Dealing with habitual residence in child abduction cases: tips for practitioners

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When seeking to determine habitual residence, case law sets out a number of crucial factors to weigh up and to evidence

The issue of habitual residence in child abduction cases is one that has troubled the courts for many years. The issue often arises in 1980 Hague Convention cases where an applicant seeks the summary return of the subject child/children to a jurisdiction that is a signatory to the 1980 Hague Convention. In addition to this, habitual residence of a child can also be an issue in cases where there are jurisdictional disputes when considering the inherent jurisdiction of the High Court. These types of proceedings take place in the Family Division High Court in the Royal Courts of Justice. This article will focus on the case law in respect of the 1980 Hague Convention. These proceedings are summary in nature and as such, there is an obligation for these proceedings to be timetabled tightly. The reason for this is by virtue of Article 11 of the 1980 Hague Convention, which states:

> "The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
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> If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be."

As such, the written evidence of the parties is essential to the court's final determination, as oral evidence on matters is limited to certain exceptions that arise in the Convention.

Over the years there has been a lot of case law on the issue of habitual residence in the High Court, Court of Appeal and, on numerous occasions, the Supreme Court. It is essential that where issues of habitual residence arise, practitioners are alert to those issues, the approaches the courts adopt, and most importantly, present the client's case in the best way possible.

Before looking at the issue of habitual residence, it is worth noting the remarks of Mostyn J in *B v B* [2014] EWHC 1804 (which was further endorsed recently in *ADK V ASI* [2022] EWHC 2610 (Fam) at para 79):

> "2 The Hague Convention of 1980 is arguably the most successful ever international treaty and it has over 90 subscribers to it... The underlying and central foundation of the Convention is that, where a child has been unilaterally removed from the land of her habitual residence in breach of someone's rights of custody, then she should be swiftly returned to that country for the courts of that country to decide on her long-term future.
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> 3 There are very few exceptions to this and the exceptions that do exist have to be interpreted very narrowly in order that the central premise of the Convention is not fatally undermined. It is important to understand what the Convention does not do. The Convention does not order a child who has been removed in the circumstances I have described to live with anybody. The Convention does not provide that the parent who is left behind should, on the return of the child, have contact or access in any particular way. The Convention does not provide that, when an order for return to the child's homeland is made, the child should stay there indefinitely. All the Convention provides is that the child should be returned for the specific purpose and limited period to enable the court of her homeland to decide on her long-term future. That is all it decides.

> 4... Equally, if the exception that is relied on is that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place her in an intolerable situation, that again has to be seen through the lens of the objective of the Convention. We are not talking here about long-term risks. We are not talking here about long-term harm. We are talking about risks and harm that would eventuate only in the period that it takes for the court of the child's homeland to determine her long-term future and to impose the necessary safeguards, if necessary, in the interim."

In light of the above, the concepts of "homeland" and "land of her habitual residence" will be considered in this article.

Habitual residence

The terminology "habitual residence" appears at various places in the 1980 Hague Convention. First:

Article 3
The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Secondly:

Article 4
The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

And thirdly:

Article 5
For the purposes of this Convention -

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

The key issue therefore arises out of Article 3: establishing "the child was habitually resident immediately before the removal or retention".

Tips for practitioners

Mr Justice Hayden in *B (A minor: Habitual residence)* [2016] EWHC 2174 (Fam) provided useful guidance to practitioners in respect of presenting evidence where there are habitual residence issues. At paragraph 18, he stated:

> "If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc. and an appreciation of which adults are most important to the child. The approach must always be child driven. I emphasise this because all too frequently and this case is no exception, the statements filed focus predominantly on the adult parties. It is all too common for the Court to have to drill deep for information about the child's life and routine. This should have been mined to the surface in the preparation of the case and regarded as the primary objective of the statements. I am bound to say that if the lawyers follow this approach more assiduously, I consider that the very discipline of the preparation is most likely to clarify where the child is habitually resident."

Hayden J went on to say the following:

> "this exercise, if properly engaged with, should lead to a reduction in these enquiries in the courtroom. Habitual residence is essentially a factual issue, it ought therefore, in the overwhelming majority of cases, to be readily capable of identification by the parties. Thus:
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> i) The solicitors charged with preparation of the statements must familiarise themselves with the recent case law which emphasises the scope and ambit of the enquiry when assessing habitual residence [para 17 of the judgment, set out below, provides a convenient summary];
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> ii) If the statements do not address the salient issues, counsel, if instructed, should bring the failure to do so to his instructing solicitors' attention;
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> iii) An application should be made expeditiously to the Court for leave to file an amended statement, even though that will inevitably result in a further statement in response;
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> iv) Lawyers specialising in these international children cases, where the guiding principle is international comity and where the jurisdiction is therefore summary, have become unfamiliar, in my judgement, with the forensic discipline involved in identifying and evaluating the practical realities of children's lives. They must relearn these skills if they are going to be in a position to apply the law as it is now clarified.

