Neutral Citation Number: [2013] EWCA Civ 865

Case No: B6/2013/0266

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISON
SIR PETER SINGER
SITTING AS A DEPUTY HIGH COURT JUDGE
FD12P01871

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2013

Before :

LORD JUSTICE THORPE
LADY JUSTICE ARDEN
and
LORD JUSTICE BEATSON

- -

Between :

DL	**Appellant**
- and -	
EL	**Respondent**
-and-	
Reunite International Child Abduction Centre (1) **Centre for Family Law and Practice (2)**	**Interveners**

Richard Harrison QC and Samantha Ridley (instructed by **Bindmans LLP**) for the **Appellant**
Henry Setright QC and Michael Gration (instructed by **Freemans**) for the **Respondent**
Teertha Gupta QC, Edward Devereux and Michael Edwards (instructed by **Lyons Davidson LLP**) by written submissions for Reunite International Child Abduction Centre
David Williams QC (instructed by **Mishcon de Reya**) by written submissions for the Centre for Family Law and Practice.

Hearing dates : 21 May 2013

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Approved Judgment

Lord Justice Thorpe :

Introduction

1. The issue for consideration in this appeal are what remedies are available to the parent whose child is removed from the country of habitual residence pursuant to a return order made on a successful application under the 1980 Hague Abduction Convention which is subsequently set aside by an appellate court.

2. That gives rise to two questions. The first is whether the child loses his habitual residence when the return order is implemented. The second question is whether an appeal against the return order initiated after the child's departure is doomed to fail, the return being irreversible and the appeal therefore academic.

3. The appeal arises from a judgment of Sir Peter Singer, sitting as a deputy judge of the Family Division given on the 17 January 2013. Permission to appeal was granted on paper on the 26th February 2013.

4. The case before Sir Peter was on any view extraordinary and the points which I have identified above have not previously been covered directly by authority in this jurisdiction.

5. This case is also remarkable in that a case on similar facts, *Chafin v Chafin*, had reached the Supreme Court in the USA and had been argued in December 2012. Judgment was pending when Sir Peter handed down his judgment. The Supreme Court judgment has since been delivered and the judgment of Sir Peter is more than once cited. That is in part because the respondent to this appeal had sought to take to the Supreme Court the very point advanced by Mrs Chafin. Once the court had decided against Mrs Chafin's appeal the respondent's attempt to appeal to the US Supreme Court fell away.

6. In almost all cases concerning children, whether domestic or international, the facts are of crucial significance. During 5 years of bitter litigation between the parties there have been clear findings made by courts in the State of Texas, particularly in the judgment of the US Court of Appeals for the Fifth Circuit dated 31 July 2012.

7. The family background and the procedural history were carefully recorded by Sir Peter in his judgment and I will pick out only those points most material to the present appeal.

Background

8. The parents are of Ghanaian origin. The father is a US citizen, a pharmacist in the US Air Force with the rank of Lieutenant Colonel.

9. The mother came to this country as a child. Currently she has indefinite leave to remain. She is a social worker.

10. The parties married in Texas on 28 December 2005 and their only child, K, was born on the 7 August 2006. The father has a son by a previous relationship, KL (now a university student). Thus from the birth of K they lived as a family of four until the

breakdown of the marriage in 2008. The father petitioned for divorce in Texas in March 2008.

11. Thereafter primary care of K depended largely on parental availability and will. Between June 2008 and August 2009 the father was posted to Afghanistan. In July 2008 the mother brought K to London where she remained until March 2010.

12. During this period of possession the mother behaved in a way that was to be strongly criticised in the Texan courts, both in relation to seeking immigration status for K in the UK and in relation to the father's contact.

13. It was the final order of 7 March 2010 in the divorce and custody proceedings that granted the father custody of K and the exclusive right to designate his place of residence. This was a welfare based judgment at the conclusion of proceedings in which both parties participated and were legally represented. The judge was highly critical of the mother in a number of respects.

14. Nevertheless, she later issued an application for a return order under the 1980 Hague Abduction Convention. She asserted that K was habitually resident in England by 2 March 2010 and the father, by relying on the order of 7 March, had wrongfully retained him in Texas.

15. The prospects of the mother succeeding on her application must have seemed negligible and the resulting order of the 10 August 2011 seems to me to be bizarre in the extreme. It required the father to deliver to the mother K, and K's passport immediately.

