Izvirni znanstveni članek
UDK 341.94:343.433

Determination of the Child's Habitual Residence According to the Brussels II bis Regulation

M. SC. ILIJA RUMENOV,
Doctoral student at the Faculty of Law, University of Ljubljana and teaching assistant of Private International Law at the Faculty of Law "Iustinianus Primus", University ss Cyril and Methodius Skopje, Republic of Macedonia

I. "Child's habitual residence" in the Regulation Brussels II bis?

A. Jurisdictional criteria

The 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 (Brussels II bis)[1] applies to cross border cases between different Member States of the European Union. It covers two major family law areas: matrimonial relationship and parental responsibility. These two fields can be narrowed down to divorce, legal separation and marriage annulment (matrimonial cases) thus parental responsibility, which consists of a bigger subject matter. With respect to parental responsibility, the issues of child abduction and access rights are separately positioned within the Council Regulation and highlighted. In most cases, the main connecting factor, the main jurisdictional criteria, is the place where the child has his/her habitual residence. The latter is the main jurisdictional criteria for determining the forum in which parental responsibility is decided,[2] and is of great importance in child abduction cases[3]. Further, as a criterion

---

1 Official Journal L 338 of 23. 12. 2003.

2 Art. 8 Brussels II bis.

3 Art. 10 Brussels II bis.

it is of paramount importance in determining the continued jurisdiction of the child's former habitual residence[4] and also on the jurisdiction based on the child's presence.[5]

From this it can be seen, that the determination of the child's habitual residence is of great importance, because it fixates the jurisdiction to the court, which is most competent to hear the case, due to its proximity with the child.[6] The use of this criterion is considered to be particularly appropriate, because in practice it is essential that the authorities in the place where the child actually lives should be responsible for his/her physical welfare and be involved in determining his/her financial needs.[7]

B. Relationship between the Brussels II bis Regulation and the Hague Conventions

One specific problem of the European Union is the correlation and the coordination of legal sources that cover subjects that can be resolved under two or sometimes more international agreements and specific EU Regulations. These subject matters are specific because the Member States of the European Union are at the same time signatories to these international agreements and they are also bound by EU Regulations. This problem is resolved by the establishment of a "hierarchical correlation" between these legal sources.[8] One of these subject matters, that are regulated by a large number of international agreements and EU Regulations, is the position of the child in the determination of parental responsibilities in

---

4 Art. 9 Brussels II bis.

5 Art. 13 Brussels II bis.

6 Regulation Brussels II bis, Recital (12) "The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility."

7 Schuz Rhona, Habitual Residence of Children under the Hague Child Abduction Convention – theory and practice, 13 Child & Fam.L.Q. 2001, pg. 3 (Schuz, Habitual Residence of Children).

8 For the position of the EU law and the International agreements see more: K. Lenaerts and E. de Smijter, "The European Union as an actor under International Law", 19 Yearbook of European Law, 19 (1999-2000); Wessel A.R., The EU as a party to international agreements: shared competences, mixed responsibilities, Law and Practice of EU External Relations (Alan Dashwood and Marc Maresceau (eds), 2008); Govaere, I., Capiau, J., & Vermeersch, 'In-Between Seats: The Participation of the European Union in International Organizations', European Foreign Affairs Review, 9 (2), 155-187 (2004); Klamert M.& Maydell N., Lost in Exclusivity: Implied Non-exclusive External Competences in Community Law, European Foreign Affairs Review 13: 493–513, 2008; Ракић Б."Фрагментација Међународног права и европско право – на западу нешто ново", Анали Правног факултета у Београду, Година LVII, бр. 1/2009.

the cases that fall under the scope of the 1996 Hague Child Protection Convention[9] and the pathological aspect of the determination of parental responsibilities – child abduction, that fall under the scope of the 1980 Hague Child Abduction Convention.[10]

1980 Hague Child Abduction Convention

The state of the child's habitual residence is also the place where the child should be returned (promptly) in cases resolved under the 1980 Child Abduction Convention. This international agreement is closely connected with the Regulation Brussels II bis.

