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Determining a Child's Habitual Residence: The Myriad of Judicial Decisions in the courts of the UK and the European Union

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ABSTRACT

In modern times, perhaps 'habitual residence' has become the most popular connecting factor in private international law, surpassing domicile and nationality. Especially, in family-related matters, habitual residence has been the 'go-to' connecting factor in both national laws and international instruments. Due to its reliance on the 'factual notion', habitual residence has been considered the ideal connecting factor for modern society, where people are constantly moving across jurisdictions. This phenomenon has been evident in cases, where determination of a child's residence has been the issue of litigation. The custody of children has always been given due importance in every jurisdiction and has surely received adequate attention in private international law legislation. While there has been no debate about the use of habitual residence in matters of child custody, its diverse interpretations in and across various jurisdictions have resulted in conflicting and confusing decisions. Although habitual residence was adopted so that it can be molded according to the needs of each case, too much uncertainty regarding this concept could hinder justice. There should be some legal certainty surrounding the concept of 'habitual residence' even in the absence of a proper definition, so that the courts could serve the 'best interests of the child.' The article explores the decisions from the courts of the UK and the courts of the European Union, to discover the common understanding of habitual residence in cases concerning a child.

Keywords: *Habitual residence, Brussels IIbis, Hague Abduction Convention, parental responsibility, physical presence.*

I. INTRODUCTION

Over the last few decades, several cases have deliberated on the issue of the determination of 'habitual residence'. In the modern conflict of law, habitual residence is regarded as one of the important connecting factors, which is much in use not only in domestic legislation but also in various Hague Conventions and private international law of the European Community. Within

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the sphere of private international law, it is usually used to establish jurisdiction rather than choice of law. Probably, the most prominent use of this concept has been in the questions concerning the custody and other matters of a child.

There is an enormous academic discussion and debate regarding the meaning and nature of 'habitual residence'. Habitual residence has become popular over the years and preferred over domicile, as it is simpler to determine.³ However, myriad of judgments from courts around the world have to some extent created some uncertainties. Due to the contradiction of the judgments concerning the determination of this issue, it seems important to equip this concept within the fixed rules and regulations. This article will explore the concept of habitual residence and analyze the different interpretations regarding the determination of the child's habitual residence according to different judgments made in light of the Brussels IIbis⁴ and the Hague Abduction Convention⁵ in the courts of the UK and that of the European Union.

(A) Definition of Habitual Residence:

The notion of 'habitual residence' lies at the heart of the 1980 Hague Convention on the Civil Aspects of International Child Abduction or popularly referred to as the Hague Abduction Convention. But the convention does not define the term. It has been left upon the judicial interpretation of the Court of Justice of the European Union (CJEU) or the domestic court, as appropriate in the particular case.⁶ During the time of the drafting the view was held by delegates that, determination of habitual residence is a matter of facts rather than the legal definition.⁷ The notion of the habitual residence is also a key concept in the Brussels IIbis, EC Regulation No 2201/2003, which is used for the determination of jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. However, it did not define this term and leaves the place for the court to give the definition.

According to Cheshire, there is no certain definition of habitual residence which is supported by Lord Scarman in *Shah v Barnet London Borough*.⁸ In *Re Bates*,⁹ the Royal Court of Justice,

³A.I. Bashar, *OUTLINES OF PRIVATE INTERNATIONAL LAW* 27 (Bengal Press 2023).

⁴Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1–29.

⁵ Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670 (entered into force Dec. 1, 1983).

⁶3 EB Crawford and J M Carruthers, *INTERNATIONAL PRIVATE LAW: A SCOT'S PERSPECTIVE* (Edinburgh: W Green 2010).

⁷See P. Beaumont and P McEleavy, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 90 (Oxford 1999).

⁸*Shah v Barnet London Borough* [1983] 2 AC 309 at 342.