16. The father and mother received the court's ruling on Wednesday 10 August 2011. On the evening of Friday 12 August the father delivered K's passport to the mother. She was then free to depart and did depart on Sunday 14 August.

17. The rules of the Texan court allow 28 days for the filing of an appeal. The father's appeal was filed on 9 September 2011, just in time.

18. The mother's response sought the dismissal of the appeal only on the ground that it was academic, she having established K's habitual residence in this jurisdiction, perhaps even before the appeal was launched. She did not assert the merits of the first instance judge's conclusion.

19. The point that she took did not find favour with the United States Court of Appeal for the 5th Circuit, which allowed the father's appeal. She did not comply with that court's order for K's return but sought to renew her argument that the father's appeal to the 5th Circuit had been moot, to use the US expression.

20. Her failure in the US Supreme Court and the father's failure to obtain a return order from Sir Peter leaves the orders of the US and the UK courts in conflict. K has now resided in this jurisdiction without interruption since mid-August 2011.

The Legal Proceedings

21. To record all the steps in the development of proceedings here and in the USA would be both tedious and superfluous. It is sufficient to emphasise the highlights many of which I have touched on in recording the background.

22. The first orders in Texas were made in 2008 and the first order in this jurisdiction was effectively a mirror order of the 3 March 2009.

23. The decisive orders in Texas were the final custody and divorce order of 7 March 2010 and the Federal Court's order on the mother's Hague Convention application of the 10 August 2011.

24. After the mother's arrival with K pursuant to the order of 10 August 2011 she commenced proceedings under the Children Act 1989 on 20 October 2011. Pending his appeal to the Fifth Circuit Appeal Court the father himself issued an application for residence and contact in this jurisdiction on 3 March 2012.

25. Following the success of the father's appeal on 31 July 2012 there were a flurry of applications by the mother in this jurisdiction and in the Fifth Circuit Appeal Court, all culminating in the Appeal Court order of 29 August 2012 directing the mother to return K to the United States and further to the custody of the father.

26. Between those two orders, on the 9 August 2012 the father issued his application in this jurisdiction under the 1980 Hague Convention for the summary return of K to the USA.

27. On the 7 September 2012 the mother petitioned the US Supreme Court for Writ of Certiorari and for consolidation with the case of *Chafin*. She also applied unsuccessfully for a stay of the order of 29 August 2012.

28. The father's convention application was the subject of a series of directions orders which perhaps explain the extended period between issue and final hearing on 10 December 2012 with a five day time estimate. *Chafin* was listed for argument in the US Supreme Court a few days prior, namely on 5 December 2012.

29. As already indicated Sir Peter Singer reserved his judgment to 17 January. Proceedings in this court I have already recorded.

Submissions

30. The parties filed full skeleton arguments; the father's was updated following the receipt of the judgement of the US Supreme Court in *Chafin*. Both the Centre for Family law in Practice and Reunite sought to intervene in the appeal attracted by the policy considerations that it seemed to raise. Both applications were partially granted but limited to written submissions only.

31. The skeleton argument from Family Law in Practice, settled by Mr David Williams QC, sought to uphold the rulings of Sir Peter Singer on all points and submitted that the appeal should be dismissed.

32. The skeleton argument filed by Reunite, settled by Mr Tertha Gupta QC Mr Edward Devereux and Mr Michael Edwards addressed only the relevant policy questions and did not seek to support either the father's appeal or the mother's response. However, Mr Harrison in his oral submissions adopted a number of the points made in Reunite's skeleton.

33. Mr Harrison argued his appeal with great skill both in his skeleton and in his oral submissions.

34. In reviewing the history Mr Harrison stressed the Texan Court's findings of fact recorded on 9 July 2012, particularly in paragraphs five and nine. The mother's clandestine immigration application for K and her failure to support contact between K and the father were, he submitted, of great importance to the decision of the father's application under the inherent jurisdiction.

35. Although the order of the 29 August had been made by the court of its own motion and without representation from the parties, it was, the expression of the appeal court's judgment and the mother remains in breach.

36. Mr Harrison emphasised that the judgment of Sir Peter Singer consolidates the conflict over K's future. The father has been granted residence in Texas, the mother here. The Texas order of 29 August requires K to return but the order of Sir Peter refuses return.