When the Council Regulation (EC) No 1347/2000 of 29 May 2000 on the jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children (Brussels II)[11] was drafted, there were two different views between the Member States regarding the future of international child abduction. The first view was to create EU rules for the return of children which would be applicable only to EU countries, and the other view considered that such an approach would undermine the Hague Abduction Convention, which by then was signed and ratified by 74 states.[12] The result was Article 37 of the Brussels II Regulation, by which precedence of the Regulation was determined over some international agreements.[13] The Hague Abduction Convention wasn't among these international agreements. It was tendentiously left out. The Regulation in itself referred to a conformal application of both instruments.[14] However this position was changed in Regulation Brussels II bis.

The relationship between the Regulation Brussels II bis and the 1980 Hague Abduction Convention is regulated in Article 60 of the Regulation, which provides for precedence of this EU instrument over enlisted international agreements, which include the Hague Abduction Convention. With this, supremacy is conferred to the Regulation over the Hague Abduction Convention. This ultimately leads to different outcomes of the return of

---

[9] The 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.

[10] The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[11] Official Journal L 160 of 30. 6. 2000.

[12] Schulz Andrea, The New Brussels II Regulation and the Hague Conventions of 1980 and 1996, International Family Law Journal (2004), pg. 23.

[13] See Article 37 Brussels II.

[14] Article 4 provides "The courts with jurisdiction within the meaning of Article 3 shall exercise their jurisdiction in conformity with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, and in particular Articles 3 and 16 thereof."

children.[15] This position however, is a starting point. Actually, the Regulation Brussels II bis adopts a compromise between the different positions of the Member States concerning this question. It actually "adopts" the Hague Abduction Convention for the needs of the EU Member States.[16] Instead of creating new rules for the return of abducted children that will be applicable in the EU, the rules of the Brussels II bis Regulation are founded on the basis of the Hague Abduction Convention with a task to strengthen the procedure for the return of abducted children. It remains in force between the Member States[17] however matters that are covered by the rules of the Brussels II bis Regulation have precedence over the rules of the Hague Abduction Convention. As for the rules not covered by the Regulation, the Convention rules apply. It can be said that both instruments are "complementary".[18]

This position was also affirmed in the Rinau case.[19] In the case it was affirmed that the 1980 Hague Convention was adopted in the interest of children and that the guiding principles of the Convention with respect to matrimonial matters and matters of parental responsibility, are also implemented in the Regulation.[20] Further, Advocate General Kokott in the opinion delivered on 29 January 2009 Case C-523/07, held the position, which was rendered in the Rinau case and stated that "Both provisions pursue the aim that abducted children should return immediately to the State in which they had their habitual residence before the unlawful removal. That coordination also makes a uniform understanding of the concept of habitual residence necessary."[21]

It can be concluded that the Regulation Brussels II bis adopts the guiding principles of the Hague Abduction Convention. This is especially affirmed in the continuity of the uniform understanding of the concept of habitual residence. In order to fully understand this concept, it is recommended to analyze the factual elements used in case law, necessary to establish the habitual residence of a child in a territory on the basis of the Hague Abduction Convention.

---

15 Ballesteros M. H., International Child Abduction in the European Union: The Solutions Incorporated by the Council Regulation, 34 Rev. Gen. 343 2004, op. cit., pg. 348.

16 Lamont Ruth, The EU: Protecting Children's Rights in Child Abduction, International Family Law Journal (2008), pg. 127.

17 Art. 62 Brussels II bis.

18 The new child abduction regime in the European Union: Symbiotic relationship or forced partnership?, Peter McEleavy, 17, J. Priv. Int'l. L, 2005, pg. 17.

19 Case C-195/08 PPU Rinau [2008] ECR I-0000.

20 Paragraphs 48, 49 and 62.

21 Opinion of Advocate General Kokott delivered on 29 January 2009, Case C-523/07, paragraph 30.

1996 Hague Child Protection Convention

The Brussels II bis Regulation and the 1996 Child Protection Convention are very closely connected. The Convention was the substantial basis for those parts of the Regulation that deal with parental responsibility.[22] It is in force among most of the Member States[23] and other non-EU states.[24] The Brussels II bis Regulation takes precedence over the 1996 Child Protection Convention, in the case that the child's habitual residence is in a Member State.[25] In another situation when a judgment is rendered in another Member State, the recognition and enforcement is conducted on the basis of the rules in the regulation, even if the child was habitually resident in a country that is a member of the 1996 Child Protection Convention but is not a Member State of the European Union.[26]