⁹No. CA 122.89, 1989 WL 1683783 (UK), High Court of Justice, Family Division Court, Royal Court of Justice

UK was of the opinion that:

*“It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions.”*¹⁰

Although it was considered that habitual residence had the same general meaning in all areas of law, the definition needed to be considered according to the context and the purpose of the different statutes.¹¹

There are certain paradoxes that in terms of the determination of habitual residence, a list of factors or circumstances need to be considered. It is the law of the forum that will determine parent’s or children’s habitual residence. And courts of different jurisdictions, through considering different circumstances, have reached diverse understandings of the concept.

There is no difference in the principle between the traditional concepts of ordinary residence and the modern concept of habitual residence. Habitual residence means a person’s home in a particular state which has been adopted with an intention to settle there for the time being or of the long term.¹² Again Lord Slynn was of the opinion that, as habitual residence is not defined in the convention, it should be given its natural and ordinary meaning, not treated as a term of art and the fact finding approach must be applied.¹³ Perhaps the most influential observation on habitual residence was given by the Royal Court of Justice, UK in *In Re Bates* case in 1989. According to the judgment of this case, the concept of habitual residence which is free from technical rules can produce inflexibility and incompatibility between legal systems. The facts and circumstances should be assessed without presupposition.¹⁴ The approach of American courts has somehow been similar to its British counterpart.

Even the European Union has been reluctant to propose a definition of habitual residence within certain legal constraints. According to the European Court of Justice, habitual residence of a person depends on where a person’s “*habitual centre of their interest is to be found*”.¹⁵ Another prominent statement comes from the Explanatory report concerning the Convention on Jurisdiction and the Recognition and the Enforcement of Justice in Matrimonial Matters by

(1989).

¹⁰See generally *Miller v. Miller*, 240 F.3d 392, 400 (4th Cir. 2001); *Feder v. Evans-Feder*, 63 F.3d 217, 222B24 (3d Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993).

¹¹ *Mark v Mark* [2006] 1 AC 98.

¹²*Id.*

¹³*Nessa v Chief Adjudication Officer* [1999] 1 WLR(1937) HL.

¹⁴ *In Re Bates*, *Supra note 7*.

¹⁵ *Swaddling v Adjudication Officer*, case c-90/97, 1999, ECR I-1075.

Professor Alegria Borrás. The report stated that:

*‘habitual residence is the place where the person had established on a fixed basis, his permanent or habitual centre of interest, with all the relevant facts being taken into account for the purpose of determining such residence.’*¹⁶

A recent interpretation was given by the CJEU in *Re A* and in *Mercredi*, under the Brussels IIa regulation, stating that, habitual residence is always a question of fact and in terms of identifying children’s habitual residence, the interaction of a child with the place, social and family atmosphere and relationship of the children, the intention of the family to move that state should be kept in mind but it can vary according to the child’s age.¹⁷

It can be said that a suitable aspect of the application of habitual residence depends on the needs of a mobile society which is absent in the characteristic of the domicile and nationality.¹⁸ However, for proper application of this concept in practice in term of cross border case, it demands a consistent application, because inappropriate determination could lead to the legal uncertainty. The Ninth Circuit Court of Appeals in the US stated that the decision to not include a definition of “habitual residence” in the Hague Convention on Abduction “has helped courts avoid formalistic determinations but also has caused considerable confusion as to how courts should interpret ‘habitual residence.’”¹⁹

II. DETERMINATION OF THE ‘CHILD’S HABITUAL RESIDENCE’

Over the last few decades, an extensive number of cases have dealt with the development of the habitual residence concept, especially the determination of children’s habitual residence. However, the meaning of this concept is far from being settled. According to the Hague Convention on Child Abduction, before the child’s wrongful removal or retention, the state where the child used to live will be considered his/ her habitual residence.²⁰ This notion is adopted for the protection of children from any kind of harm that can occur due to the wrongful removal or retention and it is possible through the prompt return of children where they were strongly engaged.²¹ On the other hand, to determine the child’s habitual residence for EU institutions, this concept is given an autonomous meaning.²² The problem is, due to the lack of

¹⁶ Explanatory report on the Convention, drawn up on the basis of art 3 of the Treaty on European Union, on jurisdiction and the recognition and the enforcement of judgment on matrimonial matters (OJ C 221, 16.7.1998) prepared by Dr. Alegria Borrás, pg C/221, para 32.