The simple message must get through to those who prepare the statements that habitual residence of a child is all about his or her life and not about parental dispute. It is a factual exploration.

19. In my review of the case law I note the observations of Lord Wilson in *Re B (A child)* [[2016] UKSC 4]:

> "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."

The above guidance is helpful in that it sets out precisely the issues that practitioners representing clients should be focusing on (solicitors and counsel) when embarking upon a forensic analysis of the evidence and, ultimately, presenting the evidence in a written statement to the court.

In the same case Hayden J also reviewed the ample amount of authorities on habitual residence and provided a useful summary guide at paragraph 17. These factors should be considered and addressed in evidence. The factors were as follows:

"i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (*A v A* [2014] 1 FLR 111, adopting the European test).

ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that [are] most likely to illuminate his habitual residence (*A v A*, *Re KL* [2014] 1 FLR 772).

iii) In common with the other rules of jurisdiction in Brussels IIR its meaning is "shaped in the light of the best interests of the child, in particular on the criterion of proximity". Proximity in this context means "the practical connection between the child and the country concerned": *A v A* (para 80(ii)); *Re B* [2016] 2 WLR 557 (para 42) applying *Mercredi v Chaffe* [2011] EWCA Civ 272 at para 46).

iv) It is 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 (*Re R* [2015] UKSC 35).

v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (*Re LC* [2014] UKSC 1). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.

vi) Parental intention is relevant to the assessment, but not determinative (*Re KL*, *Re R* and *Re B*);

vii) It will be highly unusual for a child to have no habitual residence. Usually a child [loses] a pre-existing habitual residence at the same time as gaining a new one (*Re B*).

viii) 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 (Re B – see in particular the guidance at para 46);

ix) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (*Re R* and earlier in *Re KL* and *Mercredi*).

x) The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident (*Re R*)…

xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within three months). It is possible to acquire a new habitual residence in a single day (*A v A*; *Re B*). In the latter case Lord Wilson referred (para 45) [to] those "first roots" which represent the requisite degree of integration and which a child will "probably" put down "quite quickly" following a move.

xii) Habitual residence [is] a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It [is] the stability of the residence that was important, not whether it was of a permanent character. There [is] no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (*Re R*).

xiii) The structure of Brussels IIa, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence. As such,

> "If interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former (*Re B supra*)."

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Reference to Brussells IIa above can now be omitted if the case was issued post-transition period, but the guidance remains helpful nonetheless.

In terms of practitioners who are representing applicants or respondents in the case, it can be suggested that when preparing statements, having regard to the above factors and outlining them and evidencing them in the statements would be useful.

Challenging assertions in respect of habitual residence

If a matter is proceeding to trial on the issue of habitual residence, then of course there is disagreement between the parties. One party may allege a child is habitually resident in X country at relevant date, the other in country Y. In modern times, with the use of social media and instant messaging devices, practitioners should also assess whether a client may have other useful evidence available, which can be exhibited to the main statement. For example, some evidence can relate to "parental intention" as well as pictures/messages relating to the degree of integration into life in a country or demonstrating that child's stability. For example, in the fairly recent High Court decision in *J v R* [2022] EWFC 104, Mrs Justice Roberts provided a very useful analysis, weighing up competing arguments from paragraphs 17 to 36 having reviewed the evidence and submissions. In particular, at paragraph 32, she stated what she found useful in the form of contemporaneous messages:

> "32. What has helped me most to penetrate the subjective accounts of these parents are the records of the contemporaneous WhatsApp and other exchanges between them. These were written prior to the launch of the current litigation and they appear to me to provide a line of sight into what was actually in the parties' respective contemplations at the time."

What about oral evidence? In 2021 and 2022 there have been a number of authorities in respect of oral evidence in Hague cases although in terms of habitual residence, given the focus on written evidence and ensuring that the evidence is comprehensive and going directly to the issues identified in case law, it is not an area where there is often oral evidence. However, practitioners should be alive to assessing, as Mr Justice Cobb considered recently in the case of *FB v MG* [2022] EWHC 2677 (para 4 but also see para 19 vii), whether you are "able to identify any specific issue on which a factual determination would be likely to be essential" and, if so, to make such an application.

Conclusion

Child abduction cases are invariably complex in nature but there is a vast amount of case law in existence. Habitual residence has been one issue which has resulted in many published judgments both at High Court and the appellant level. The fact that these cases are often in the High Court and the appellant court results in published judgments. It is useful reading to consider how the courts adopt and weigh up certain factors, and practitioners should have this in mind as well.

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