The main focus of the Brussels II bis Regulation is the determination of the jurisdiction, recognition and enforcement between the Member States of the EU. The 1996 Child Protection Convention however, contains conflict of law rules for the determination of the applicable law in the cases of child protection. Such rules are not provided in the Brussels II bis regulation. This means that between the Member States of the EU, the determination of the applicable law is still determined by the 1996 Convention, even if the jurisdiction is based on the Regulation.[27]

II. Defining "Habitual residence"

In legal theory there are several attempts to propose a definition and to explain this legal institute. Its main significance is that this legal institute is a modern one and is not burdened by several definitions. It is accepted that the determination of habitual residence is a matter of facts, rather than legal definitions.[28] In fact, one of the main reasons why this institute has its "glory" over the domicile, is that there is a need to avoid confusion, which has arisen due to an unclear understanding of the circumstances, which primarily contribute to the establishment

---

[22] European Commentaries on Private International Law: Brussels II bis Regulation, U. Magnus, P. Mankowski – 2007 – Sellier, European Law Publishers, pg. 430 (Magnus, Mankowski, Comentary on Brussels II bis Regulation).

[23] Except for Belgium and Italy which has signed it but still not ratified it. (last seen on 22. 9. 2013, http://www.hcch.net/index_en.php?act=conventions.status&cid=70).

[24] Albania, Australia, Ecuador, Monaco, Montenegro, Morocco, Russian Federation, Switzerland, Ukraine and Uruguay.

[25] Art. 61 (a) Brussels II bis.

[26] Art. 61 (b) Brussels II bis.

[27] Magnus, Mankowski, Comentary on Brussels II bis Regulation, pg. 432.

[28] The reporter of the 1980 Hague Abduction Convention didn't refer to this concept since it was 'well established concept in the Hague Conference' and it is 'a question of pure fact'. See Perez-Vera report, Actes et Documents de la Quatorzieme Session, October 1980, Vol III par. 66, pg. 445 (Perez Vera Report).

or loss of domicile.[29] As one commentary explains, "*this has been a matter of deliberate policy, the aim being to leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems.*"[30]

On the other hand there is a certain paradox, in all of the cases in which there is a need to determine the habitual residence (especially in common law countries), as they tend to define the subject, as well as create a list of factors or circumstances which will quantify to amount to the creation or loss of habitual residence in a certain territory.[31] These circumstances, together with the absence of definitions in the Hague Conventions create space for a different understanding of habitual residence before the courts of different legal systems. It is to the law of the forum to determine, in each factual situation, whether the parents or child/children have habitual residence. The vast number of judicial decisions allows for the proper understanding and the correct determination of habitual residence.

Legal theory and practice together take the same approach. For example, according to *Cheshire, North u Fawcett* there is no certain definition, and in support of such contention it refers to the court decision rendered by Lord Scarman in the case *Barnet London Borough Council, ex p Shah*[32] that holds that there is no difference in the principle between the traditional concept of ordinary residence and the more contemporary concept of habitual residence and that they both refer to "*a person's abode in a particular place or country which he has adopted voluntary and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.*"[33]

A similar approach was taken in an ECJ case, *Swaddling v. Adjudication Officer,*[34] where the Court stated that the Member State in which the person resides is "*the State in which the persons concerned habitually reside and where the habitual center of their interests is to be found*".[35] In that context, due consideration should be given in particular to the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence;

---

29 Schuz, Habitual Residence of Children, op. cit., pg. 2.

30 J. H. C. Morris, Dicey and Morris on the Conflict of Laws (10th ed. 1980), pg. 144.

31 Schuz, Rhona, Policy Considerations in Determining the Habitual Residence of a Child and the Relevance of Context. Journal of Transnational Law and Policy, Vol. 11-1, pg. 4-5.

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

33 Cheshire, J. M., Sir Peter North and Fawcett J. J., Private International Law, Oxford University Press, 2008, pg. 185.

