CJEU has also contradicted itself because in *Mercredi* the CJEU emphasized that in relation to young children the parental intent of a sole custodian parent can be determinative of a change in the child's habitual residence very soon after a lawful move by the parent with the child to a new country.

#### **4. Decision of the Irish Supreme Court**

On 6 February 2015 the Irish Supreme Court upheld the original decision of the Irish High Court of 13 August 2013 that the child was not habitually resident in France by the time of the French appeal court judgment on 5 March 2013 since the child had moved to Ireland lawfully with her mother in July 2012 and her day to day life was centred in Ireland.<sup>116</sup> The Irish Supreme Court took note (at paras 34 and 51) of the CJEU's caveat in paragraph 55 of the CJEU judgment that the fact that the original French judgment authorizing the mother to take the child to Ireland was subject to an appeal was:

“not conducive to a finding that the child's habitual residence was transferred, since that judgment was provisional and the parent concerned could not be certain at the time of the removal that the stay in that Member State would not be temporary.”

However, in the following brief but undoubtedly correct conclusion the Supreme Court decided that:

“there was sufficient evidence before the High Court concerning integration, family environment and the nature of the relationship between the child, H and her parents such as to allow the High Court judge to come to the conclusion [on habitual residence] she did.”<sup>117</sup>

## **V. Conclusion**

Over the past 30 years the concept of habitual residence of the child in the UK has developed from one which put weight on parental intention to a mixed model, which takes a more child centric and fact based approach. By following the jurisprudence of the CJEU, the UK Supreme Court has made a genuine and conscious attempt to provide a uniform interpretation of the 1980 Abduction Convention. This will hopefully have the effect of creating

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<sup>116</sup> *G v G* [2015] IESC 12 [43] – [51].

<sup>117</sup> *Ibid.*, [50].

a more uniform approach to the definition of habitual residence amongst all Contracting States to the Hague Abduction Convention.<sup>118</sup> However the risk is that the CJEU will not have the judicial expertise in private international law (especially family law aspects thereof) to maintain a high quality interpretation of habitual residence based on international best practice. It does not have a good record of referring to the case law of other national courts on the interpretation of international treaties in order to try to achieve a uniform interpretation of the treaty. In *Mercredi* it 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. This was perhaps not carefully enough heeded by the majority of the UK Supreme Court *In the Matter of A*.

If enough weight is given to parental intention of the custodial parent(s) of newborns then physical presence is not required to establish habitual residence. This is an easier solution to arrive at if the myth that habitual residence is a pure question of fact is abandoned.

Whilst a mixed question of fact and law is the best way to analyse the 'habitual residence' of the young child, it is not appropriate to introduce into the equation a suggestion that somehow habitual residence cannot change when the custodial parent lawfully removes a child to another country just because that decision was still subject to appeal in that country even though the appeal did not suspend the custodial parent's right to take the child out of the country lawfully.

Such an appeal should not prevent the loss of the child's habitual residence in the country where the appeal is made and should not impact on the "stability" of the child's residence in the new jurisdiction to prevent habitual residence being established there within a few months of the residence beginning.

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118 Schuz, *op. cit.* n. 4, p. 186. The parental intention model has been followed by the UK and Commonwealth countries therefore it is possible that Commonwealth courts will follow the UK Supreme Court decision and adopt a more mixed model.