DISCERNING THE MEANING OF "HABITUAL RESIDENCE OF THE CHILD" IN UK COURTS

A CASE FOR THE ORACLE OF DELPHI

Janeen CARRUTHERS*

* Professor of Private Law at the University of Glasgow.

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I. Introduction

Increasingly in international family law the connecting factor of "habitual residence" is employed. In the United Kingdom, habitual residence has been used as a connecting factor in a variety of contexts since the middle of the 20th century. Its rise to prominence, however, was precipitated by the fact that in 1980 (by which time, it had established its place in the pantheon of jurisdiction rules as "the principal internationally-recognised basis for according jurisdiction to the upbringing of children"[1]), the choice fell upon the "habitual residence of the child" as the foundation on which the Hague Conference on Private International Law built its ambitious structure to regulate the civil aspects of international child abduction.[2]

From that international investiture in 1980, habitual residence now is deployed in a wide range of matrimonial, child custody and family property matters. Typically, it trumps domicile and nationality as the preferred personal law connecting factor (in practice, even if not always in terms of strict drafting hierarchy) to resolve international private law problems, having achieved a favoured status in harmonisation instruments emanating from the European Union and the Hague Conference and being a favourite tool of European regulations and international conventions alike. Thus, habitual residence is the principal connecting factor in matters pertaining to divorce, legal separation and marriage annulment, encapsulated in Regulation (EU) No 2201/2003[3] and Rome III;[4] in rules relating to parental responsibility in terms of Regulation (EU) No 2201/2003[5] and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children ("the 1996 Convention"),[6] as well as in adoption;[7] in

[1] *Re C (Children) (Abduction)* [2018] UKSC 8, per Lord HUGHES, at 20, referring to the 1961 Hague Convention concerning the powers of authorities and the law applicable in respect of the protection of infants, article 1.

[2] 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the 1980 Convention"), article 3.

[3] Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (*OJ* L 338, 23.12.2003, pp. 1–29) ("Regulation No 2201/2003"), article 3. See also Council Regulation (EU) No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction ("Brussels II *bis* Recast") (*OJ* L 178, 2.7.2019, pp. 1–115), article 3.

[4] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ("Rome III") (*OJ* L 343, 29.12.2010, pp. 10–16) (into which the UK did not opt), articles 5 and 8.

[5] Article 8. See also Brussels II *bis* Recast, article 7.

[6] *E.g.* Article 5.

[7] 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, article 2.

problems pertaining to maintenance in terms of the EU Maintenance Regulation[8] and associated Hague instruments;[9] in matters concerning matrimonial property and property of registered partners;[10] in social security law;[11] and even in problems concerning wills and succession regulated by the EU Succession Regulation.[12] In these disparate contexts, habitual residence operates variously as a connecting factor for the purpose of allocating jurisdiction and in choice of law *qua* applicable law.

One of the most prominent manifestations of the use of habitual residence still is in relation to international child abduction under the 1980 Convention and/or cross-border parental responsibility matters under Regulation No 2201/2003. Habitual residence of the child, though the fulcrum of the 1980 Convention, has rather an unusual use within the instrument, making its function difficult to categorise in international private law terms. It forms neither the basis of jurisdiction[13] nor judgment recognition,[14] nor does it constitute the applicable law,[15] but rather is a device by which to restore the *status quo ante* following the wrongful removal or retention of a child. The decision whether or not a removal or retention is wrongful is one referable to the law of the child's habitual residence and it is generally for the courts of that legal system to determine the ultimate substantive custody outcome.

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[8] Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (*OJ* L 7, 10.1.2009, pp. 1–79), article 3.

[9] *E.g.* 2007 Hague Protocol on the Law Applicable to Maintenance Obligations, article 3.

[10] Council Regulation (EU) No 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (*OJ* L 183, 8.7.2016, pp. 1–29), articles 5, 6, 22.1 and 26.1; and Council Regulation (EU) No 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (*OJ* L 183, 8.7.2016, pp. 30–56), articles 5, 6 and 22.1. The UK did not opt into either Regulation.

[11] *E.g. Swaddling v Adjudication Officer* [1999] All ER (EC) 217; *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677; and *Gingi v Secretary of State for Work and Pensions* [2001] EWCA Civ 1685.

[12] Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (*OJ* L 201, 27.7.2012, pp. 107–134) (into which the UK did not opt), articles 4 and 21.

[13] At least not directly. Indirectly, however, it determines in which country is the appropriate forum to decide the merits of the dispute, that is, where and with whom a child's future should lie.

[14] E. PÉREZ-VERA, Explanatory Report on the 1980 Hague Child Abduction Convention ("PÉREZ-VERA Report"), para. 36.

[15] *Ibidem*, para. 36.

In the abduction context especially, the meaning and application of the connecting factor of habitual residence of the child has generated animated legal debate not only across Europe, but also globally among the legal systems of states party to the 1980 Hague Convention. In recent years the connecting factor has generated voluminous and highly significant case law in UK courts.[16] Extraordinarily, since 2013, the United Kingdom Supreme Court has had occasion to consider the meaning of habitual residence of the child in six cases: *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)*;[17] *In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)*;[18] *In re LC (Children) (Reunite International Child Abduction Centre intervening)*;[19] *In re R (Children) (Reunite International Child Abduction Centre and others intervening)*;[20] *In re B (A Child) (Reunite International Child Abduction Centre and others intervening)*;[21] and *Re C (Children) (Abduction)*.[22] It is not the ambition of this essay to provide detailed commentary on each of these important cases.[23] Rather, it is intended, first, to analyse the general approach in UK courts to ascertainment of a child's habitual residence; secondly, having distilled the key principles from UK case law and wider European and global influences, to depict the characteristics and identify the *indicia* of the connecting factor; and finally to offer some reflections on the interpretative evolution of the factor.

II. The General Approach in UK Courts to the Ascertainment of a Child's Habitual Residence

[16] For early analysis of the topic from a UK perspective, see E.B. CRAWFORD, "Habitual Residence of the Child" as the Connecting Factor in Child Abduction Cases: A Consideration of Recent Cases, *Juridical Review* 1992, p. 177. See also E.B. CRAWFORD, A Day is Not Enough: Further Views on the Meaning of Habitual Residence, *Juridical Review* 2000, p. 89; E.B. CRAWFORD, Payment postponed: exploring the extent of *Nessa's* authority, 10 *Journal of Social Security Law*, 2003, p. 52; E.M. CLIVE, The Concept of Habitual Residence, *Juridical Review*, 1997, p. 137; E.M. CLIVE, The New Hague Convention on Children, *Juridical Review* 1998, p. 169; and P. ROGERSON, Habitual Residence: The New Domicile?, 49 *International and Comparative Law Quarterly* 2000, p. 86.

[17] [2013] UKSC 60 ("*A v A*").

[18] Also known as *DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal*) [2013] UKSC 75 ("*In re L*").

[19] [2014] UKSC 1 ("*In re LC*").

[20] Also known as *AR v RN* [2015] UKSC 35 ("*In re R*").

[21] [2016] UKSC 4 ("*In re B*").

[22] [2018] UKSC 8 ("*In re C*").

[23] For detailed commentary, see N.V. LOWE, The UK Senior Court's Contribution to the Global Jurisprudence on International Child Abduction, 135 *Law Quarterly Review* 2019, p. 114.

A. Habitual Residence – A Fragmented Concept

In international private law rules operative in the UK, the connecting factor of domicile is recognised to be a unitary concept.[24] Its rules remain the same in whichever private law context it is called into play (*e.g.* marriage, succession, or child law *etc*.), subject only to the specialties of tax law and certain other legislative particularities. Specifically, one must bear in mind the different forms of ascription of domicile to persons at birth and under 16 years of age under English and Scots law, respectively,[25] and the fundamentally different meaning which the concept of domicile carries within the European framework of rules of civil and commercial jurisdiction and judgment recognition and enforcement.[26]

In contrast, the meaning of habitual residence, to some extent at least, varies according to the subject matter context in which it is encountered and therefore is a fragmented concept. Although the meaning of the factor ought to be consistent within a single instrument[27] and, more broadly, across different instruments within a single subject area, *e.g.* in child law,[28] and even across different Hague Conventions regulating different subject areas,[29] as between, *e.g.*, child law and the law of obligations, the meaning and interpretation of the connecting factor differ markedly. In contrast to its role in the family law sphere, habitual residence has emerged as merely a bit player in choice of law rules pertaining to contractual and non-contractual obligations and an autonomous legislative definition of the concept is provided within each of the Rome I and Rome II Regulations.[30] Such

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[24] E.B. CRAWFORD/ J.M. CARRUTHERS, *International Private Law: A Scots Perspective*, 4th ed., Edinburgh 2015, para 6-36.

[25] Domicile of origin and domicile of dependence exist in English law, whereas in Scots law the "domicile of persons under 16" has replaced those concepts per the Family Law (Scotland) Act 2006, section 22.

[26] Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("Brussels I Recast"), *OJ* L 351, 20.12.2012, pp. 1–32, articles 62 and 63.

[27] *E.g.* CJEU (Fifth Chamber), 8 June 2017, *OL v PQ*, ECLI:EU:C:2017:436, para. 41: consistent interpretation for the respective purposes of articles 8, 10 and 11 of Regulation No 2201/2003.

[28] *E.g.* CJEU (First Chamber), 17 October 2018, *UD v XB*, ECLI:EU:C:2018:835, [2019] I.L.Pr. 27, at Opinion of the AG, paras 37 and 39; see also the Opinion of the AG SAUGMANDSGAARD ØE, emphasising in the context of child law, the "importance of a consistent and uniform application of the criterion of habitual residence both within the EU and in all the States Signatories to the Hague Conventions" (Opinion of the AG, ECLI:EU:C:2018:749, para. 40).

[29] See *e.g.* remarks of COBB J in *TD v KD* [2019] EWCOP 56 at [10].

[30] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I") (*OJ* L 177, 4.7.2008, pp. 6–16), article 19; and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II") (*OJ* L 199, 31.7.2007, pp. 40–49), article 23. *Cf.* the elaboration of the meaning of habitual residence in Regulation (EU) No 650/2012, Recitals 23 and 24.

explicit legislative definition is rare and the concept has been left largely to judicial interpretation.

B. Absence of Legislative Definition

It is well known that the 1980 Convention does not supply a definition of habitual residence. As has been observed on many occasions, notably by the High Court of Australia,[31] this is not unusual in the context of Hague Conventions.

The absence of a definition is not inadvertent. The rapporteur on the 1980 Convention, Professor Elisa PÉREZ-VERA, made clear that, "Following a long-established tradition of the Hague Conference,[32] the Convention avoided defining its terms, with the exception of those in article 5 concerning custody and access rights, where it was absolutely necessary to establish the scope of the Convention's subject-matter."[33] Honouring this tradition[34] has led, at different times, to courts enjoying flexibility and discretion in interpreting habitual residence (to the perceived benefit of the child in question and/or either parent), but also to the drawback of uncertainty of meaning and to the cost and delay inherent in litigation to resolve the matter. The absence of any fixed legislative definition has spawned, in the context of return applications under the 1980 Convention, countless disputes on where a child is considered to be habitually resident for the purpose of that instrument. It is difficult, therefore, for advice in advance of litigation confidently to be offered to a parent.