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

¹⁸ P.M. North and G.C. Cheshire, *PRIVATE INTERNATIONAL LAW* 166-67 (Butterworths Law, London 1992)

¹⁹ *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004).

²⁰ Hague Abduction Convention, *supra note 3*, at article 4.

²¹ *Id.*, at Preamble.

²² See 2C.M.V Clarkson and J Hill, *JAFFEY ON THE CONFLICT OF LAWS* 65 (Butterworths 2002).

formal definition, different approaches and interpretation have been taken by the courts.

The definition of the concept of the habitual residence has proved problematic with diverse interpretations emerging in different jurisdictions. There is a lack of uniformity as to whether in determining the child's habitual residence; the emphasis should be exclusively on child or on the intention of the custodian or both the interest of the child as well as parental responsibility. Any assessment of the interpretation of the habitual residence is further complicated by the fact that cases focusing on the concept may concern different situations on the basis of facts of each case. For example, enrolment in a school can become a key factor in establishing whether a child has acquired a new habitual residence.²³

Habitual residence is a primary connecting factor that can be interpreted within two categories.²⁴ In order to determine the child's habitual residence, the first category is parental responsibility or parental rights approach and the other one is in favour of child-centered approach. Recently another model was considered by the CJEU where the court focused on the child's center of interest along with parental responsibility for the identification of the child's habitual residence.²⁵

Under the Hague Abduction Convention, two policy considerations are taken into account while determining the habitual residence of a child. These are: (i) a child should always have a habitual residence and (ii) a child cannot have a habitual residence in more than one country at a particular time.²⁶ Although courts and policymakers have been reluctant to formulate a uniform definition of habitual residence in order to keep the concept flexible, but some policy considerations would ensure some certainty, and help erase some contradictions and confusions among the lawyers, judges and parties of the case. Another conceivable problem with the flexible nature of the concept of habitual residence is that, it opens the doors for forum shopping. If forum shopping increases in cases of child custody, the defendants will face great inconvenience and some courts will gain favourable (or unfavourable) reputation among the litigants.²⁷

III. APPROACH OF THE ENGLISH LAW ON CHILD'S HABITUAL RESIDENCE

²³See, e.g., *Silvestri v. Oliva*, 403 F. Supp. 2d 378, 386 (D. N.J. 2005).

²⁴Rhona Schuz, *Habitual Residence of Children Under the Hague Child Abduction Convention? Theory and Practice*, 13 Child and Family Law Quarterly 1.

²⁵*Id.*

²⁶Rhona Schuz, *Policy Considerations in Determining the Habitual Residence of a Child and the Relevance of Context*, 11(1) Journal of Transnational Law & Policy 20 (2001).

²⁷A.I. Bashar, *supra* note 1, 156.

English law traditionally adopted the parental responsibility approach where a child's habitual residence is determined by the parents who have the responsibility over him. Under article 8 of the Brussels IIbis child's habitual residence will be determined on the ground of parental responsibility.²⁸ According to the judgment in *Re P (children)* case, child's habitual residence will be determined by the parents' habitual residence.²⁹ In the case of *B v H*, it was held that the child will have a habitual residence in England even the child had never been to England.³⁰ Similarly, in *Re G (Abduction: Withdrawal of Proceedings, Acquiescence, Habitual Residence)*, the court found that a new born baby had 'acquired upon her birth the mother's habitual residence in England for that first period of her young life'.³¹ When the parents separate, children will take the principle carer's habitual residence that he lives with or the person who has legal custody. However, difficulties arise when the court considers the physical appearance and intention of the individuals as a requirement for the determination of the child's habitual residence. In *In the Matter of A*, the Supreme Court of UK, while giving the judgment, considered the issue of the child's actual presence, moving away from the parent-centered approach and stated that physical presence is an important factor in ascertaining the child's habitual residence.³² As such, the Supreme Court completely ignored the Brussels IIbis regulation in term of ascertaining child's habitual residence. Before this case, parent parent-centered approach was always considered by the UK Supreme Court.³³ The question thus stands as to whether physical presence is necessary or not, in terms of determining a child's habitual residence. For the establishment of the habitual residence, there must be an actual presence and settled intention to remain.³⁴ This is because it establishes a strong link between the child and the state.³⁵ Physical presence in some contexts has become more important than the element of intention. Although the child follows the habitual residence of their primary carer, the child must be a resident of that place.³⁶