37. In considering policy considerations, Mr Harrison reminded us that these are discussed in the enforcement volume (part 1 and 4) of the Hague Conference Guide to Good Practice under the Hague Convention and in the European Commission's Guide to the Operation of Brussels II bis published in 2005. On the one hand there is the tension where the duration of the appeal averages a year or more between the grant of a stay (which holds the child in limbo and thus defeats the objectives of the Convention) and the refusal of a stay which may render the appeal meaningless. Stays in the United States are generally refused, as is illustrated by the proceedings in *Chafin*.

38. Mr Harrison then put his submissions under three grounds. The first, to which fourteen pages of the skeleton are directed, addressed habitual residence. The second, advanced in a single page, went to K's wrongful removal from the USA. The third, directed to the welfare survey, is advanced over the final four pages.

39. In his oral submissions Mr Harrison interestingly commenced his review of the development of the interpretation of habitual residence in international family law with Professor Steiger's explanatory report to the 1961 Protection of Children Convention. Within Professor Steiger's report he emphasises:-

> "The notion of habitual residence is certainly a little vague, and one can expect that it will not be appreciated everywhere in the same way. But doubts subside if one remembers that we can talk of habitual residence when the place in question is the actual place where the minor's life is centred, this particularly compared to other places where he could reside, which come into play."

40. This emphasis on centrality, Mr Harrison submits, can be traced through the Perez-Vera report to the recent decisions of the Court of Justice of the European Union, particularly *Mercredi v Chaffe* (Case C-523/07 [2010] Fam 42.

41. Mr Harrison traced the development of domestic authority and recent judicial debate as to whether the domestic test differs from the European test. He emphasised the desirability of one uniform test applied in our domestic law, in European family law and in the autonomous law of the Convention. He submitted that that position is now achieved, particularly if *Mercredi v Chaffe* is read as not introducing the requirement of "permanence" in the acquisition of habitual residence.

42. Mr Harrison submitted that applying the case law to the facts of the appeal K's United States habitual residence was not lost during the appeal process. The mother knew of the father's right of appeal. He acted promptly. She did not oppose his appeal on the merits and accordingly K's presence here was never more than, provisional or transient. That being so, the mother's failure to obey the return order amounts to a wrongful retention under the Convention.

43. On his second ground Mr Harrison submitted that the mother's removal on 14 August was clearly wrongful once the appellate decision removed its lawfulness. The father held rights of custody pursuant to the orders of the Texan court and he was exercising his rights, or would have exercised those rights but for the removal. The return order did not curtail his rights of custody but authorised removal in spite of his rights. Article 3 of the Convention requires a ruling on whether the father exercised rights at the date of the hearing before Sir Peter Singer. Although the point is novel this approach is consistent with the language of Article 3 and the policy considerations that underlie the convention.

44. As to his third ground, Mr Harrison particularly criticises the judge's judgment where at paragraphs 62-65 he rejects the father's case under the inherent jurisdiction and Article 18 of the Convention in robust terms. Mr Harrison submits this is unacceptable because the judge proceeds on the basis of K's return in the abstract whilst the father had offered a range of protective undertakings that would have allowed the mother to return with K to create a regime of shared care in Texas, at least during the currency of any proceedings then issued by the mother. Mr Harrison emphasised that K is a US national, whose status here was achieved by stealth. A welfare decision would be easier in the United States and his return would remove conflict between our jurisdictions. These factors were not adequately reflected in the judgment below nor had the judge given due weight to K's very strong attachments to his father, to his half-brother and to the United States.

45. In summary Mr Harrison submitted that:-

i. The judge was wrong in law on K's habitual residence

ii. In deciding the inherent jurisdiction application he put the wrong question in paragraph 63 when he said:-

> "So the question becomes whether I can on the information presently available to this court reasonably conclude that to

leave his mother in London for his father and San Antonio would, at this point, be in his best interest."

That was not the correct question given the father's proposals for protective undertakings.

iii. The judge failed to give proper weight to the US court orders. Although he did not have the benefit of the US Supreme Court judgment in *Chafin*, and on the mother's application to follow *Chafin*, he had the clear decision of the Fifth circuit appeals court that the father's appeal was not academic. He had available to him the briefs from the United States and from the National Council for Missing and Exploited Children to the Supreme Court both supporting the decision of the Fifth Circuit Appeals Court.

46. Mr Setright QC had also filed a full and careful skeleton. His task at our hearing was an easier one. He sensibly relied on the primary submission that the judge was correct on all three grounds for the reasons which he had given.

Conclusions

47. I would accept Mr Harrison's attractive argument which traces the development of domestic and international law and how habitual residence has steadily displaced other tests such as domicile and nationality.