34 Case C-90/97 [1999], ECR I-1075.

35 Case C-90/97 [1999], ECR I-1099.

the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances.[36]

In another statement given by Lord Slynn in an opinion of the House of Lords, regarding the case *Nessa v Chief Adjudication Officer,*[37] it was held that there is no actual definition of habitual residence and that the fact finding approach must be applied. The factors, among others, which have to be taken into account in determining habitual residence are steps like bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, "durable ties" with the country of residence or intended residence.[38]

Perhaps the most influential definition of the term "habitual residence" comes from the English case of In re Bates, No. CA 122-89, High Court of Justice, Family Div l Ct. Royal Courts of Justice, United Kingdom (1989). In this case, at first the court found that: "The notion of habitual residence is free from technical rules, which can produce rigidity and inconsistencies as between legal systems ... the facts and the circumstances of each case should continue to be assessed without resort to presumptions or presuppositions ... All that is necessary is that the purpose of living where one does have a sufficient degree of continuity to be properly described as settled." Then it gave the following definition: *"[T]here must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled*."

The US approach is similar to the British. In the understanding of the term habitual residence, the US legal system has a more practical approach. The US approach opposes giving the term "habitual residence" a strict definition and is in favour of instructing the court to interpret the expression "habitual residence" according to "the ordinary and natural meaning of the two words it contains [as] a question of fact to be determined by references to all the circumstances of any particular case."[39]

---

36 Ibid.

37 [1999] 1 WLR 1937 (HL).

38 Stone P., The Concept of Habitual Residence in Private International Law, Anglo-American Law Review 2000, pg. 347.

39 Mozes v. Mozes 239 F. 3d at 1071.

The term should be interpreted from the child's perspective[40] and in the context of his family and social environment in which his or her life has developed.[41] The main factors that predetermine the habitual residence are based on cultural, educational and social experiences. The place of the habitual residence shouldn't be ordinarily determined by the expectations of either parent or by future plans.[42]

In Feder v. Evans-Feder, (3rd. Cir. 1995) 63 F.3d 217, the court stated its definition of habitual residence as follows:

"[W]e believe that a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there."[43]

The European Union avoids proposing a definition of habitual residence in its legal sources. The predominant understanding of habitual residence comes from the Explanatory report concerning Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters prepared by Professor Alegria Borras (OJ C 221, 16. 7. 1998). This definition is in compliance with the above mentioned definitions given on numerous occasions by the European Court of Justice. It states that the habitual residence is "*the place where the person had established, on a fixed basis, his permanent or habitual center of interests, with all the relevant facts being taken into account for the purpose of determining such residence*".[44]

National definitions

Several states have adopted a definition of habitual residence in their national Private International Law Acts.

The Swiss Private International law act[45] from 1987 holds a simple definition of habitual residence. The habitual residence of a natural person is the place where that person *"Has his*

---

40 Friedrich v. Friedrich 983 F.2d 1396, 1401 (6th Cir 1993), 78 F.3d 1060 (6th Cir 1996).

41 Perez Vera Report, par. 11, pg. 428.

42 Janakis-Kostun v. Janakis, 6 S.W. #d 843, 847-848 (Ky. App. 1999).

43 Rohna Schuz, Policy considerations in Determining the Habitual Residence, op. cit., pg. 5.

44 Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (OJ C 221, 16. 7. 1998) prepared by Dr ALEGRÍA BORRÁS, pg. C 221/38, paragraph 32.

45 Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987 – Loi féderale sur le droit international privé (LDIP) du 18 décembre 1987.

place of habitual residence in the State in which he lives for an extended period of time, even if this time period is limited from the outset".[46]

In its Code of Private International Law[47] Belgium has adopted a definition on habitual residence of natural persons. It provides that habitual residence is *"the place where a natural person has established his main residence, even in the absence of registration and independent of a residence or establishment permit; in order to determine this place, the circumstances of personal or professional nature that show durable connections with that place or indicate the will to create such connections are taken into account."*[48]

A similar definition is given in the Bulgarian PIL Code.[49] For the purpose of the Code "*habitual residence of a natural person" shall denote the place where the said person has settled predominantly to live without this being related to a need of registration or authorization of residence or settlement. For determination of this place, special regard must be had to circumstances of personal or professional nature arising from sustained connections of the person with the said place or from the intention of the said person to establish such connections."*[50]