In *In the Matter of A*, the Supreme Court upheld the opinion of CJEU in the *Barbara Mercredi case* and explained that without the physical presence of the child, it is impossible to develop social integrity in that country which is an indispensable component of habitual residence.³⁷ Furthermore, tension exists regarding how quickly and how long the actual presence require for

²⁸ Brussels IIbis, *supra* note 2, article 8.

²⁹ *Re P (Children)*, sub nom *P v P* [2007] 2 FLR 439.

³⁰ *B v H (Habitual Residence: Wardship)* [2002] 1 FLR 388.

³¹ [2007] EWHC 2807 (Fam), 2007 WL 4190656, para 99.

³² *In the Matter of A (children)* 2013 UKSC 60.

³³ *Mark v Mark*, *Supra* note 9.

³⁴ *Re J (a minor) (Abduction: Custody Rights)* 1990 2 AC 562.

³⁵ *P. Beaumont and P McEleavy*, *supra* note 5, at 101.

³⁶ *Al Habtoor v Fotheringham* [2001] EWCA Civ 186 [2001] FCR 385, 402.

³⁷ *In the Matter of A*, *Supra* note 30.

the identification of habitual residence. Long-time residence within a territory indeed has a significant impact on tying a person with that state and the legal system. According to Clive, community interaction is important for the establishment of a child's habitual residence and one-year residence is considered sufficient in this aspect.³⁸ Habitual residence is no longer a simple factual concept and application of this issue; the period of residence, varies depending upon the legal context in which it is exploited.³⁹ Moreover, the definition of habitual residence which is given by the European Court of Justice in *Swaddling* case focused on intention and best interest of child and this concept was also applied by UK Supreme court in *Re L (A Child) (Habitual residence)*.⁴⁰ As young children cannot form intention, on the ground of factual concept; period of actual residence is required.⁴¹ For the protection of children and to avoid the jurisdictional problem, short period of residence might be acceptable.⁴²

However, considering the physical presence and a period of time as a requirement before habitual residence can also pose some problems. If the period of actual residence is accepted as an essential requirement of habitual residence, in that case, the state where the child was resident will be empowered on the subject of the child. It can create problems to carry evidence across borders and result in a gap in jurisdiction. On the other hand, assessment of the child's best interest will be more difficult causing the proceeding to be delayed. This issue also poses questions about children who spend a specified time or a long time with each parent. If parents live in separate states, it will be difficult to determine the child's habitual residence. In that case, the child's opinion can be considered. But a very young child may not be capable of expressing his opinion. The most important point is if presence is considered as an essential factor to habitual residence, then it is merely impossible to determine the habitual residence of the infant.

After the Brexit, the UK is no longer a party to the Brussels IIbis regulation, since the 1 January 2021. As such, jurisdiction regarding the custody of a child will be based on national law, which is the Family Law Act, 1986 for England and Wales and the 1996 Hague Convention on Parental Responsibility,⁴³ which is similar but not identical to the Brussels II regulation.

IV. APPROACH OF THE COURTS OF THE EUROPEAN UNION

³⁸ E. Clive, *The concept of Habitual residence*, The Juridical Review 137 (1997).

³⁹ R. Lamont, *Habitual residence and the Brussels II bis: Developing Concepts for European Private International Family Law*, Journal of Private International Law, 264 (2007)

⁴⁰ *Re L (A Child) (Habitual residence)* [2013] UKSC 75.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, entered into force on 1 January 2002.