48. I accept his conclusion that there is now no distinction to be drawn between the test according to our domestic law, the test expounded by the Court of Justice of the European Union in *Proceedings brought by A* (Case C-523/07 [2010] Fam 42 and *Mercredi v Chaffe* (cited above) and the autonomous law of the Hague Convention.

49. Judges in this jurisdiction have questioned the language of the court's judgment in *Mercredi v Chaffe* which seems to introduce an element of permanence as a necessary ingredient of habitual residence; se *Re H-K (Habitual Residence) [2012] 1 FLR 436* and *FVS v MGS (Habitual Residence)* [2012] 1 FLR 1184. However, Sir Peter in an endnote to his judgment below demonstrated that the expression of permanence appears only in the English version of the court's judgment and is not to be found in the judgment in French, which speaks of stabilité rather than permanence. This endnote is a valuable contribution to discussion and understanding of the case law of the Court of Justice and I annexe it to my judgment for ease of reference.

50. Although I accept Mr Harrison's submissions as to the law I cannot agree with his submission that the application of the law to the facts of this case necessitates a finding that K did not lose his habitual residence in the USA.

51. I reject that submission for the following obvious reasons:-

i. K's departure from the United States was a lawful removal pursuant to the order of the Court of Competent Jurisdiction.

ii. Albeit acting under compulsion the father co-operated in K's departure.

iii. K had previously been resident in this jurisdiction for an extended period and in all probability had acquired habitual residence by the date of the filing of the father's appeal.

iv. It is artificial, indeed almost fanciful, to label his residence here between summer 2011 and summer 2012 as conditional upon the outcome of the father's appeal and therefore transient.

52. Equally I reject Mr Harrison's second ground of appeal. Again, it seems to me quite artificial to assert that the effect of the appellate decision was to render a lawful removal wrongful and that the father was exercising rights of custody prior to the issue of his Convention application and/or at the date of trial. Mr Harrison submits that the language of Article 3 of the 1980 Convention supports this interpretation. I cannot agree. In my judgment the 1980 Abduction Convention was never foreseen or intended to be used in present circumstances. Once there has been a lawful departure, annulled 12 months later by a successful appeal, in my opinion only Article 18 (and in an English context the inherent jurisdiction) provides a remedy for the successful appellant.

53. Nor am I impressed by Mr Harrison's third ground. Mr Harrison's criticism of paragraphs 63 of the judgment below is altogether too narrow.

54. Ideally Sir Peter would have referred to the protective undertakings and the extent to which they would have resulted in mother and child returning together. However, it must be doubted whether any protective undertakings would have cleared the obvious impediment that the mother has conflicting responsibilities to her baby and to the father of her baby. She could hardly go without her baby and she would not be free to go without the consent of the father or order of the court.

55. However, above all, Sir Peter's primary point was that there was insufficient evidence to allow any welfare conclusion to be drawn. Whether a case requires further investigation, further evidence or more expertise is essentially one for the discretion of the trial judge who bears the responsibility for the outcome of a welfare based judgment. Sir Peter was not concluding the case against the father. The father had the opportunity to participate in a fuller investigation and a further hearing. He did not take advantage of that opportunity.

<u>The Policy Considerations.</u>

56. I would like to express some views on the submissions of Mr Harrison, Mr Setright, Mr Williams and Mr Gupta, particularly in the light of the judgments of the US Supreme Court which were not available to Sir Peter.

57. The question as to whether an appeal is rendered academic by an earlier lawful removal might be thought to be an unlikely question to reach the summit of the US judicial system. However, it was clearly necessary given the conflicting conclusions among the Appellate Circuit Courts. That conflict of judicial opinion equally stems from the nature of the appellate proceedings in the USA.

58. A specialist judge or practitioner in this jurisdiction would find it difficult, if not impossible, to conceive the need to address this question in practice. That is because

of the important distinctions between our appellate system and the appellate system in many states of the Union. First we do not have appeals as of right but only subject to the filter of permission. Second, any application for permission, and any resulting appeal, are case managed by a single Lord Justice. Third, appeals from the grant or refusal of a return order under the 1980 Convention are prioritised over domestic family appeals. Thus an application for permission will be referred to me within days of filing. I will look at the papers within a matter of days. If I think that the case requires the consideration of the full court I will adjourn either to an oral hearing without notice, or to an oral hearing with appeal to follow or to a full appeal. Whichever is apt, the further hearing will be accommodated by the listing officer on request, ordinarily within three weeks at most.