The rationale for eschewing a formal definition in any given instrument seemingly is to afford latitude to domestic courts in interpreting and applying the instrument in question[35] and "to avoid the application of rigid formulas"[36] or "rigid legal rules".[37] In 1997, Professor Eric CLIVE wrote that, "The attraction of the

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[31] *L.K. v. Director-General, Department of Community Services* [2009] HCA 9 at [21]. *Cf.*, in Canada, *Beairsto v. Cook,* 2018 NSCA 90, per BEVERIDGE J. A., at [41].

[32] The concept, undefined, was used in a Hague Convention on civil procedure as long ago as 1905.

[33] PÉREZ-VERA Report (note 14), para. 53.

[34] *Cf.* Absence of definition in the 1996 Hague Convention and in the 2000 Hague Convention on the International Protection of Adults, observed by COBB J in *TD v KD* [2019] EWCOP 56 at [10] – [14], and by MOYLAN J in *An English Authority v SW and others* [2014] EWCOP 43 at [64].

[35] See comments in litigation before the United States Supreme Court *sub nom. Monasky v Taglieri* (Case Number 18-935), the Brief of *Amicus Curiae* per Reunite International Child Abduction Centre in support of neither party (on Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit) (August 21, 2019), p. 5. See, subsequently, *Monasky v Taglieri* 589 U.S. _ (2020).

[36] *Monasky v Taglieri* (Case Number 18-935), Brief of *Amicus Curiae – per* International Academy of Family Lawyers, at p 3. *Cf. Re LC (Children) (Habitual Residence: Grave Risk of Harm) (AKA M v F)* [2014] EWFC 8; [2015] 1 F.L.R. 1019; [2014] Fam. Law 1377), per RODERIC WOOD J, at [13].

[37] CJEU (First Chamber), 17 October 2018, *UD v XB*, ECLI:EU:C:2018:835, [2019] I.L.Pr. 27, at Opinion of the AG, para. 38.

concept of habitual residence has always been that it is a simple, non-technical concept that can be applied directly to the facts of cases."[38] While this feature furnishes domestic courts with considerable discretion and extends to them the power to exercise autonomy – not least because, in respect of Hague conventions, there is no supranational court with overarching jurisdiction to control interpretation of key terms and provisions – it is apparent that judges frequently have strained to identify criteria to steer their approach to finding a child's habitual residence, a factor which, in practice, often proves difficult to discern.[39]

Negotiators at the Hague Conference, and likewise the drafters of Regulation No 2201/2003 and of Brussels II *bis* Recast, having determined not to define habitual residence, UK judges have grappled with the concept and have endeavoured over many decades to settle on a clear working practice, if not a definition, to assist them in their application of the connecting factor of habitual residence.[40]

C. A Mixed Question of Fact and Law

The PÉREZ-VERA Report expressly states that the Hague Conference regards the notion of habitual residence "as a question of pure fact, differing in that respect from domicile".[41] The notion repeatedly has been described as a matter of fact not law, that is, "as something to which no technical legal definition is attached so that judges from any legal system can address themselves directly to the facts."[42] Following the first, famous articulation of the proposition in the UK House of Lords, by Lord BRANDON OF OAKBROOK in *In re J (A Minor) (Abduction: Custody Rights)*,[43] that "… the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case",[44] British judges have said often, and firmly, that the words "habitual residence" should bear their ordinary and natural meaning, for the term is not a term of art with some special import, but a matter of fact.[45]

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[38] E.M. CLIVE, The Concept of Habitual Residence, *Juridical Review* 1997, at 137.

[39] *E.g.* in *Re E (A Child) (Abduction: Article 13B: Deferred Return Order)* [2019] EWHC 256 (Fam), KNOWLES J remarked, at [59], that the child's habitual residence did not "reveal itself instantly". *Cf. In re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174, per HAYDEN J, at [16].

[40] *E.g. Cruse v Chittum* [1974] 2 All E.R. 940; *R. v Barnet LBC Ex p. Shah* [1983] 2 A.C. 309 at 342- 343; and *Re P-J (Children)* [2009] EWCA Civ. 588, See, however, *A v A* [2013] UKSC 60, per Baroness HALE OF RICHMOND, at [54].

[41] PÉREZ-VERA Report (note 14), para. 66.

[42] *L.K. v. Director-General, Department of Community Services* [2009] HCA 9 at [21].

[43] [1990] 2 A.C. 562.

[44] *Ibidem*, at 578.

[45] *E.g. Re P-J (Children) (Abduction: Habitual Residence: Consent)* [2009] EWCA Civ 588; *A v A (Children) (Habitual Residence)* per Baroness HALE OF RICHMOND DPSC [2013] UKSC 60; [2014] A.C. 1, at [54], and per Lord HUGHES JSC at [80]; *In re LC*

The rejection by UK courts of a "rule-based" approach to the determination of habitual residence is attributable, at least partly, to European influence. In 2013, in *A v A*,[46] Baroness HALE OF RICHMOND DPSC (with whom Lords Wilson, Reed and Toulson JJSC agreed), when "drawing the threads together",[47] ruled that, "(i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents."[48] The argument was made that since the Hague Conference, and the UK Parliament in enacting the Child Abduction and Custody Act 1985, had determined not to define the concept, "… it would be wrong to purport to lay down a series of legal propositions about the meaning of habitual residence. That would not only convert the concept into a technical legal concept like domicile but would also greatly increase the risk of the concept acquiring different meanings in different countries."[49]

However, the characterisation of habitual residence as a matter of fact not law is a more subtle, chameleon point than at first sight may appear. Thus Professor CLIVE stated, in connection with the 1996 Hague Convention, that habitual residence "… is a legal concept, but one which depends almost entirely on the facts of the situation."[50] This contention was judicially affirmed in 2016 in the UK House of Lords in *In re B*.[51] Lord Wilson JSC having asserted that the identification of a child's habitual residence is "overarchingly a question of fact",[52] Baroness Hale DPSC and Lord Toulson JSC opined – qualifying, in effect albeit not expressly, the Supreme Court's earlier ruling in *A v A*[53] – that, "[a]t the risk of appearing pedantic, we would prefer to describe it as a mixed question of fact and law, because the concept is a matter of law but its application is a matter of fact."[54]

(Children) (Reunite International Child Abduction Centre intervening) [2014] UKSC 1, [2014] A.C. 1038, per Baroness HALE OF RICHMOND DPSC at [59]; *Re LC (Children) (Habitual Residence: Grave Risk of Harm) (AKA M v F)* [2014] EWFC 8; [2015] 1 F.L.R. 1019; [2014] Fam. Law 1377), per RODERIC WOOD J at [13]; and *In re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] UKSC 4, per Lord WILSON JSC at [46] and per Baroness HALE OF RICHMOND DPSC and Lord TOULSON JJSC, at [57].

[46] [2013] UKSC 60; [2014] A.C. 1.

[47] *Ibidem* at [54] – [58]. See also [36].

[48] *Ibidem* at [54].

[49] E.M. CLIVE (note 38), at 137.

[50] E.M. CLIVE, The New Hague Convention on Children, *Juridical Review* 1998, p. 169, at 174.

[51] [2016] UKSC 4.

[52] *Ibidem*, at [46]. See also per Lord CLARKE OF STONE-CUM-EBONY JSC (dissenting) at [93].

[53] [2013] UKSC 60; [2014] A.C. 1. *Cf.* also dicta of Baroness HALE OF RICHMOND DPSC (with whom Lord SUMPTION JSC agreed) in *In re LC* [2014] UKSC 1 at [59]: "The first principle is that habitual residence is a question of fact ...".

[54] *In re B* [2016] UKSC 4, at [57]. *Cf. A v A* [2013] UKSC 60; [2014] A.C. 1, per Lord HUGHES, who conceded at [92] that, "it is well established that although rules of law are generally inappropriate the concept of habitual residence is necessarily to some extent a

A similar line was followed by the dissenting judges in *In re B*, to the effect that, "… while the test for what constitutes habitual residence is a question of law, whether it is satisfied is a question of fact."[55] Interestingly, the United States Supreme Court has concluded that a child's habitual residence presents,

> "what U.S. law types a « mixed question of law and fact albeit barely so » … The inquiry begins with a legal question: What is the appropriate standard for habitual residence? Once the trial court correctly identifies the governing totality-of-the-circumstances standard, however, what remains for the court to do in applying that standard … is to answer a factual question: Was the child at home in the particular country at issue?"[56]

The characterisation of habitual residence as a matter of fact or law is significant partly because it may affect whether or not a trial court's determination of a child's habitual residence is subject to review by an appellate court. But its significance lies also in the edict that judges should avoid juridification of the concept, that is, they should avoid formulating, whether by accident or design, rules or principles which dictate the process by which, or the manner in which, a child's habitual residence is to be ascertained.[57] Critically, as Baroness Hale of Richmond DPSC directed in *A v A*,[58] "(vii) The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce."[59]

So far, so good. However, the delineation between fact and law can be blurred. Moreover, there is a difficulty, noted by Lord Hughes JSC in *A v A* when he highlighted "[the] long-standing tension between the generally accepted proposition that habitual residence is a question of fact and the desire to provide some guidance on the approach which courts should adopt when deciding whether

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legal one; [as PATTEN LJ said [2013] Fam 232, para. 59,] it is a jurisdictional concept." *Cf. TD v KD* [2019] EWCOP 56, per COBB J at [14], "… despite the important legal consequences attaching to it, [habitual residence'] should remain a factual concept".

[55] *In re B*, *ibidem*, per Lord SUMPTION JSC (dissenting), with whom Lord CLARKE OF STONE-CUM-EBONY JSC agreed, at [64].

[56] *Monasky v Taglieri* 589 U.S. _ (2020), Opinion of the Court delivered by GINSBURG J, at p. 15. See also Opinion of ALITO J, at p. 2: 'Habitual residence' is not a pure question of fact … But it does involve a heavily factual inquiry."

[57] *Cf.* remarks of Baroness HALE OF RICHMOND DPSC in *A v A* [2013] UKSC 60 at [37]. See also R. SCHUZ, Habitual residence of children under the Hague Child Abduction Convention – theory and practice, 13 *Child and Family Law Quarterly*, 2001, p. 4.

[58] *Ibidem* at [54].

[59] *Cf. In re L* [2013] UKSC 75, per Baroness HALE OF RICHMOND DPSC (with whom Lord NEUBERGER OF ABBOTSBURY PSC, Lord WILSON, Lord HUGHES and Lord HODGE JJSC agreed) at [20]; and the approach taken by the UKSC in *In re R (Children)* [2015] UKSC 35, [2015] 2 W.L.R. 1583. See also *In re E (Children* [2011] UKSC 27, [2012] 1 A.C. 144, at [31], where Baroness HALE OF RICHMOND and Lord WILSON JJSC, delivering the judgment of the Supreme Court, held that the words in article 13 of the Hague Convention were "quite plain" and needed "no further elaboration or «gloss»." *Cf. In re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174, per HAYDEN J at [17].

it has been demonstrated."[60] Lord Hughes, drawing a distinction between a judge (permissibly) making a "helpful generalisation of fact" concerning the determination of a child's habitual residence and his/her essaying a "proposition of law",[61] concluded that doing the latter cannot be acceptable for it would destroy the agreed starting point that habitual residence is a question of fact. But where is the boundary to be drawn between a judge making a "helpful generalisation of fact" and his/her expressing a "proposition of law"? When does "guidance on the approach which courts should adopt" tip into the framing of a proposition of law and the improper application of legal gloss?