As stated above, under the Brussels Ibis Regulation the court has to consider the parental approach in terms of determining the child's habitual residence.⁴⁴ But in practice, like the Supreme Court of UK, the CJEU has also moved away from this concept and practised the combined approach. The CJEU in *A (case C-523/07)* 2009 concluded that the determination of habitual residence is a matter of question of fact and this concept under article 8 (1) of the Regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects the social and family integrity with children.⁴⁵

In 2014, the Third Chamber of the CJEU gave a ruling in *C v M* case that in terms of child abduction case, the case law of the CJEU under Brussels Ibis regarding habitual residence, considering the approach of parental responsibility, will be applicable.⁴⁶ The inclusion of the child abduction case within the sphere of the Brussels Ibis was controversial and there is a complex legal arrangement. This issue is practically and effectively discussed and dealt with by the Hague Convention on Child Abduction. According to article 12 of the Hague Convention, the child must be immediately returned to his/her habitual residence and any related issue regarding parental responsibility will be solved there in a substantive hearing. The problem is that the child may be returned to a state where ultimately they do not have any social, environmental or personal interaction.⁴⁷ So it is important to ensure that the child returns to a known environment.

Under article 2(11) of the Brussels Ibis regulation, a removal or retention is wrongful if custodial rights is breached which was ensured by the law of child habitual residence before the removal or retention. In this case, mother was a custodial parent and was given permission to move by court. The *Swaddling* and *Mercredi* cases established that if the move is lawful, the child can acquire habitual residence immediately on arrival in a member states. Moreover, as habitual residence is determined by the facts and if there is no factual connection, it will be incompatible to determine the jurisdiction over a parental responsibility dispute on return.⁴⁸

Furthermore, according to Advocate General of the European Court of Justice, Maciej Aleksander Szpunar, if a child is moved legally by a custodial parent, child can obtain habitual residence in the other member state.⁴⁹ Proceeding regarding the child custody can be promoted by the member state of origin, because habitual residence is a factual concept which cannot be

⁴⁴*Supra note 2*, article 8.

⁴⁵Case C-523/07, A, Judgment of the Court (Third Chamber), 2 April 2009.

⁴⁶*C v M*, Case C-376/14 PPU, Judgment of the Court (Third Chamber), 9 October 2014.

⁴⁷*Supra note 43*.

⁴⁸*Id.*

⁴⁹*Supra note 44*, view of Advocate General Maciej Szpunar.

determined by legal proceeding.⁵⁰ The meaning of this expression must be identified in light of the best interest of the child and the principle of proximity. As such, a child's habitual resident under article 8(1) of the Regulation should correspond with the place in which the child - making an overall assessment of all the relevant factual circumstances, specific to each case in particular the duration and stability of residence and familial and social integration – has his or her centre of interests.

Taking into consideration the words and objectives of the Brussels IIbis, Advocate General Kokott stated that, the concept of habitual residence in article 8(1) of the regulation should be considered in light of the child's actual centre of interest.⁵¹ As relevant criteria for the distinction between habitual residence and the temporary presence, the AG designates in particular a certain duration and regularity of residence, which might be interrupted as long as it is only a temporary absence. The basic indicators are categorized according to the duration and the regularity of the residence and the familial and social situation of the child.

Furthermore, the factor which influences the duration of the transformation from mere presence into the habitual residence is the lawfulness of the stay. If the move is unlawful (in the child abduction case) the duration of the transformation is a longer period and if the move is lawful, then habitual residence of a child can shift even after a very short time. Family and social interaction of the child indicates the clear picture of the stability that distinguishes the habitual residence from mere presence whose relevancy may vary according to the child's age.

V. CONCLUSION

Habitual residence demands further judicial interpretation because of the contradiction of the judgments of CJEU. The CJEU should consider furthering the principle that has developed in favour of the actual presence, especially in terms of determining a child's habitual residence. Due to the factual concept of habitual residence, it is the court's responsibility to consider all the facts, and not to approach them selectively. Although the focus should be on the benefits of the children, it also needs to bear in mind that those children are connected with their parents. A uniform definition is required for the establishment of a child's habitual residence at the European level. The court must have an identical structure and specific guidelines that make their task easier.

⁵⁰*Id.*

⁵¹Case C-523/07, *Supra note 41.*