59. Of course our practice is only at one end of a very wide spectrum. The question of enforcement figured large at the fifth meeting of the Special Commission and is comprehensively considered in volume four of the Good Practice Guide to which I have referred above. The diversity of procedures in a global community of some ninety jurisdictions is impossible to standardise.

60. The judges who sat in the *Chafin* appeal were not surprisingly impressed by our procedures which are possible in a jurisdiction of many millions compressed into a small island territory. We have the further advantage of a highly specialist judiciary, soon to be united in a single family court.

61. Within the European region standardisation has been attempted in that Regulation Brussels II bis takes priority over the Convention and Article 11 amounts to a protocol to the Convention which European Member States (with the exception of Denmark) are bound to apply.

62. In the first months of operation of the Regulation the European Commission published a Guide which had been written by a group of experts. It deals with enforcement of a first instance order for return without any consideration of the effects of a live right of appeal. This is hardly informative.

63. However, in June 2009 an Expert Group within the European Judicial Network was formed to prepare a Good Practice Guide to administrative and judicial proceedings in the operation of the Convention and Article 11 of the Regulation.

64. The decision in *Chafin* came after completion of the first draft of the Good Practice Guide but before its publication. Accordingly the text has been amended to encompass the issues considered by the U.S. Supreme Court. I have chaired the Expert Group. The Guide is shortly to be published on the EJN website and network judges are being asked to disseminate it in their respective jurisdictions. Subject to funding it will be translated into the languages of the Member States.

65. The United States does not have the advantage of concentration of jurisdiction. Accordingly there are innumerable first instance judges in the state courts and the federal courts who may never encounter such an application. If he or she does encounter such an application (and remember that whilst the United States has more Hague applications in and out every year than any other jurisdiction they remain small in number), the judge will have no familiarity and no previous experience with such

applications. In any system where the trial judge has little experience the absence of an effective right of appeal might be a denial of justice.

66. Guidance for European jurisdictions is important since some have not adapted their Appeal processes to prioritise international family law appeals. In some jurisdictions the exhaustion of the appellate process may take a year or more. This is a general problem that needs to be addressed. Article 11 (3), although not explicit, is generally taken to apply only to the first instance trial. If that is so the Regulation is silent as to the obligations of the Appellate courts. When the process of the revision of the Regulation commences in 2014 this is an issue that I consider needs to be addressed.

67. In short I welcome the decision of the Supreme Court in *Chafin* and I hope that some of the evolutions, suggested particularly by Justice Ginsburg, may come to pass. The United States of America is a steadfast supporter of the 1980 Abduction Convention. That is the policy of the government and officials of the highest calibre have invariably safeguarded that policy and provided the essential administrative services via the Central Authority. The US judicial system, and standards in the application of the Convention are prevented from achieving their potential as a result of impediments which we do not experience but which we must recognise in drawing comparisons.

68. All that said I would dismiss the appeal presently before this court.

Endnote

71. I do wish however to add some observations on the English-language report of the case of *Mercredi v Chaffe*, a decision of the Court of Justice of the European Union (CJEU Case C-497/10), reported at [2011] 1 FLR 1293. My comments are obiter as far as the instant case is concerned, as what I will point out has not affected my conclusions one way or the other: but still they may be of some and it may even be more than mere passing interest in relation to the quest for autonomous rationalisation of the concept of habitual residence, consistently across international instruments, now so central to so many cross-border cases affecting adults just as much as children.

72. The question I would like to pose is whether the use of the word 'permanent' and its cognate 'permanence' in the English-language version of the judgment published on the curia.europa.eu website is fair and accurate; or at least whether it should be understood as signifying a state of affairs which can be less than completely permanent.

73. I observe first that in the earlier CJEU decision where the test for habitual residence was described, *Re A (Area of Freedom, Security and Justice)* (C523/07), [2009] 2 FLR 1 the concept of permanence finds no place in the English text which (taken from the website) proceeds thus:

> [44] Therefore, the answer to the second question is that the concept of 'habitual residence' under Article 8(1) of the Regulation must be interpreted as meaning that it corresponds to 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.