In response to a submission in *In re B*[62] that the court should strive not to introduce any gloss on the meaning of habitual residence, Lord Wilson JSC said that,

> "A gloss is a purported sub-rule which distorts application of the rule. … In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules[63] but expectations which the fact-finder may well find to be unfulfilled in the case before him: … "[64]

While the distinction between fact and law may seem plain in theory, as a matter of practice, in the context of a given dispute, it can be far from clear. As Lord Sumption JSC said with a note of resignation in *In re B*, with regard to the question whether one habitual residence may be lost before a new one has been acquired, "I remain uncertain whether this is said to be a principle of law or a proposition of fact."[65] One judge's bald statement of a proposition of fact may be deemed by another to be the application of legal gloss.

D. Resisting Juridification of the Concept

In 1998 Professor CLIVE remarked that, "If the [1996 Hague Children] Convention is to work well it will be important that all Contracting States resist the temptation to embellish the concept of habitual residence with subsidiary legal rules of a

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[60] *A v A* [2013] UKSC 60; [2014] A.C. 1, at [72].

[61] *Ibidem* at [73].

[62] [2016] UKSC 4.

[63] Nor, apparently, does his Lordship offer "rules": see *In re B, ibidem,* per Baroness HALE OF RICHMOND DPSC and Lord TOULSON JSC, at [57]: "We do not … understand Lord WILSON JSC to be laying down *a rule of law* that a child must always have an habitual residence: rather that, *as a matter of fact*, the loss of an established habitual residence in a single day before having gained a new one would be unusual." (emphases added).

[64] *Ibidem,* per Lord WILSON JSC (with whom Baroness HALE OF RICHMOND DPSC and Lord TOULSON JSC agreed), at [46].

[65] *In re B* [2016] UKSC 4 at [64]. *Cf.* doubt expressed by BLACK LJ in *Re H (Children)* [2014] EWCA Civ. 1101 at [34].

technical nature. The two words 'habitual' and 'residence' contain all the ingredients required to make the concept work."[66]

Habitual residence is intended to be a common sense concept, one readily understandable by the man or woman (possibly even the mature child) in the street. But the person in the street would be astonished at the areas of doubt and complexity which a deconstruction of the concept lays bare. Despite habitual residence being overarchingly a question of fact, the facts of cases have demanded that difficult questions be addressed. Fundamentally, for example:

- how does an individual acquire an habitual residence?[67]
- is physical residence necessary and, if so, what period of time qualifies as "habitual"? [68]
- how does an individual lose habitual residence, and how quickly?
- can a person be without an habitual residence, *i.e.* can there be a gap or lacuna between residences?
- can a person have more than one habitual residence concurrently?[69]

Aside from such fundamental questions, there are more subtle nuances:

- must that residence be lawful?
- to what extent is the mental attitude of the *propositus* relevant, be s/he an adult or a child?
- must there be free will or "voluntariness" at the outset of the residence, and throughout the period of residence?
- must there be "settled" intention, that is, a settled purpose before habitual residence can be said to have been acquired?
- is the habitual residence of a child necessarily the same as that of the parent having care and control of him?
- can the habitual residence of a child be changed through the unilateral actings of one parent?
- can (must) an unborn,[70] or newborn,[71] child have an habitual residence and, if so, how is it to be assigned?

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[66] E.M. CLIVE, The New Hague Convention on Children, *Juridical Review* 1998, p. 169, at 174.

[67] *E.g. Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562 at 578, 579; *Re N (Child Abduction: Habitual Residence)* [1993] 2 F.L.R. 124; *Re R (Wardship: Child Abduction) (No.2)* [1993] 1 F.L.R. 249; *Al-H v F* [2001] EWCA Civ 186; [2001] 1 F.L.R. 951; *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968; [2004] 1 F.L.R. 216; *Re D (Abduction: Habitual Residence)* [2005] EWHC 518; [2005] 2 F.L.R. 403; *Re A (Abduction: Consent: Habitual Residence: Consent)* [2005] EWHC 2998; [2006] 2 F.L.R. 1; *E v E* [2007] EWHC 276; [2007] Fam. Law 480; and *W v F* [2007] EWHC 779 (Fam).

[68] *E.g. A v A* [2013] UKSC 60.

[69] *E.g. C v FC* [2004] 1 F.L.R. 362.

[70] *E.g. Re F (Abduction: Unborn Child)* [2006] EWHC 2199 (Fam).

[71] In *A v A* [2013] UKSC 60, Lord HUGHES JSC stated at [69] that, " … although it is unusual for the habitual residence of a new born baby to fall for consideration when he has not yet reached the shores of his family's established home, both this case and *B v H (Habitual Residence: Wardship)* [2002] 1 FLR 388 show that it is by no means hypothetical."

These questions, all arising in the area of child law, have been prompted by real life scenarios. One must ask whether, in practice, it is possible for courts applying a so-called "simple, non-technical concept" to resist the temptation to embellish it and to clothe it with legal raiment. And even if that temptation can be resisted, one must observe that in the application (a matter of fact) of a legal concept, judges need some framework to guide them.

In the UK, over many decades of jurisprudence, the *indicia* of the connecting factor of domicile have been built up, and the rules pertaining to its acquisition, retention and loss, in the main, are well established. Habitual residence, as conceived, was never intended to be constrained by an equivalent framework of rules.[72] But what is seen in practice is that the varied, often complex living patterns of families (patterns often inadequately vouched by evidence) require that questions such as those listed above be investigated and that courts provide answers. Although judges are urged to abstain from expressing formulas, rules, sub-rules and glosses, it is clear from scrutiny of cases that habitual residence as an operational connecting factor is in a state of constant refinement in light of factual circumstances presenting. Analysis of case law enables certain characteristics to be discerned[73] and *indicia* perceived[74] and it is the aim of the following section to cast light on these features and traits.

III. Habitual Residence of the Child – Characteristics and *indicia*

A. Integration in a Social and Family Environment

At the start of its use in the modern era, the meaning of habitual residence inevitably varied from one national forum to another. Different nuances of interpretation across courts in the contracting states to the 1980 Convention were inevitable. The europeanisation of family law, however, entailed significant European influence on UK (and other Member State) courts in relation to the meaning and application of habitual residence.

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[72] *A v A* [2013] UKSC 60, per Baroness HALE at [36].

[73] A careful distillation of principles presented by HAYDEN J in *In re B (A Child) (Custody Rights: Habitual Residence)*, [2016] EWHC 2174, J at [17] has become, in effect, a working guide relied upon by many other first instance judges, *e.g. AH v CD* [2018] EWHC 1643 (Fam), per WILLIAMS J at [38]; *KD v AM* [2018] EWFC 64, per THEIS J at [26]; *Re E (A Child) (Abduction: Article 13B: Deferred Return Order)* [2019] EWHC 256 (Fam), per KNOWLES J at [56]; and *L v M (Jurisdiction: Repudiatory Retention)* [2019] EWHC 219 (Fam), per LIEVEN J at [50]. *Cf. AB v CD* [2018] EWHC 1021 Fam, per KEEHAN J at [5].

[74] *Cf. Office of the Children's Lawyer v Balev (earlier Balev v Baggott)* 2018 Supreme Court of Canada 16 (20 April 2018), per MCLACHLIN CJ at [47]: "courts allude to factors or considerations that tend to recur …".

Following in the same tradition as the 1980 Hague Convention, neither Regulation (EU) No 2201/2003 nor its Recast successor incorporates any definition of habitual residence.[75] Clear direction, however, on the meaning of the habitual residence of a child was handed down by the European Court of Justice in *Proceedings brought by A*,[76] a Finnish case concerning the operation of Regulation (EU) No 2201/2003, article 8, a provision which bestows jurisdiction in matters of parental responsibility on the courts of the Member State where a child was habitually resident. The main question referred to the CJEU by the Finnish Court of Appeal (*Korkein hallinto-oikeus*) concerned what, in the context of article 8, were the criteria for determining habitual residence, particularly where a child was permanently resident in one state, but was staying in another state carrying on a peripatetic life there. Significantly, on the reference, the CJEU (Third Chamber) held that that the words "habitually resident" in article 8(1) denoted:

> "… the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a 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 must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case."[77]

This interpretation was confirmed by the CJEU (First Chamber), on a reference from the English Court of Appeal, in *Mercredi v Chaffe*,[78] where the CJEU ruled that:

> "According to settled case law, it follows from the need for a uniform application of European Union law and the principle of equality that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the

[75] As noted by CJEU (Fifth Chamber), 8 June 2017, *OL v PQ*, ECLI:EU:C:2017:436; and in CJEU (First Chamber), 17 October 2018, *UD v XB*, ECLI:EU:C:2018:835; [2019], I.L.Pr. 27, para. 45.

[76] CJEU, 2 April 2009, *Korkein hallinto-oikeus - Finland*, ECLI:EU:C:2009:225; [2010] Fam 42; [2009] I.L.Pr. 39.

[77] *Ibidem*, para. 44.

[78] CJEU (First Chamber), 22 December 2010, *Barbara Mercredi v Richard Chaffe, preliminary ruling: Court of Appeal (England and Wales) United Kingdom*, ECLI:EU:C:2010:829, [2011] I.L.Pr. 23, [2012] Fam. 22. See, subsequently, in the English Court of Appeal [2011] EWCA Civ 272.

> European Union, having regard to the context of the provision and the objective pursued by the legislation in question:"[79]

Moreover, in *OL v PQ*,[80] the CJEU ruled that since the concept of habitual residence is undefined in each of the 1980 Convention and Regulation (EU) No 2201/2003 and since the articles of the latter instrument which refer to it do not contain any "express reference to the law of the Member States for the purpose of defining its meaning and scope",[81] the concept – an autonomous one of EU law[82] – "has to be interpreted in the light of the context of the provisions referring to that concept and the objectives of Regulation No 2201/2003…".[83] Thus, although the 1980 Convention does not define habitual residence and it is clear that not all states party to it apply an identical test, Regulation (EU) No 2201/2003, in laying down a uniform jurisdictional scheme among European Member States, has had the effect that all EU Member State courts in the application of that instrument must interpret the concept in the manner articulated by the CJEU.

An autonomous European meaning of habitual residence of the child having emerged, UK courts have settled upon the same interpretation for all purposes within the particular area of conflict of laws rules concerning children. In 2013, Baroness HALE OF RICHMOND DPSC, in a significant judgment in *A v A*,[84] noted that, "It has hitherto been thought … that the concept of habitual residence, as developed by the courts of England and Wales for the purposes of both the [Family Law Act] 1986 … and the [1980] Hague Convention … is different from the concept of habitual residence as interpreted by the Court of Justice of the European Union for the purposes of the [Regulation (EU) No 2201/2003]. … Nevertheless, it is highly desirable that the same test be adopted and that, if there is any difference, it is that adopted by the Court of Justice."[85]

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[79] *Ibidem*, para. 45. *Cf.* CJEU (Fifth Chamber), 8 June 2017, *OL v PQ*, ECLI:EU:C:2017:436, paras 39-41.

[80] CJEU (Fifth Chamber), 8 June 2017, *OL v PQ*, ECLI:EU:C:2017:436.

[81] *Ibidem*, para. 39.