The PIL Act of the Republic of Macedonia[51] adopted a definition for habitual residence, but it is only applicable in the determination of the applicable law in non-contractual obligations. *"For the purposes of this Law the habitual residence for a natural person is the place where the person has established a permanent center of his/her activities, and it is not necessary to be filled any documents associated with registering or obtaining a residence permit from the competent national authorities. In determining the habitual residence, especially should be considered the circumstances of a personal or professional character, arising from permanent connections with the place or intention to make such connections. In every case, the natural person has his/her habitual residence in one country, if he/her stays in that country longer that 6 mounts."*[52]

---

46 Article 20(1)(b).

47 Loi du 16 Juillet 2004 portant le Code de droite international prive. Moniteur Belge 27 July 2004 ed 1 57344-57374 (English translation available on line by Clijmans and Torremans http://www.ipr.be/data/B.WbIPR%5BEN%5D.pdf).

48 Article 4 § 2.

49 Кодекс На Международното Частно Право, Обн. ДВ. бр.42 от 17 Май 2005г., изм. ДВ. бр.59 от 20 Юли 2007г., изм. ДВ. бр.47 от 23 Юни 2009г (English translation http://solicitorbulgaria.com/index.php/bulgarian-private-international-law-code).

50 Article 48 (7).

51 "Official Gazette of the Republic of Macedonia" (Службен Весник на РМ) no. 87/2007, 156/2010.

52 Article 12-a.

In its draft of the PIL Code,[53] Montenegro envisaged a definition of habitual residence. *"For the purpose of this law the habitual residence of natural person is the place in which the person has settled predominantly without this being related to a need of registration or authorization of residence or settlement and without taking into account if the residence is temporally predetermined. In determining the habitual residence, especially should be considered the circumstances of a personal or professional character, arising from permanent connections with the place or intention to make such connections."*[54]

In its draft of the PIL Code,[55] Serbia also envisaged a definition of the habitual residence. *"1. Habitual residence is the place in which the person lives for an extended period of time, with or without the intention to settle there and without this being related to a need of registration or authorization of residence or settlement or obtaining a residence permit.*

2. In determining the habitual residence, as referred in paragraph 1, especially should be considered the circumstances of a personal or professional character, referring to permanent connections with the place or intention to make such connections."[56]

It can be concluded that the favorable aspect of the application of habitual residence as a jurisdictional criteria in family matters, is its adaptability to the needs of a mobile society, a characteristic that is absent in the criteria of domicile or nationality.[57] However, to properly apply it in practice, it needs consistent application in cross border cases, because its incorrect determination could lead to parallel litigations, and essentially to legal uncertainty.

III. Determination of the "Child's habitual residence"

A. Physical presence of the child

For a person (whether it is an adult, or a child) to establish habitual residence in a territory, he/she must be physically present in that territory. This obvious preposition in itself however, hides some disputed questions, such as: does the residence have to be lawful? When is the moment when the residence transforms into habitual residence? Can the residence be interrupted?

---

[53] The Draft can be found on the official page of the Government of Montenegro http://www.gov.me/ResourceManager/FileDownload.aspx?rId=92221&rType=2.

[54] Article 12.

[55] The Draft version can be downloaded from this page http://www.pravnik.rs/najava-zakona/zakon-o-medunarodnom-privatnom-pravu.aspx.

[56] Art. 4.

[57] North P. M. and Fawcett J. J., Cheshire and North's Private International Law, 12 edn. London, 1992, 166, 167.

It is undisputed that the child (or adult) must reside in a territory to create habitual residence. The first question, especially important to child abduction cases, is whether the person that resides in a territory, does this lawfully? For this question, the assumption is that the child will reside with his parent/parents.[58] The lawfulness of the habitual residence has two positions. The first is the premise that habitual residence is a factual concept[59] and the second, is that the unlawful change of habitual residence cannot lead to an alteration of the jurisdiction, because it will encourage the wrongful removal and retention of children.[60]