74. But when the CJEU addressed the question again in *Mercredi*, although there was no express intention stated to depart from the *Re A* formulation referred to apparently approvingly at [47, 48 and 50], the English text for the relevant passage on the Europa website proceeds thus (with instances of the use of permanent/permanence highlighted by me):

> 44 … it must first be observed that the Regulation contains no definition of the concept of 'habitual residence'. It merely follows from the use of the adjective 'habitual' that the residence must have **a certain permanence or regularity.**
>
> 45 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 European Union, having regard to the context of the provision and the objective pursued by the legislation in question (see, inter alia, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C 98/07 *Nordania Finans and BG Factoring* [2008] ECR I 1281, paragraph 17; and *Case C 523/07 A* [2009] ECR I 2805, paragraph 34).
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> 46 Since the articles of the Regulation which refer to 'habitual residence' make no express reference to the law of the Member States for the purpose of determining the meaning and scope of that concept, its meaning and scope must be determined in the light of the context of the Regulation's provisions and the objective pursued by it, in particular the objective stated in recital 12 in the preamble to the Regulation, that the grounds of jurisdiction established in the Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity.
>
> 47 To ensure that the best interests of the child are given the utmost consideration, the Court has previously ruled that the concept of 'habitual residence' under Article 8(1) of the Regulation corresponds to the place which reflects some degree of integration by the child in a social and family environment. That place must be established by the national court, taking account of all the circumstances of fact specific to each individual case (see A, paragraph 44).
>
> 48 Among the tests which should be applied by the national court to establish the place where a child is habitually resident, particular mention should be made of the conditions and reasons for the child's stay on the territory of a Member State, and the child's nationality (see A, paragraph 44).
>
> 49 As the Court explained, moreover, in paragraph 38 of A, in order to determine where a child is habitually resident, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent.
>
> 50 In that context, the Court has stated that the intention of the person with **parental responsibility to settle permanently with the child in another Member State**,

manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence (see A, paragraph 40).

51 In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have **a certain duration which reflects an adequate degree of permanence**. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind **to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character**. Accordingly, the **duration of a stay can serve only as an indicator in the assessment of the permanence of the residence**, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case.

52 In the main proceedings, the child's age, it may be added, is liable to be of particular importance.

53 The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant.

54 As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.

55 That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the Court's case-law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant.

56 It follows from all of the foregoing that the answer to the first question is that the concept of 'habitual residence', for the purposes of Articles 8 and 10 of the Regulation, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case.

75. This is in marked contrast and, I suggest, to the terminology used in the official French-language version of the judgement, of which below are set out in full the same paragraphs, with the same passages emphasised:

> 44 … il y a lieu de constater, à titre liminaire, que le règlement ne comporte aucune définition de la notion de «résidence habituelle». L'utilisation de l'adjectif «habituelle» permet simplement de déduire que la résidence doit présenter **un certain caractère de stabilité ou de régularité**.
>
> 45 Selon une jurisprudence constante, il découle des exigences tant de l'application uniforme du droit de l'Union que du principe d'égalité que les termes d'une disposition du droit de l'Union qui ne comporte aucun renvoi exprès au droit des États membres pour déterminer son sens et sa portée doivent normalement trouver, dans toute l'Union européenne, une interprétation autonome et uniforme qui doit être recherchée en tenant compte du contexte de la disposition et de l'objectif poursuivi par la réglementation en cause (voir, notamment, arrêts du 18 janvier 1984, Ekro, 327/82, Rec. p. 107, point 11; du 6 mars 2008, Nordania Finans et BG Factoring, C-98/07, Rec. p. I-1281, point 17, ainsi que du 2 avril 2009, A, C-523/07, Rec. p. I-2805, point 34).
>
> 46 Les articles du règlement qui évoquent la notion de «résidence habituelle» ne comportant aucun renvoi exprès au droit des États membres pour déterminer le sens et la portée de ladite notion, cette détermination doit être effectuée au regard du contexte dans lequel s'inscrivent les dispositions du règlement et de l'objectif poursuivi par ce dernier, notamment celui qui ressort du douzième considérant du règlement, selon lequel les règles de compétence qu'il établit sont conçues en fonction de l'intérêt supérieur de l'enfant et, en particulier, du critère de proximité.
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> 47 Afin que cet intérêt supérieur de l'enfant soit respecté au mieux, la Cour a déjà jugé que la notion de «résidence habituelle», au sens de l'article 8, paragraphe 1, du règlement, correspond au lieu qui traduit une certaine intégration de l'enfant dans un environnement social et familial. Ce lieu doit être établi par la juridiction nationale en tenant compte de l'ensemble des circonstances de fait particulières de chaque cas d'espèce (voir arrêt A, précité, point 44).
>
> 48 Parmi les critères à la lumière desquels il appartient à la juridiction nationale d'établir le lieu de la résidence habituelle d'un enfant, il convient de relever notamment les conditions et les raisons du séjour de l'enfant sur le territoire d'un État membre, ainsi que la nationalité de celui-ci (voir arrêt A, précité, point 44).
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> 49 Comme la Cour l'a, par ailleurs, précisé au point 38 de l'arrêt A, précité, afin de déterminer la résidence habituelle d'un enfant, outre la présence physique de ce dernier dans un État membre, d'autres facteurs supplémentaires doivent faire apparaître que cette présence n'a nullement un caractère temporaire ou occasionnel.
>
> 50 Dans ce contexte, la Cour a souligné que l'intention du responsable parental de **s'établir avec l'enfant dans un autre État membre**, exprimée par certaines mesures tangibles telles que l'acquisition ou la location d'un logement dans l'État membre d'accueil, peut constituer un indice du transfert de la résidence habituelle (voir arrêt A, précité, point 40).