[82] The autonomous nature of the concept was confirmed in CJEU (First Chamber), 17 October 2018, *UD v XB*, ECLI:EU:C:2018:835, [2019] I.L.Pr. 27, at Opinion of the AG, paras 40 and 46. As noted in Section II.A, above, however, despite the emergence of an autonomous and uniform application of the concept of the habitual residence of a child throughout the EU, it cannot yet be said that a European meaning for one purpose, *e.g.*, jurisdiction in parental responsibility matters, can be transposed directly to another, *e.g.* choice of law in succession in terms of the EU Succession Regulation, or choice of law in contract in terms of the Rome I Regulation. To this extent, the factor remains fragmented.

[83] CJEU (Fifth Chamber), 8 June 2017, *OL v PQ*, ECLI:EU:C:2017:436, para. 40.

[84] [2013] UKSC 60.

[85] *Ibidem* at [34] and [35]. *Cf. DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal)* [2013] EWCA Civ 865, in which the English Court of Appeal, per THORPE LJ at [48], accepted that "there is now no distinction to be drawn" among the tests expounded by the CJEU in *Proceedings brought by A* and *Mercredi v Chaffe*, the autonomous law of the Hague Convention and English domestic law. See also *In re L* [2013] UKSC 75; and *In re R* [2015] UKSC 35, [2015] 2 W.L.R. 1583, per Lord REED JSC at [12].

It has become clear that the concept of habitual residence arising in child law matters in UK courts now is the "modern international concept of habitual residence".[86] Following the European model, it is apparent that in UK law habitual residence of the child corresponds to *the place which reflects some degree of integration by the child in a social and family environment*. This conscious alignment of national and European concepts is appropriate, for the sake of coherence and simplicity. However, the emergence of a uniform European concept and streamlining of national laws should not be regarded as a panacea, curing all interpretative difficulties for, in practice, as will be seen, questions have persisted concerning the precise contours of the concept.

B. Tne Extent of Integration

1. Assessing Integration

Plainly, a child can be integrated, to some degree, in more than one place simultaneously. The pertinent question in ascertaining a child's habitual residence is whether the child has achieved "some" degree of integration in a social and family environment.

The factual enquiry should be centred on the child's life and integration ought to be determined according to objective and subjective factors.[87] Although evidence of complete integration in a state (that is, to the exclusion of some degree of integration in, or attachment to, another country) is not necessary in order to establish habitual residence in the former territory,[88] the assessment of integration appears to entail a comparative exercise, whereby a child's connections to the erstwhile habitual residence and the putative (new) habitual residence are measured. The comparative analysis, seemingly, need not be explicit, but the exercise ought at least generally be undertaken.[89]

In the assessment of integration, the weight that should be commanded by any single factor is not predetermined. The factual approach means that there is no fixed tariff or pre-conceived ranking of individual factors and seemingly it is the case that no single factor is uniformly dispositive of the matter.[90] In many cases, in the absence of judicial determination, habitual residence is very difficult to predict or state with confidence, which is strange for an allegedly simple, common sense concept.

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[86] *In re B* [2016] UKSC 4, per Lord WILSON JSC (with whom Baroness HALE OF RICHMOND DPSC and Lord TOULSON JSC agreed) at [30]. See also *AH v CD* [2018] EWHC 1643 (Fam) per WILLIAMS J at [38].

[87] *AB v CD* [2018] EWHC 1643 (Fam) per WILLIAMS J at [38]. See also *In re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174, per HAYDEN J at [17] and Section III.H, below.

[88] *In re B* [2016] UKSC 4, per Lord WILSON JSC at [39]; and *In re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174, per HAYDEN J at [17].

[89] *AH v CD* [2018] EWHC 1643 (Fam), per WILLIAMS J at [38].

[90] *Cf. Monasky v Taglieri* 589 U.S. _ (2020), Opinion of the Court delivered by GINSBURG J, at pp. 8-9.

Neither the 1980 Convention nor Regulation (EU) No 2201/2003 establishes a standard of proof, but the usual civil standard of the balance of probabilities is to be applied.[91] The question who bears the onus of proof has received mixed answers,[92] in contrast to the position regarding proof of change of domicile, where it is clear that the party who is averring a change of domicile bears the burden of proof.

2. Impossibility of Dual Habitual Residence

While the possibility of an individual having dual or multiple habitual residences concurrently is a point which has been debated more in relation to adults than in respect of children,[93] the question whether or not a child, simultaneously, can be habitually resident in more than one place is a pertinent one.[94] The premise of the international legislative framework is that a child can have only one habitual residence at any given time, and as the CJEU made clear in *Proceedings brought by HR (with the participation of KO and another)*,[95] habitual residence is the place which, in practice, is the centre of the child's life. On the logic that there can be only one centre, a child, for the purpose of international legal instruments, can have only one habitual residence at any given point in time.[96] The task of identifying where the centre of the child's life was located at the *tempus inspiciendum* is one for the national court.[97]

C. The Speed of Integration and the Absence of any Minimum Period of Residence

Some degree of integration (that is, the "requisite degree of integration"[98]) in a social and family environment can occur quickly. There is no particular

[91] *Cf. Bell v Kennedy* (1868) 6 M (HL) 60.

[92] See *AH v CD* [2018] EWHC 1643 (Fam), per WILLIAMS J at [39].

[93] See, *e.g.*, with regard to matrimonial jurisdiction, *Marinos v Marinos* [2007] EWHC 2047 (Fam), per MUNBY J at [34]; *V v V* [2011] 2 FLR 778, per PETER JACKSON J, at [50] – [51]; *Tan v Choy* [2014] 1 FLR 492 at [31]; *AJ v DM* [2019] EWHC 702 (Fam), per COHEN J, at [34]; and *Pierburg v Pierburg* [2019] EWFC 24, per MOOR J, at [46].

[94] See, *e.g.*, *X v Y*, decision of the Court of Appeal of The Hague (3 April 2019) (Reference: ECLI:NL:GHDHA:2019:758), at p. 13, available at https://www.incadat.com/en/case/1426.

[95] CJEU (Fifth Chamber), 28 June 2018, *Sad Rejonowy Poznan v Stare Miasto w Poznaniu*, ECLI:EU:C:2018:513, [2018] Fam 385, paras 42 and 66.

[96] Even though a person can be (ordinarily) resident in two countries at the same time: *Pierburg v Pierburg* [2019] EWFC 24, per MOOR J at [46].

[97] CJEU (Fifth Chamber), 28 June 2018, *Proceedings brought by HR (with the participation of KO and another),* ECLI:EU:C:2018:513, [2018] Fam 385, para. 66.

[98] *In re B* [2016] UKSC 4, per Lord WILSON JSC, at [39]; and *In re B (A Child) (Custody Rights: Habitual Residence)*, [2016] EWHC 2174, per HAYDEN J, at [17].

requirement that a child should have been resident in a country for a prescribed minimum period of time.[99] The sufficiency of integration may be dependent on the nature and extent of pre-existing connections. The revival of previous connections is likely to happen more quickly than is the cultivation of new connections.

Analysing the correlation between loss of one habitual residence and acquisition of another,[100] Lord WILSON JSC in *In re B*[101] stated that,

> "The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts *down* those first roots which represent the requisite degree of integration in the environment of the new state, *up* will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it." [102]

There is a clear link between loss of one habitual residence and acquisition of another. Focusing on the extent and speed of integration in the new country (rather than on disintegration of existing ties), Lord WILSON indicated – not by way of "sub-rules", but merely by way of "expectations which the fact-finder may well find to be unfulfilled in the case before him" – that,

> "(a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state; (b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and (c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it."[103]

While Lady HALE DPSC and Lord TOULSON JSC expressly stated in *In re B* that "the loss of an established habitual residence in a single day before having gained a new one would be unusual",[104] seemingly it is theoretically possible to acquire a

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[99] *Re G-E (Children) (Hague Convention 1980: Repudiatory Retention and Habitual Residence)* [2019] EWCA Civ 283, at [61]; and *CM v ER* [2017] CSIH 18, per Lady PATON, at 27.

[100] In respect of which, see Section III.I, below.

[101] [2016] UKSC 4.

[102] *Ibidem*, per Lord WILSON JSC (with whom Baroness HALE OF RICHMOND DPSC and Lord TOULSON JSC agreed), at [45].

[103] *Ibidem*, at [46]. See, by way of example, *G v E* [2018] EWHC 2980, per HILLIER J at [101] – [113]; *AB v CD* [2018], EWHC 1021 Fam, per KEEHAN J, at [19]; *DP v CP* [2019] EWHC 3098 (Fam), per TEERTHA GUPTA QC at [47]; and *Re I (Children) (1996 Hague Child Protection Convention: Inherent Jurisdiction)* [2019] EWCA Civ 1956, per MOYLAND LJ, at [79].

[104] [2016] UKSC 4 at [57].

new habitual residence in a single day.[105] This would not be immediately obvious to any individual not well versed in the relevant jurisprudence, for the lay person would not ordinarily construe "habitual" as denoting residence of only one day. This, therefore, is in conflict with the much-vaunted "simple" character of the concept.

While it is clear from case law that no strict timeframe should be put on the matter, a more typical period of integration may be as indicated by HAYDEN J in *In re B (A Child) (Custody Rights: Habitual Residence),* namely that, "the requisite degree of integration can, in certain circumstances, develop quite quickly (article 9 of Brussels IIA envisages within three months)".[106]

D. The Importance of Stability of Residence

It has been stressed in UK case law that it is the stability or regularity of residence that is important in assessing if it is habitual, and not its perceived permanence.[107] In *In re LC*,[108] Baroness HALE OF RICHMOND DPSC explained that the question to be asked by the investigating court is, "… has the residence of a particular person in a particular place acquired the necessary degree of stability (permanent is the word used in the English versions of the two CJEU judgments) to become habitual?"[109]

A stable residence appears to denote that a child's residence in a place is settled,[110] not accidental.[111] While it is possible for physical settlement to be construed in terms of length of residence,[112] it is apparent that stability in this

[105] *In re B* [2016] UKSC 4 at [57], and per Lord WILSON JSC (with whom Baroness HALE OF RICHMOND DPSC and Lord TOULSON JSC agreed), at [34] and [47]. See also *In re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174, per HAYDEN J at [17]; *AB v CD* [2018] EWHC 1021 Fam, per KEEHAN J at 5; and *AH v CD* [2018] EWHC 1643 (Fam), per WILLIAMS J at [38]. Contrast the position taken by the House of Lords in *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562, per Lord BRANDON, at 965, namely, that, "An *appreciable* period of time and a *settled* intention will be necessary to enable [a person] to become [habitually resident in a country]" (emphases added).

[106] [2016] EWHC 2174, per HAYDEN J at [17].

[107] See, *e.g.*, *KD v AM* [2018] EWFC 64, per THEIS J at [60]. *Cf. UD v XB,* ECLI:EU:C:2018:835, [2019] I.L.Pr. 27, para. 45, and also, in Canada, *Beairsto v. Cook,* 2018 NSCA 90.

[108] [2014] UKSC 1, [2014] A.C. 1038.

[109] *Ibidem* at [59].

[110] *E.g. NN v HN* [2018] CSOH 56, per Lady WISE at [23], "The fact that the parties always planned to move to Austria in the longer term in no way precluded the children from acquiring a habitual residence in Germany… I conclude that they acquired a habitual residence in Germany shortly after the parties moved there and *settled* into the home in Town K which the petitioner had organised and already moved into." (emphasis added)

[111] *Cf.* approach of District Court of The Hague in *X v Y* (Application Number FA RK 18-1) (Case Number C/09/545612), available at https://www.incadat.com/en/case/1391.