There is a certain specific position regarding the determination of habitual residence of children: there must be free will in the creation of habitual residence. This situation was underlined in cases of child abduction. During the drafting of the Child Abduction Convention there was uniformity regarding this question. It was accepted that unlawful removal or retention of a child cannot lead to an alteration of its habitual residence.[61] Any other solution would grant legitimacy to the unlawful act of the abductor and would leave the Convention without effect. This basic premise is supported by one pre-Convention decision in which Lord Denning stated *"I do not see that a child's ordinary residence, so found, can be changed by kidnapping him and taking him from his home, even if one of his parents is the kidnaper"*.[62] This was based on the understanding that habitual residence can be obtained only voluntarily and it cannot be a result of an unlawful act.[63] It was rationalized that an individual cannot be forced against his will, to adopt the law of the forum as his personal law.[64]

The position of this premise has shifted towards a more liberal position, that there must be some moment in time that will transform involuntary residence in a certain territory to habitual residence. It wouldn't be logical for example not to acquire habitual residence although the person resides in that territory for years.[65] This newer standpoint by which an involuntary stay in a territory over a longer period of time can be qualified as habitual residence, is backed up in a decision rendered by Lord Justice Clerck Ross in the case Cameron v. Cameron,[66] where it was originally concluded that *"Even though Robison Crusoe had no opportunity to escape, we*

---

58 Although older children can form an own habitual residence. On this see more Schuz, Habitual Residence of Children, op. cit., pg. 17.

59 Perez Vera, par. 66, pg. 445.

60 Perez Vera, par. 11, pg. 428.

61 Ibid.

62 Re P. (G.E.) (An Infant) [1965] Ch. 586 (cited by Beaumont Paul, McElvay Peter, The Hague Convention on International Child Abduction; Oxford University Press 1999, pg. 94).

63 Beaumont, McElvay, op. cit., pg. 94.

64 Loc.cit.

65 Loc.cit.

66 1996 SC 17, pg. 20.

are inclined to think that he had his habitual residence on the desert island. Likewise, in recent years, Nelson Mandela and other political detainees on Robben Island in South Africa, who were on the island for prolonged periods, in our opinion had their habitual residence there although they were detained or imprisoned".[67]

To acquire habitual residence, a person must reside there for an appreciable period of time.[68] However, that does not mean permanent residence in that territory. Temporary absence, such as vacation, educational activities, or a try by the spouses for reconciliation wouldn't lead to loss of habitual residence in a territory.[69] On the other hand,, the migrant loses his habitual residence from the moment he leaves the country for a period of time (sometimes of longer nature), if he did not intend to return.[70] The essence of the habitual residence concept is that the person creates significant ties with that country and acquires the right to settle his legal matters in that country, in accordance with that legal system.[71]

B. Appreciable period of time

As it was stated above,[72] the basic doctrine of habitual residence is that it is a matter of facts not of legal terms. This assumption leads to a larger space of subjectivity by the courts in the determination of habitual residence. This is particularly fertile ground for different interpretation; basically because one of the main criteria for the determination of habitual residence is the intent of the person to stay in a territory. To correct such a position, very important criteria, that makes the intent more "real" is the time period that a person resides in the territory. It is logical to conclude that the longer the person resides in a territory, the greater the significance of ties it creates with that state and with its legal system.

In the cases of the determination of the child's habitual residence, the factual connections with the territory have greater importance than the time period of residence, but at the same time habitual residence is no longer a simple factual concept. With the complexity of the

---

67 See also Beaumont, McElvay, op. cit., pg. 95.

68 Stone P., The concept of Habitual residence , op. cit., pg. 350.

69 Cheshire and others, 2008, op. cit., pg. 186.

70 Stone P., The concept of Habitual residence , op. cit., pg. 350.

71 Lord Brandon has discussed the distinction between abandoning a prior habitual residence and acquiring a new one: [T]here 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 habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. C v S (minor: abduction: illegitimate child), [1990] 2 All E.R. at 965.