51 … il y a lieu de souligner, afin de distinguer la résidence habituelle d'une simple présence temporaire, que celle-ci doit en principe être d'une **certaine durée pour traduire une stabilité suffisante.** Cependant, le règlement ne prévoit pas de durée minimale. En effet, pour le transfert de la résidence habituelle dans l'État d'accueil, compte surtout la volonté de l'intéressé **d'y fixer, avec l'intention de lui conférer un caractère stable, le centre permanent ou habituel de ses intérêts**. Ainsi, **la durée d'un séjour ne saurait servir que d'indice dans le cadre de l'évaluation de la stabilité de la résidence**, cette évaluation devant être effectuée à la lumière de l'ensemble des circonstances de fait particulières du cas d'espèce.

52 Dans l'affaire au principal, l'âge de l'enfant est, de surcroît, susceptible de revêtir une importance particulière.

53 En effet, l'environnement social et familial de l'enfant, essentiel pour la détermination du lieu de sa résidence habituelle, est composé de différents facteurs variant en fonction de l'âge de l'enfant. Ainsi, les facteurs à prendre en considération dans le cas d'un enfant en âge scolaire diffèrent de ceux qu'il y a lieu de retenir s'agissant d'un mineur ayant terminé ses études ou encore de ceux qui sont pertinents en ce qui concerne un nourrisson.

54 En règle générale, l'environnement d'un enfant en bas âge est essentiellement un environnement familial, déterminé par la personne ou les personnes de référence avec lesquelles l'enfant vit, qui le gardent effectivement et prennent soin de lui.

55 Cela est vérifié a fortiori lorsque l'enfant concerné est un nourrisson. Celui-ci partage nécessairement l'environnement social et familial de l'entourage dont il dépend. Par conséquent, lorsque, comme dans l'affaire au principal, le nourrisson est effectivement gardé par sa mère, il y a lieu d'évaluer l'intégration de celle-ci dans son environnement social et familial. À cet égard, les critères énoncés par la jurisprudence de la Cour, tels que les raisons du déménagement de la mère de l'enfant dans un autre État membre, les connaissances linguistiques de cette dernière ou encore ses origines géographiques et familiales peuvent entrer en ligne de compte.

56 Il découle de tout ce qui précède qu'il convient de répondre à la première question que la notion de «résidence habituelle», au sens des articles 8 et 10 du règlement, doit être interprétée en ce sens que cette résidence correspond au lieu qui traduit une certaine intégration de l'enfant dans un environnement social et familial. À cette fin, et lorsque est en cause la situation d'un nourrisson qui séjourne avec sa mère depuis quelques jours seulement dans un État membre autre que celui de sa résidence habituelle, vers lequel il a été déplacé, doivent notamment être pris en considération, d'une part, la durée, la régularité, les conditions et les raisons du séjour sur le territoire de cet État membre et du déménagement de la mère dans ledit État, et, d'autre part, en raison notamment de l'âge de l'enfant, les origines géographiques et familiales de la mère ainsi que les rapports familiaux et sociaux entretenus par celle-ci et l'enfant dans le même État membre. Il appartient à la juridiction nationale d'établir la résidence habituelle de l'enfant en tenant compte de l'ensemble des circonstances de fait particulières de chaque cas d'espèce.