[112] Though, as noted above at Section III.C, residence need not be long in order to qualify as habitual.

context is to be determined according to a qualitative, not quantitative, assessment and a wide range of factors will be taken into account to determine stability: "it is the integration of the child into the environment rather than a mere measurement of the time a child spends there".[113] In reality, it is difficult to reconcile the concept of a stable residence with one which has endured for as little as one day. In *Re J (A Child) (Finland: Habitual Residence)*,[114] the Court of Appeal acknowledged that, although acquisition of a new habitual residence in one day is theoretically possible, it would need justification and evidence of some degree of integration. Brief residence, when set in the context of unsettled residence, will not suffice to found habitual residence.[115]

The practical difficulty in this regard is that the "most commonly troublesome questions" tend to concern those "associated with moves from one country to another which one side contends to be temporary and the other to be sufficiently settled".[116]

Demonstrating settlement is a concept familiar to judges hearing return applications under the 1980 Convention. In the context of article 12 of the 1980 Hague Convention, "settlement" has been construed as having an emotional as well as a physical element,[117] and arguably it is the case that, for any residence to be deemed habitual, it should demonstrate stability in terms of the child's emotional wellbeing.

E. The Characteristics of Residence

1. The Need for Physical Presence

Simple physical presence *per se* is not sufficient to constitute habitual residence,[118] but the question whether or not habitual residence can be acquired by a child without his/her physical presence in the legal system in question has been a contentious one. In *L-S (A child)*,[119] prior to consideration of the point by the CJEU

[113] *In re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174, per HAYDEN J at [17]. See also *Re P (A Child: Jurisdiction)* [2018] EWFC 38. *Cf.* in divorce proceedings, *Ikimi v Ikimi* [2002] Fam.72.

[114] [2017] EWCA Civ 80.

[115] *E.g. Re P (A Child: Jurisdiction)* [2018] EWFC 38 (referring to the 4-week placement of a child in foster care). In *RV v VT* [2018] EWHC 2808 (Fam) habitual residence in Latvia was established in less than six months, and in *Re I (Children)* [2018] EWCA Civ 580 the Court of Appeal determined that habitual residence could be established in as little as three months (per MCFARLANE LJ at [13], [36] and [37]).

[116] *A v A* [2013] UKSC 60, per Lord HUGHES at [71].

[117] *Re E (Abduction: Intolerable Situation)* [2008] EWHC 2112 (Fam). See also *Re M (Abduction: Rights of Custody)* [2008] 1 A.C. 1288.

[118] *A v A* [2013] UKSC 60, per Lord HUGHES at [80]. See also the Opinion of the Advocate General SAUGMANDSGAARD ØE in CJEU (First Chamber), 17 October 2018, *UD v XB*, ECLI:EU:C:2018:835, [2019] I.L.Pr. 27, at Opinion of the AG, para. 44. *Cf. Monasky v Taglieri* 589 U.S. _ (2020), Opinion of the Court delivered by GINSBURG J, at p. 12.

[119] [2017] EWCA Civ 2177.

in *UD v XB*,[120] the English Court of Appeal had accepted, as common ground between the parents of the child in question, that it was not possible for a very young child to be habitually resident in a country to which he had never physically been.[121]

The reference to the CJEU by the English High Court in *UD v XB*,[122] on a point of interpretation of article 8(1) of Regulation (EU) No 2201/2003, provided an opportunity fully to explore the issue of whether or not physical presence in a country is a precondition of habitual residence there. The request for a preliminary ruling was made in proceedings between UD, the mother of a girl born in Bangladesh in February 2017, and XB, the father, concerning applications made by the mother for orders that the child should be made a ward of the referring court and for her return with the child to England to participate in proceedings before the High Court. The background to the instant case was discussion in the UK Supreme Court in *A v A*,[123] concerning the habitual residence of a young child, born in Pakistan, who had never physically set foot in the UK. His mother, after living for several years in England where she had already given birth to three children, had travelled to Pakistan before conceiving her fourth child, with the intention of paying only a temporary visit there. Against her will, the mother was detained by her husband in Pakistan and was obliged to give birth there to her fourth child, the subject of the legal proceedings. Determined to hold fast to the notion that habitual residence is a factual concept, Baroness HALE DPSC asked , "… which approach accords most closely with the factual situation of the child – an approach which holds that presence is a necessary precursor to residence and thus to habitual residence or an approach which focusses on the relationship between the child and his primary carer?"[124] The answer, in the view of the majority of the Court,[125] was the former. As expressed by Baroness HALE (with whom Lords WILSON, REED and TOULSON JJSC agreed):

> "It is one thing to say that a child's integration in the place where he is at present depends on the degree of integration of his primary carer. It is another thing to say that he can be integrated in a place to which his primary carer has never taken him. It is one thing to say that a person can remain habitually resident in a country from which he is temporarily absent. It is another thing to say that a person can acquire a habitual residence without ever setting foot in a country. It is one thing to say that a child is integrated in the family environment of his primary carer and siblings. It is another thing to

[120] CJEU (First Chamber), 17 October 2018, *UD v XB*, ECLI:EU:C:2018:835, [2019] I.L.Pr. 27.

[121] [2017] EWCA Civ 2177, per MCFARLANE LJ at [21]. See Section III.H.2, below, regarding relevance of parental intention.

[122] CJEU (First Chamber), 17 October 2018, *UD v XB*, ECLI:EU:C:2018:835, [2019] I.L.Pr. 27.

[123] [2013] UKSC 60.

[124] *Ibidem* at [55].

[125] Lord HUGHES JSC delivered a dissenting judgment: [71] – [94].

> say that he is also integrated into the social environment of a country where he has never been."[126]

Baroness HALE noted, however, that whether or not Regulation (EU) No 2201/2003 required some physical presence as a prerequisite of habitual residence was not *acte clair* for the purpose of EU law,[127] and accordingly that the Supreme Court would not have been able to dispose of the case on that basis without having made a reference to the Court of Justice for its prior determination – something, however, which was not necessary in the circumstances of the case, the Supreme Court in any event having inherent jurisdiction *qua parens patriae* to make the order sought. The question, therefore, was left open.[128]

In *UD v XB*, in contrast to the view of the majority of justices in the UK Supreme Court,[129] and taking an approach which cleaves to the notion that habitual residence is a matter to be determined on the basis of a child-centric test, the opinion of Advocate General SAUGMANDSGAARD ØE was that a child's physical presence in a particular state should not be a prerequisite for determining that s/he is habitually resident there.[130] Although it is counter-intuitive to say that, as a pure matter of fact, a child can be habitually resident in a country which he has not visited (for that, in effect, presumably would be on the basis of some abstract legal tie between the child and said country), to say otherwise would be to lay down a sub-rule which would offend the principle that habitual residence is matter of fact, not law.

There is not scope in this essay to rehearse the arguments in favour of, and against, the proposition that physical presence should be a necessary precondition of habitual residence.[131] Rather, it suffices to note that the CJEU (First Chamber),[132] departing from the Advocate General's opinion, decided that a child must have been physically present in a Member State to be regarded as habitually resident there for the purpose of article 8 of Regulation (EU) No 2201/2003. Accordingly, an English court did not have jurisdiction to consider an application by the mother, a Bangladeshi national, that her child be made a ward of court in circumstances

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[126] *Ibidem*, at [55].

[127] *Ibidem*, at [56].

[128] AG SAUGMANDSGAARD ØE observed in CJEU (First Chamber), 17 October 2018, *UD v XB*, ECLI:EU:C:2018:835, [2019] I.L.Pr. 27 (Opinion of the AG, para. 44), that the same problem had been brought to the attention of the French courts.

[129] But, curiously, in common with the opinion of the UK Government (as well as of the child's mother and the Czech Government) in CJEU (First Chamber), 17 October 2018, *UD v XB*, ECLI:EU:C:2018:835, [2019] I.L.Pr. 27, para. 44, and Opinion of the AG, paras 64 and 69.

[130] *Ibidem,* Opinion of the AG, para. 46. See also *ibid*., para. 79: "… decisive weight cannot automatically, without consideration of the particular features of each case, be attributed to the criterion of physical presence."

[131] See, however, Opinion of AG SAUGMANDSGAARD ØE, in *UD v XB* (note 128), at paras 64 – 79, for a very helpful resumé of the arguments.

[132] Upholding the arguments laid by the child's father and the European Commission: CJEU (First Chamber), 17 October 2018, *UD v XB*, ECLI:EU:C:2018:835, [2019] I.L.Pr. 27, para. 44.

where the child had been born and remained in Bangladesh and had never been present in the UK.

The recognition that a child's habitual residence in a given Member State requires at least that the child has been physically present in that state – thereby establishing physical presence as a prerequisite of integration, of stable residence and therefore of habitual residence – amounts, in effect, to a legal gloss or sub-rule on the meaning of habitual residence.[133] Although the judgment of the CJEU strictly is confined to the circumstances of article 8 of Regulation (EU) No 2201/2003, it would be artificial and at odds with previous direction from the Court, not to extend the same principle to the habitual residence of children more generally.

A related question is whether or not habitual residence can be retained after final departure from a country. Lord Hughes in *A v A* stated that "…habitual residence can and often does co-exist with actual current absence."[134] It appears to be clear that habitual residence in a country is capable of surviving the *propositus'* final departure therefrom albeit the de-integration of the child's ties in that country, be it sudden or gradual, likely will commence immediately on the point of departure.

2. The Impact of Coerced Residence

The CJEU's judgment in *UD v XB*[135] does not stipulate that residence, in order to found habitual residence, need be voluntary. Coerced residence (as in the instant case, where the Bangladeshi mother of a girl, born in Bangladesh, was duped by the child's father into travelling there and then was detained when he thwarted her attempt to return with her four children to England), as a pure matter of fact, can be "settled" and therefore qualify as habitual.

The focus is on the *de facto* situation of the child and circumstances such as one parent's coercion of the other, or *force majeure* whereby a child's presence in a country is involuntary and compelled by circumstances, do not seemingly have any determinative bearing on the wider factual enquiry.[136]

In *JK v SS*,[137] where, during a planned short visit to Scotland, the infant child who was the subject of the proceedings was diagnosed as suffering from a

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[133] *Ibidem*, at H9 and H10, and paras 52 and 53.

[134] [2013] UKSC 60; [2014] A.C. 1, at [92].

[135] CJEU (First Chamber), 17 October 2018, *UD v XB*, ECLI:EU:C:2018:835, [2019] I.L.Pr. 27. *Cf. AB v CD* [2018] EWHC 1643 (Fam) per WILLIAMS J at [38].

[136] CJEU (First Chamber), 17 October 2018, *UD v XB*, ECLI:EU:C:2018:835, [2019] I.L.Pr. 27, at H14 and para 70. *Cf. Re PT (A Child*) [2020] EWHC 834 (Fam) per David REES QC (Deputy Judge of English High Court) at [46] – [48]. *Sed contra*, the view of the United States Supreme Court in *Monasky v Taglieri* 589 U.S. _ (2020): "… suppose, for instance, that an infant lived in a country only because a caregiving parent had been coerced into remaining there. Those circumstances should figure in the calculus." (Opinion of the Court delivered by GINSBURG J, at p. 9). See Section III.H.2, below.

[137] *JK v SS* [2019] CSOH 4.

tumour in her pelvis and requiring immediate treatment, including chemotherapy, in Edinburgh, Lady WISE noted the existence of conflicting authorities on the question whether or not residence need be voluntary to qualify as habitual.[138] On the facts, her Ladyship was not required to address the perceived conflict in earlier case law,[139] but the tenor of modern case law (in the absence of explicit direction to the contrary) suggests that voluntariness of residence is not a pre-condition of habitual residence.[140]

3. Illegal Residence

In relation to the law on domicile, the question has been asked whether or not unlawful residence in a country suffices as a basis on which to found, with *animus manendi*, a domicile of choice. The early view of the English courts was that acquisition of a domicile of choice in a country could not be founded upon such illegal residence,[141] but that position was qualified by the unanimous decision of the House of Lords in *Mark v Mark*,[142] a divorce jurisdiction case, in which the petitioner's Nigerian husband argued that the habitual residence of the wife in England for 12 months prior to the petition could not clothe the court with jurisdiction because her presence in England was unlawful, her leave to remain in the UK having expired. The House of Lords, taking a purposive approach, held that the residence of a petitioner need not be lawful residence to establish jurisdiction under section 5(2) of the Domicile and Matrimonial Proceedings Act 1973. The view that lawfulness of presence was not a prerequisite of a finding of habitual residence received support from the House of Lords, at least with regard to its meaning for the purposes of the 1973 Act.

Likewise, in the context of the settlement defence set out in article 12 of the 1980 Convention, the Family Division of the English High Court in *Re E (Abduction: Intolerable Situation)*[143] held that a child had settled physically and emotionally in the UK, clear evidence being given of his integration into family and school life, despite the fact that he and his mother were overstayers in the UK, of insecure immigration status.

In the context of determination of habitual residence, it is clear that habitual residence, as a matter of fact, may be based on unlawful residence, but it should be

[138] *Ibidem*, at [27], referring to, *e.g. Dickson v Dickson* 1990 SCLR 693, which indicates that the acquisition of habitual residence is a voluntary state, whereas the contrary was suggested in *Cameron v Cameron (No 1)* 1996 SC 17.

[139] [2019] CSOH 4, at [27].

[140] CJEU (First Chamber), 17 October 2018, *UD v XB*, ECLI:EU:C:2018:835, [2019] I.L.Pr. 27, paras 61 and 70.

[141] *Puttick v Attorney General* [1980] Fam. 1.

[142] *Mark v Mark* [2006] 1 A.C. 98.

[143] [2008] EWHC 2112 (Fam). *Cf. B, Petitioner* 2014 G.W.D. 2-43.

noted that that very quality may prevent residence from being sufficiently stable and settled as to qualify as habitual.[144]

F. A Factor Capable of Being Changed by a Parent Unilaterally

Where wrongful removal or retention of a child is said to have occurred, the question whether or not the removing parent may establish for the child an habitual residence in the "new" country is of crucial importance.[145]

It was established early in the corpus of UK case law interpretative of the 1980 Hague Convention that, where both parents have parental responsibility, it should not be possible for one parent to effect a change in the habitual residence of a child through unilateral wrongful actings, that is to say, although, as a matter of fact, the child might be residing in the legal system to which s/he has been removed, in law his/her habitual residence remains the legal system from which s/he has been taken.[146] The traditional view had been that to allow otherwise would be a charter for abduction. However, there has been an observable change of attitude by UK courts towards unilateralism, to the effect now that a change in a child's habitual residence is capable of being effected by the unilateral actings of one parent.

In *Mercredi v Chaffe*,[147] the CJEU (First Chamber) revealed a pro-unilateralist stance insofar as it held that the intention of the person with parental responsibility to settle permanently with the child in another Member State,[148] manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, can constitute an indicator of the transfer of habitual residence.

Following *Mercredi*, the UK Supreme Court, stressing the point that habitual residence is a factual construct, was critical in *A v A*[149] of any attempt to

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[144] *In re L* [2013] UKSC 75, per Baroness HALE OF RICHMOND DPSC at [26]. See Section III.D, above.

[145] Examples can be found of UK and other legislative provisions designed to secure for a limited period, by means of a "deeming" provision, continuing jurisdiction to adjudicate upon the case: *e.g.* Family Law Act 1986 s 41(1)(b) and Regulation (EU) No 2201/2003, article 10.

[146] *E.g. In re P (GE) (An Infant)* [1965] Ch 568; and *In re J (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562, in which the House of Lords affirmed the decision of the Court of Appeal, where Lord DONALDSON, at 572, expressed himself firmly against the power of one parent unilaterally to terminate the habitual residence of the child by wrongfully removing him/her from the jurisdiction, in breach of the other parent's rights.

[147] CJEU (First Chamber), 22 December 2010, *Barbara Mercredi v Richard Chaffe, preliminary ruling: Court of Appeal (England and Wales) United Kingdom*, ECLI:EU:C:2010:829, [2011] I.L.Pr. 23, [2012] Fam. 22, para. 50. In *Mercredi*, however, as in *In re J* (note 146), the abducting parent had sole parental responsibility.

[148] See further, Section III.H.2, below.

[149] *A v A* [2013] UKSC 60, per Baroness HALE at [39]; and per Lord HUGHES JSC at [76] with regard to habitual residence in circumstances of wrongful retention.

overlay it with legal constructs along the lines of a "rule"[150] whereby one parent cannot unilaterally change the habitual residence of a child in circumstances where two parents share parental responsibility for the child.[151]

Subsequently, in 2015, the UK Supreme Court in *In re R*[152] affirmed the decision of the Extra Division of the Inner House of the Court of Session,[153] to the effect that the first instance judge had erred, not only in identifying a shared parental intention to move permanently to Scotland as an essential element in any alteration in the children's habitual residence from France to Scotland, but also in failing to consider whether or not on all the evidence the residence had the necessary quality of stability.

On the important question of unilateralism, the Supreme Court held that since, as explained, the essentially factual and individual nature of the inquiry is not to be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce, there is no rule that one parent cannot unilaterally change the habitual residence of a child. It is now clear, therefore, that it is legally possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (albeit that the withholding of consent by one parent may adversely affect the extent or quality of integration by the child in the "new" state).

The articulation of this principle is highly significant in international child abduction cases. The so-called "rule" that where both parents had parental responsibility neither unilaterally could change the child's habitual residence has been superseded by a factual inquiry into where the child was habitually resident, tailored to the circumstances of the individual case, as a part of which the court may take into account the purposes and intentions of the parents.[154] Accordingly, the mere fact that one parent neither wanted nor sanctioned a child's move to another country will not prevent the child from becoming habitually resident there.

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[150] See *In re H (Children) (Reunite International Child Abduction Centre intervening)* [2014] EWCA Civ 1101, [2015] 1 W.L.R. 863, where BLACK LJ noted at [26] that, "… it is worth remembering that no authority has been found in which the "rule" is articulated as part of the *ratio*; it has simply been taken for granted for many years."

[151] *Cf. Office of the Children's Lawyer v Balev (earlier Balev v Baggott)* 2018 Supreme Court of Canada 16 (20 April 2018), per MCLACHLIN CJ at [42].

[152] [2015] UKSC 35, [2015] 2 W.L.R. 1583.

[153] *R, Petitioner* [2014] CSIH 95, 2014 SLT 1080.

[154] *In re H (Children) (Reunite International Child Abduction Centre intervening)* [2014] EWCA Civ 1101, [2015] 1 W.L.R. 863, per BLACK LJ at [34]. See further, Section III.H.2, below.

G. Habitual Residence of a Child Will Often, but not Inevitably, Coincide with Parental Habitual Residence

As explained by the UK Supreme Court in 2013 in *A v A*,[155] there is no legal rule akin to that whereby a child automatically takes the domicile of his parents.[156] Habitual residence of a child is not an adjunct concept based on dependency on an adult: a child's habitual residence does not derive legally from that of his/her parent(s), but rather rotates around the axis of the child. In contrast to what previously was understood to be the position, a child's habitual residence will not necessarily follow the habitual residence of the parent with whom s/he lives.[157]

That said, a child's habitual residence cannot be viewed in isolation from his/her parent's(s') residence, for parental residence is likely to have a "powerful impact"[158] upon the outcome of the child's habitual residence. This is true particularly in relation to a newborn or very young child. Although such a child's habitual residence does not legally depend upon his/her carer's circumstances, the circumstances of the carer's integration are likely to be inextricably linked to those of the child and so will be of considerable importance in determining the place which is the centre of the child's life.[159] Thus usually, though not inevitably, the habitual residence of a newborn or very young child will be the same as the parent having day-to-day care:[160] "integration, where it involves a very young child, must be understood in the context of her tender age, her dependence on her primary caregiver...". [161] But against that proposition, the older the child, the "greater the degree of distinction may be".[162]

In view of the principle, discussed above,[163] that a child's habitual residence in a given Member State requires at least that the child has been physically present in that Member State, there is no scope for ascribing to a newborn child the

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[155] [2013] UKSC 60; [2014] A.C. 1.

[156] *Ibidem*, at [54].

[157] *In re B* [2016] UKSC 4, per Lord WILSON at [31], referring to *Re LC (Children) (International Abduction: Child's Objections to Return)* [2014] UKSC 1 per Lord WILSON at [34] – [37].

[158] *Re W (A child)* [2017] EWCA Civ 2152, per McFarlane LJ at [22]. *Cf. AH v CD* [2018] EWHC 1643 (Fam), per WILLIAMS J at [38].

[159] See *e.g. CM v ER* [2017] CSIH 18, per Lady PATON, at 34; CJEU (Fifth Chamber), 28 June 2018, *Proceedings brought by HR (with the participation of KO and another)*, ECLI:EU:C:2018:513, [2018] Fam 385, para. 44; and *JK v SS* [2019] CSOH 4, per Lady WISE at [28]. See also CJEU (Fifth Chamber), 8 June 2017, *OL v PQ*, ECLI:EU:C:2017:436, para. 45; and judgment of District Court of The Hague in *X v Y* (Application Number FA RK 18-1, Case Number C/09/545612), available at https://www.incadat.com/en/case/1391.

[160] *Re P (A Child: Jurisdiction)* [2018] EWFC 38, per BELLAMY J at [30]; and *AB v CD* [2018] EWHC 1021 Fam, per KEEHAN J at [5].

[161] *JK v SS [2019] CSOH 4,* per Lady WISE at [31]. *Cf. UD v XB*, ECLI:EU:C:2018:835*,* [2019] I.L.Pr. 27 at Opinion of the AG, para. 50.

[162] *AH v CD* [2018] EWHC 1643 (Fam), per WILLIAMS J at [38].