76. The cross-Channel shift can more starkly be seen if the relevant versions are juxtaposed, thus:

[44] un certain caractère de stabilité ou de régularité

a certain permanence or regularity

[50] s'établir avec l'enfant dans un autre État member

to settle permanently with the child in another Member State

[51] une certaine durée pour traduire une stabilité suffisante

a certain duration which reflects an adequate degree of permanence

and

> d'y fixer, avec l'intention de lui conférer un caractère stable, le centre permanent ou habituel de ses intérêts

to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character

and

> la durée d'un séjour ne saurait servir que d'indice dans le cadre de l'évaluation de la stabilité de la résidence

the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence

77. 'Stability 'has a quite different connotation from 'permanence'. 'To establish oneself somewhere with a child' is by no means necessarily the same as 'to settle permanently with the child

78. Moreover when one looks at what is described as the Ruling of the court (where in the French fashion the court 'dit pour droit', or pronounces what the law is) at the conclusion of the judgement one finds an English and a French text which, I suggest, are essentially more harmonious then would appear from the highlighted contrasts, precisely because permanence as a concept is absent from both versions:

> *La notion de «résidence habituelle», au sens des articles 8 et 10 du règlement (CE) n° 2201/2003 du Conseil, du 27 novembre 2003, relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le règlement (CE) n° 1347/2000, doit être interprétée en ce sens que cette résidence correspond au lieu qui traduit une certaine intégration de l'enfant dans un environnement social et familial. À cette fin, et lorsque est en cause la situation d'un nourrisson qui séjourne avec sa mère depuis quelques jours seulement dans un État membre autre que celui de sa résidence habituelle, vers lequel il a été déplacé, doivent notamment être pris en considération, d'une part, la durée, la régularité, les conditions et les raisons du séjour sur le territoire de cet État membre et du déménagement de la mère*

dans ledit État, et, d'autre part, en raison notamment de l'âge de l'enfant, les origines géographiques et familiales de la mère ainsi que les rapports familiaux et sociaux entretenus par celle-ci et l'enfant dans le même État membre. Il appartient à la juridiction nationale d'établir la résidence habituelle de l'enfant en tenant compte de l'ensemble des circonstances de fait particulières de chaque cas d'espèce.

… and …

The concept of 'habitual residence', for the purposes of Articles 8 and 10 of Council 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, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case.

79. I have invited attention to the French version first, because although the 'language of the case' is noted at the foot of each version to the English, the language of the judgement is French (as, I have to say, had seemed to me likely when I came across the apparent contradictions in the text). That would also explain why the German-language version looks even to my inexpert eye to have derived from the French, rather than an English, as its original.

80. I must thank Mr Setright for drawing to my attention what follows, which is copied from the curia.europa.eu website: when, on the page http://curia.europa.eu/juris/recherche.jsf?language=en&jur=C,T,F&td=ALL&parties=Mercredi 'Mercredi' is inserted, and the page is completed by, above and to the right of 'authentic language' ticking ***both*** the boxes ***'language of the case'*** and ***'language of the opinion'***, and with ***'English'*** inserted (by the use of the icon on the right side of the page); and when, with this done, 'search' is clicked, the site then goes to a new page, and when the icon on the right of the reference is clicked, on the bottom of new page: http://curia.europa.eu/juris/fiche.jsf?id=C%3B497%3B10%3BRP%3B1%3BP%3B1%3BC2010%2F0497%2FJ&pro=&lgrec=en&nat=&oqp=&dates=&lg=EN%252C%252Btrue%252Ctrue&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=ALL&pcs=O&avg=&mat=or&parties=Mercredi&jge=&for=&cid=1200751 the lower part of which is copied below, the following is found:

81. I appreciate that there have been (at least) two expressions of judicial unease about the use of 'permanence' in the context of determining habitual residence. Thus in *Re H-K (Habitual Residence)* [2011] EWCA Civ 1100, [2011] 2 FLR 436 Ward LJ at [17 and 18] cautioned against taking the use of 'permanent' in Mercredi too literally; and *Holman J in*

FVS v MGS (Habitual Residence) [2011] EWHC 3139 (Fam), [2012] 1 FLR 1184 at [46] suggested that 'the word "permanence" is not used by the Court of Justice of the European Union in the sense of "forever" or even necessarily "indefinite". The contrast is with temporary.' But now, I suggest, a very sound basis for downplaying (if not indeed for eliminating) the implications of permanence as an ingredient of habitual residence is reinforced upon the basis of internal analysis of the English-language judgement in the light of its derivation from a French-language original.

Lady Justice Arden

69. I agree.

Lord Justice Beatson

70. I also agree.