[163] See further, Section III.E.1, above.

habitual residence of his parent with care in circumstances where the child has not physically been integrated in that state or had a stable residence there.[164]

H. The Relevance of Intention

1. The Child's State of Mind

In *In re LC (Children)*,[165] the UK Supreme Court stated explicitly that the acquisition of habitual residence is not a matter of intention: "… one does not acquire a habitual residence merely by intending to do so; nor does one fail to acquire one merely by not intending to do so."[166] However, introducing a novel mental dimension into the determination of a petition for return of a child under the 1980 Hague Convention, the Court made explicit the link between intention and integration in a social and family environment. Lord WILSON JSC (with whom Lord TOULSON and Lord HODGE JJSC agreed), stated that,

> "… where the child is older, in particular one who is an adolescent or who should be treated as an adolescent because she (or he) has the maturity of an adolescent …, the inquiry into her integration in the new environment must encompass more than the surface features of her life there. I see no justification for a refusal even to consider evidence of her own state of mind during the period of her residence there. Her mind may—possibly—have been in a state of rebellious turmoil about the home chosen for her which would be inconsistent with any significant degree of integration on her part. In the debate in this court about the occasional relevance of this dimension, references have been made to the « wishes », « views », « intentions » and « decisions » of the child. But, in my opinion, none of those words is apt. What can occasionally be relevant to whether an older child shares her parent's habitual residence is her state of mind during the period of her residence with that parent."[167]

Widening the role traditionally afforded under the 1980 Convention to the child's state of mind (namely, the ability to voice objection in terms of article 13), the Supreme Court consigned to history the notion previously adhered to in UK courts,[168] namely, that evidence of state of mind was not relevant to the determination of a an individual's habitual residence. Thus, the assertions and

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[164] *UD v XB*, ECLI:EU:C:2018:835, [2019] I.L.Pr. 27. See also CJEU (Fifth Chamber), 8 June 2017, *OL v PQ*, ECLI:EU:C:2017:436, para. 25.

[165] [2014] UKSC 1, [2014] A.C. 1038.

[166] *Ibidem*, per Baroness HALE OF RICHMOND DPSC (with whom Lord SUMPTION JSC agreed), at [59].

[167] *Ibidem*, per Lord WILSON JSC, at [37].

[168] See, *e.g.*, *R. v Barnet LBC Ex p. Shah* [1983] 2 A.C. 309, per Lord SCARMAN, at [344], referred to by Lord Wilson JSC in *In re LC (Children)* (note 165), at [37].

insights of an adolescent child regarding his/her state of mind during a period of residence in a country seemingly are relevant to the determination whether or not the residence there was habitual. Integration is not to be viewed solely through the lens of physical settlement, but rather may entail consideration of the state of mind of the young person in question.

Going further still, Baroness Hale (with whom Lord Sumption JSC agreed) argued that the question of principle, whether the state of mind of a child is relevant to whether or not s/he has acquired a habitual residence in the place where s/he is living, ought not to be restricted to adolescent children, for it should apply equally, in her Ladyship's judgment, to younger children.[169] However, the view of the majority of the Bench prevailed, namely, that the state of mind of a younger child, on its own, may not affect a first instance judge's deliberation on habitual residence. The state of mind of a young child should not be a factor to be weighed in the balance. It will be apparent that the jurisprudence concerning the meaning of habitual residence in cases affecting children is fast-moving; who can say for how long the "rule" expressed by the majority will reflect accurately the state of UK law on the point?

2. Parental Intention

The role of parental intention in the determination of a child's habitual residence has been controversial in the UK as elsewhere.[170] The UK Supreme Court held in *A v A*[171] that any test that purports to rely on the purposes and intentions of a child's parents in determining his/her habitual residence should be abandoned.[172]

This move away from the parental intention approach is a positive step given the often emotionally charged circumstances of parental abduction cases, the vagaries and inconsistencies of parental intention, and the difficulty of judging with certainty what an individual or couple may have intended at any given time.[173]

However, parental intention, though not determinative, remains a relevant factor and part of the factual matrix.[174] The UK Supreme Court further held in *In re*

[169] [2014] UKSC 1, [2014] A.C. 1038, at [57] – [58]. On the facts, the adolescent girl was 13 years, and the younger children were boys aged 11 and 9 years, respectively.

[170] *E.g. Monasky v Taglieri* 589 U.S. _ (2020).

[171] [2013] UKSC 60, at [54].

[172] See also *NN v HN* [2018] CSOH 56, per Lady WISE at [21]. For background detail, see *Monasky v Taglieri*: Brief of *Amicus Curiae* – per Reunite International Child Abduction Centre in support of neither party (On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit) (August 21, 2019), pp. 6-7. See, subsequently, *Monasky v Taglieri* 589 U.S. _ (2020), in which the United States Supreme Court held categorically that "an actual agreement between the parents is not necessary to establish an infant's habitual residence" (Opinion of the Court, per GINSBURG J, at pp. 2 and 7).

[173] *E.g. L v M (Jurisdiction: Repudiatory Retention)* [2019] EWHC 219 (Fam), per LIEVEN J at [14] and [29]; and *NN v HN* [2018] CSOH 56, per Lady WISE at [25].

[174] *e.g. In re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2015] UKSC 35, per Lord REED JSC at [21]; *In re B (A Child) (Custody Rights: Habitual Residence)*, [2016] EWHC 2174, per HAYDEN J at [17]; *L-S (A child)*

L[175] that although a child may lose his/her habitual residence without a parent's consent, parental intent "in relation to the reasons for a child's leaving one country and going to stay in another"[176] is relevant to establishing or changing a child's habitual residence and ought to be taken into account along with other relevant factors in deciding whether a move to another country carried a sufficient degree of stability as to constitute such a change.[177] Baroness HALE OF RICHMOND DPSC made plain that, in the same way that a child's habitual residence may change by means of court order in the face of opposition from one parent, so too habitual residence may change in the face of shared parental intent to the contrary.[178]

The important point is that parental intention, if it is to be deemed relevant, must be buttressed by conduct evidencing integration;[179] intention, be it express, implied or imputed, cannot prevail over factual circumstances to the contrary. Parental intention to settle with a child in a country is likely to be relevant only where it is "manifested by certain tangible steps" in the host state.[180] In this way, such intention is, at most, an "'indicator', capable of complementing a body of other consistent evidence"[181] and will not override the determination of habitual residence based on objective circumstances.[182] Rather than binding the court, parental intention at best will cast light on the extent of a child's integration in a particular environment, which is the real focus of the factual enquiry. Thus, where a child was born and lived continuously with her mother for several months in Greece, in accordance with the joint wishes of her parents, the initial intention of her parents with respect to the return of the mother and child to Italy, where the parents were habitually resident before her birth, could not justify a conclusion that the child was habitually resident in Italy.[183]

[2017] EWCA Civ 2177, per MCFARLANE LJ at [21]; CJEU (Fifth Chamber), 8 June 2017, *OL v PQ*, ECLI:EU:C:2017:436, para. 51; CJEU (Fifth Chamber), 28 June 2018, *Proceedings brought by HR (with the participation of KO and another)*, ECLI:EU:C:2018:513, [2018] Fam 385, para. 62; *JK v SS* [2019] CSOH 4, per Lady WISE at [28]; and *Re G-E (Children) (Hague Convention 1980: Repudiatory Retention and Habitual Residence)* [2019] EWCA Civ 283, per MOYLAN LJ at [60]. See also, in Canada, *Beairsto v. Cook,* 2018 NSCA 90, per BEVERIDGE JA at [117].

[175] [2013] UKSC 75.

[176] *Ibidem*, per Baroness HALE OF RICHMOND DPSC at [23].

[177] *Ibidem*.

[178] *Ibidem*, at [25]. *Cf.* CJEU (Fifth Chamber), 8 June 2017, *OL v PQ*, ECLI:EU:C:2017:436, para. 51.

[179] CJEU (Fifth Chamber), 8 June 2017, *OL v PQ*, ECLI:EU:C:2017:436, para. 47.

[180] *Ibidem*, para. 46. See also CJEU (Fifth Chamber), 28 June 2018, *Proceedings brought by HR (with the participation of KO and another),* ECLI:EU:C:2018:513, [2018] Fam 385, para. 46; and CJEU (First Chamber), 17 October 2018, *UD v XB*, ECLI:EU:C:2018:835, [2019] I.L.Pr. 27, at Opinion of the AG, para. 48.

[181] *OL v PQ,* (note 174), para. 47.

[182] CJEU (Fifth Chamber), 28 June 2018, *Proceedings brought by HR (with the participation of KO and another),* ECLI:EU:C:2018:513, [2018] Fam 385, para. 64.

[183] *OL v PQ*, (note 174), para. 70.

Echoing developments in the EU, the Supreme Court of Canada, by majority decision in *Office of the Children's Lawyer v Balev*,[184] recently took the law in Canada in a change of direction by adopting a multi-factored hybrid approach to the determination of a child's habitual residence in preference to a parental intention approach, holding that courts should look at all relevant considerations and circumstances to ascertain a child's habitual residence. The Court, by 6-3 majority, did not deem the parental intention approach, which pre-*Balev* had dominated Canadian jurisprudence,[185] to be in keeping with the "dominant thread of international Hague Convention jurisprudence".[186] The majority approach in *Balev* is in line with jurisprudence in the UK and elsewhere, to the effect that parental intention is not determinative in the assessment of a child's habitual residence, nor will it prevail over other factors.

The weight which will be attributed in any given case to parental intention seemingly will depend on the facts and circumstances of the individual case.[187]

I. Absence of Habitual Residence

1. Legal Limbo Is Possible but Exceptional

An issue recently arising for consideration in the UK Supreme Court was the question whether or not a child can be without an habitual residence at any given time. Can there be a gap or lacuna?

In 1990, in *In re J (A Minor) (Abduction: Custody Rights)*,[188] the UK House of Lords ruled that a state of limbo was legally possible. Speaking for a unanimous Appellate Committee, Lord BRANDON stated in the third of his four propositions, that:

> "… there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become

[184] *Office of the Children's Lawyer v Balev (earlier Balev v Baggott)* 2018 Supreme Court of Canada 16 (20 April 2018).

[185] *Ibidem*, per MCLACHLIN CJ at [40].

[186] *Beairsto v. Cook,* 2018 NSCA 90, per BEVERIDGE JA at [117]. The dissenting justices in *Balev* (CÔTÉ and ROWE JJ, with MOLDAVER J concurring) opined that, in situations where the parents' intentions were clear, those intentions should carry decisive weight, leading to faster and more predictable decisions.

[187] *Monasky v Taglieri*: Brief of *Amicus Curiae* - per Reunite International Child Abduction Centre in support of neither party (On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit) (August 21, 2019), p. 4. See, subsequently, *Monasky v Taglieri* 589 U.S. _ (2020).

[188] [1990] 2 A.C. 562.

> habitually resident in country B in a single day.[189] An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B." [190]

On the European plane, the state of legal limbo (*i.e.* a transitional phase when a child is "between" habitual residences) was countenanced by Advocate General KOKOTT in *Proceedings brought by A*,[191] and by the CJEU (First Chamber) in *Mercredi v Chaffe*.[192] Following the European line, the UK Supreme Court in *A v A*[193] put it beyond doubt in UK law that, "… it is possible that a child may have no country of habitual residence at a particular point in time."[194]

2. Endeavouring to Fill the Lacuna

Although the state of legal limbo – being without an habitual residence – is legally possible, it will very rarely be desirable for a child to be without an habitual residence given the "international primacy"[195] and central role now played by that factor in allocating jurisdiction for parental responsibility matters. A state of legal limbo, therefore, will be exceptional.[196] Explicitly in the context of Regulation (EU) No 2201/2003,[197] and according to judicial interpretation of the 1980 Hague Convention,[198] habitual residence is a factor to be "shaped in the light of the best interests of the child, in particular on the criterion of proximity". Respecting this

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[189] See now, however, Section III.C, above.

[190] [1990] 2 A.C. 562, per Lord BRANDON OF OAKBROOK at 578.

[191] CJEU, 2 April 2009, *Korkein hallinto-oikeus* -, ECLI:EU:C:2009:225, [2010] Fam 42, [2009] I.L.Pr. 39, at Opinion AG paras 45, 52 and 81.

[192] CJEU (First Chamber), 22 December 2010, *Barbara Mercredi v Richard Chaffe, preliminary ruling: Court of Appeal (England and Wales) United Kingdom,* ECLI:EU:C:2010:829, [2011] I.L.Pr. 23, [2012] Fam. 22.

[193] [2013] UKSC 60.

[194] [2013] UKSC 60, per Baroness HALE at [54]. *Cf. In re LC* [2014] UKSC 1, [2014] A.C. 1038, per Baroness HALE OF RICHMOND DPSC (with whom Lord SUMPTION JSC agreed) at [63]. See further *Re G (Children) (Jurisdiction: Presence in England and Wales)* [2018] EWHC 381 (Fam), per BAKER J at [20].

[195] *In re B* [2016] UKSC 4, per Lord Wilson JSC (with whom Baroness Hale of Richmond DPSC and Lord Toulson JSC agreed), at [30].

[196] *A v A* [2013] UKSC 60, per Lord HUGHES JSC at [80]. See also *NN v HN* [2018] CSOH 56, per Lady WISE at [24] and [27]; and *DP v CP* [2019] EWHC 3098 (Fam), where Judge GUPTA QC, referred at [10], to the "default setting" that a child will have a habitual residence somewhere.

[197] Recital 12. *Cf.* Brussels II *bis* Recast, recital 19.

[198] *In Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, per Baroness HALE and Lord WILSON at [52]: "… the whole of the Hague Convention is designed for the benefit of children, not of adults. The best interests, not only of children generally, but also of any individual child involved are a primary concern in the Hague Convention process."

premise, the UK Supreme Court held in *In re B*[199] that, where possible, a child should have an habitual residence for it is not in the interests of children routinely to be left without one.[200] Citing Professor CLIVE, Lord WILSON JSC explained that,

> "In that event [*i.e.* where a child lacks an habitual residence] the machinery of international instruments designed to achieve an orderly resolution of issues relating to them does not operate as primarily intended."[201]

Specifically, the absence of habitual residence will deprive a child of the cloak of protection conferred by the 1980 Convention. Taking cognisance of this potential deprivation, it has been recommended that, if interpretation of the concept of habitual residence in the circumstances reasonably can yield two options, first, a conclusion that a child has a habitual residence and, alternatively, a conclusion that he lacks one, the court should prefer the former interpretation.[202] Accordingly, it will be highly unusual for a child to be without a habitual residence.[203]

The modern supposition in UK courts is that only when a child gains a new habitual residence does he lose the old one, rendering it, "highly unlikely, albeit conceivable, that a child will be in … limbo …".[204] This is a subtle change of position for, as Lord WILSON JSC indicated in *In re B (A Child)*,

> "It has been hard-wired into the mind of many family lawyers in England and Wales that, were a parent to remove a child from a state in which they were habitually resident to another state with the settled intention that they would cease to reside in that first state and make their home in that second state, the child would be likely to lose habitual residence in the first state *immediately* upon the removal and, until later acquiring habitual residence in the second state, would be likely not to be habitually resident anywhere."[205]

The two dissenting justices, Lords SUMPTION and CLARKE OF STONE-CUM-EBONY JJSC, expressed the view that "there is nothing wrong in principle with a finding that a former habitual residence has been lost before a new one has been obtained".[206] Stressing that the lack of a habitual residence, as a matter of law, does

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[199] *In re B* [2016] UKSC 4.

[200] *Ibidem*, per Lord WILSON JSC (with whom Baroness HALE OF RICHMOND DPSC and Lord TOULSON JSC agreed), at [30].

[201] *Ibidem*.

[202] *Ibidem*, per Lord WILSON JSC (with whom Baroness HALE OF RICHMOND DPSC and Lord TOULSON JSC agreed), at [42].

[203] *In re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174, per HAYDEN J at [17].

[204] *Ibidem*. In *AB v CD* [2018] EWHC 1021 Fam, at [5], KEEHAN J refers to the "seamless transfer" from one habitual residence to another.

[205] *In re B* [2016] UKSC 4 per Lord WILSON JSC (with whom Baroness HALE OF RICHMOND DPSC and Lord TOULSON JSC agreed), at [1] (emphasis added).

[206] *Ibidem*, at [92].

not subject a child to jurisdictional limbo since jurisdiction can be founded on the presence of the child,[207] their Lordships said that whatever may be the flaws of "presence" as a ground of jurisdiction, "for better or for worse", that is what the law provides.[208]

However, the majority of the Supreme Court having held that it is not in the interests of children routinely to be left without a habitual residence, *In re B* has repercussions regarding the loss of one habitual residence and the acquisition of another. There is inevitably a correlation between the two, between de-integration in one state (or achieving the "requisite degree of disengagement" [209]) and integration or engagement in another: "In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move …".[210] The deeper the degree of integration in the former state, the slower is the likely integration in the new state.[211]

While historically, the focus of the judicial enquiry was on the time at which one habitual residence was lost, the focus now is more likely to be on the point of acquisition of a new habitual residence. As Lord WILSON JSC indicated, although the question is whether or not the *propositus* has achieved the requisite degree of disengagement from the erstwhile habitual residence, in truth the court is scrutinising whether or not s/he has by that date achieved the requisite degree of integration in the new environment.[212] The search is for the "tipping point" of the so-called seesaw to ascertain when integration in the new environment has occurred;[213] the early signs are that the tipping point more readily is being deemed to have been reached.

IV. Reflections on the Interpretative Evolution of the Factor

[207] *Ibidem*, per Lord SUMPTION JSC (dissenting) (with whom Lord CLARKE OF STONE-CUM-EBONY JSC agreed) at [66].

[208] *Ibidem*, per Lord SUMPTION JSC, at [74] and [76].

[209] *Ibidem,* per Lord WILSON JSC (with whom Baroness HALE OF RICHMOND DPSC and Lord TOULSON JSC agreed), at [49]. See also *Re J (A Child) (Finland: Habitual Residence)* [2017] EWCA Civ 80.

[210] *In re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174, per HAYDEN J at [17]. *Cf. NN v HN* [2018] CSOH 56, per Lady WISE at [27].

[211] *In re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] UKSC 4 per Lord WILSON JSC (with whom Baroness HALE OF RICHMOND DPSC and Lord TOULSON JSC agreed), at [46].

[212] *In re B* [2016] UKSC 4, per Lord WILSON JSC (with whom Baroness HALE OF RICHMOND DPSC and Lord TOULSON JSC agreed), at [48].

[213] *Cf. G v E* [2018] EWHC 2980, per HILLIER J at [101].

It is too easy in litigation between disputatious parents for the focus to shift from the child to the adults, but it is the duty of the court to "drill deep for information about the child's life and routine" if that has not already been "mined to the surface in the preparation of the case".[214] Since the "very object of the international framework is to protect the best interests of the child",[215] it is right that, in understanding and applying the concept of habitual residence of the child, the child should be at the centre of the court's scrutiny. It is apparent from recent jurisprudence in the UK that the child is "at the centre of the exercise when evaluating his or her habitual residence".[216]

A child's habitual residence evidently will depend on the precise nuances of the case. As the United States Supreme Court opined in *Monasky v Taglieri*, "The inquiry into a child's habitual residence is a fact-intensive determination that cannot be reduced to a predetermined formula and necessarily varies with the circumstances of each case."[217]Arguably, the malleability of the concept of habitual residence, in the hands of judges who are trying to do their best for the child in question, is its greatest virtue. But it is also its vice; a tool which has no legislative definition lays itself open to a variety of interpretations and to the temptation of result selection. In the absence of a fixed definition or predetermined formula, the connecting factor is fluid and sometimes volatile, which is quite something for a lauded, common sense criterion and unnerving for parent and adviser.

The meaning of habitual residence has evolved significantly since it was first deployed as a tool in the child law field. European developments have been highly influential, as has the case law of courts around the world. In the UK, the jurisprudence of the UK Supreme Court has transformed the concept in many ways, for it is clear that judges have departed from tenets formerly followed; that which was an accepted position in 1990[218] can be seen to have been supplanted through the subtly dismissive prose of a later judgment.[219] The same can be said of practice in other senior courts around the world.[220]

The hope has been expressed that since identification in law of habitual residence entails a factual exploration, in the overwhelming majority of cases, the concept ought to be "readily capable of identification by the parties". [221] Yet case law on the meaning and operation of habitual residence – a matter which

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[214] *Ibidem.*

[215] *In re B* [2016] UKSC 4, per Baroness HALE OF RICHMOND DPSC and Lord TOULSON JSC at [62].

[216] *In re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174, per HAYDEN J at [18].

[217] *Monasky v Taglieri* 589 U.S. _ (2020), Opinion of the Court, per GINSBURG J at p. 9.

[218] *E.g. In re J (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562, per Lord DONALDSON, at 572.

[219] *E.g. In re L* [2013] UKSC 75, per Baroness HALE OF RICHMOND DPSC, at [21].

[220] *E.g. Monasky v Taglieri* 589 U.S. _ (2020), Opinion of THOMAS J, at p. 4.

[221] *In re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174, per HAYDEN J at [18].

frequently arises merely as a preliminary issue[222] – is copious, slippery and difficult to master. Even confining consideration of the connecting factor to the child law context, the high volume and lively state of case law reveals that the unique, factual circumstances of any given case frequently tempt judges to essay propositions of law, while at the same time denying that they are doing so; sometimes there is an element of protesting too much. Although judicial "distaste for subsidiary rules"[223] is evident, the facts of cases mean that, to some extent, the concept of habitual residence gradually is being adorned in legal raiment as, progressively, judges in specific instances depict its characteristics and identify its *indicia*. The concept increasingly is subject to gloss in the form of a continually developing body of case law comprising judicial guidance on how to resolve individual cases.

In Greek mythology, Croesus, King of Lydia, around 560 BC, tested the oracles of the world and concluded that the high priestess of the Temple of Apollo at Delphi provided the most accurate, albeit cryptic, answers. As is well known, the Delphic pronouncements required interpretation.

The concept of habitual residence, like the Delphic pronouncements, though apparently straightforward, is unexpectedly abstruse. "Habitual residence" looks simple and is alleged to be simple, but scrutiny of its operation in practice shows it to be far from simple. It is ironic that, despite swathes of case law, the self-styled eschewing of rules by the judiciary and the concomitant increase in judicial discretion render it difficult for a family law adviser or commentator confidently to predict the outcome in a UK court of a dispute pertaining to the determination of a child's habitual residence.

Those who seek the meaning of habitual residence of the child know that there are many oracles – courts far and near, high and low – though, insofar as concerns the 1980 Hague Convention, there is none of overarching, worldwide authority. A UK adviser must study the most recent pronouncements of the UK Supreme Court. It is hoped that this examination of the subject will assist in interpreting the nuances of these judicial pronouncements.

[222] *E.g. Re J (A Child) (Finland: Habitual Residence)* [2017] EWCA Civ 80.

[223] *Re H (Children)* [2014] EWCA Civ. 1101, per BLACK LJ at [34].