72 Supra, pg. 6.

individual's everyday connections with the environment. its application varies depending on the legal context in which it is utilized, and on the degree of connections regarded as desirable. For the concept to retain its factual emphasis, a period of actual residence before habitual residence is established, should be required. This is especially important in relation to children.[73]

What is important to the court, are the ties that the child is in the process of building in the new social environment (language, culture, age, etc.) These ties become more persistent, more fundamental with the presence of the child in a territory over an appreciable period of time. There is a great difference however, between states with respect to the time period that is considered sufficient to create habitual residence in a territory. Judicial practice of the USA, Australia and New Zealand accepts that **six months** or more is enough to determine a habitual residence in a territory.[74] In Scotland, although there is a difference in the determination of the habitual residence of the child,[75] Lord Justice Clerk Ross made an interesting conclusion, stating that "There is no minimum period which is necessary in order to establish the acquisition of a new habitual residence …"[76]. In this case, taking into consideration the circumstances (school, participation in local events, registered medical care etc.), **three months** was accepted as sufficient.[77] In England this period is shorter – in one case this period was two months[78] – although judicial practice argues that a shorter period of time could suffice to create habitual residence.[79]

Regarding the determination of the child's habitual residence two things have to be kept in mind. Firstly, the *"habituality"* of the residence. For a child to create a tie with a state and its legal system, this connection must be a real and active one.[80] The activeness must be determined by the factual situations which arose out of the life that the child is living in that state. The other alternative, is to make the habitual residence more technical and similar to the domicile. Only a precise determination of "real" connections with a state, distinguishes habitual residence from that of a domicile. Secondly, even if the "*habituality*" can be shortened

---

73 Lamont, Ruth, Habitual Residence and Brussels II bis: Developing Concepts for European Private International Family Law, Journal of Private International Law 2007, pg. 268.

74 Beaumont, McElvay, op. cit., pg. 106.

75 See Dickson v. Dickson 1990 SCLR 692 at 730; Moran v. Moran 1997 SLT 541 at 543, Cameron v. Cameron 1996 SC 17 and Singh v. Singh 1998 SLT 1084.

76 Cameron v. Cameron 1996 SC 17 at 24.

77 Beaumont, McElvay, op. cit., pg. 107.

78 V v. B. (A Minor)(Abduction) [1991] 1 FLR 266.

79 Re F [1992] 1 FLR 548 (CA) in this case habitual residence was determined after three months but nevertheless L. J. Butler-Sloss determined that even a month would suffice.

80 Beaumont, McElvay, op. cit., pg. 108.

for adults who are capable of making independent decisions, this wouldn't be appropriate for children because they cannot. Children have to adapt to the surroundings.

C. Intention for residence

Manifested intention for a longer residence in a place, is one that is not of a temporary nature. This intent however should be accompanied with some evidence. Lack of evidence for the intent of a person to reside in a territory will allow subjectivity to enter a delicate situation (as parental responsibility and the child abduction cases represent). Some material proof of ones intent to reside a longer period of time in a territory will mean an objective manifestation of his actions. As for example, in a Scottish case the intent for a longer residence in a territory was the consent to move their children with their father in France.[81] In another case, the fact that the father had taken an application for permanent residence in Australia and applied for a work permit, as well as the fact that they had packed all of their belongings was enough evidence for manifested intent for a longer residence in Australia.[82]

For the domicile, *animus simper vivendi* is required, or the intention of the person to reside there indefinitely – as for habitual residence, such requirement is unnecessary.[83] The "intent" in habitual residence is much weaker than the one at domicile. There is no need for the person to prove that he/she wants to reside there permanently or indefinitely.[84] It is possible that the person's intent is to reside there for a limited period of time, such as for employment for a period of 6 months, one year or for example army service abroad. As it was stated by Lord Scarman "The purpose may be one or there may be several. It may be specific or general. All the law requires is that there is [sic] a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."[85] However, the intention must stand out as it is stated in one case: *"A settled purpose is not something to be searched for under a microscope. If it is there it will stand out clearly as a matter of general impression."*[86]

---

81 Cameron v. Cameron 1996 SC 17.

82 Re.F . (Minors) (Child Abduction) [1992] 1 FLR 548.

83 Varadi T., Bordaš B., Knezević G., Pavić V., Međunarodno privatno pravo, Beograd, 2007, p. 274.

84 As can be seen from the national definitions, most of them distinguish the habitual residence from the administrative procedures for obtaining residence permit.

85 Shah, [1983] 1 All E. R. at 235.

86 Re. B. (Minors) (Child Abduction) (No2) [1993] 1 FLR 993 at 998.

So whose intention should the judges consider when determining the habitual residence of the child? Should the courts in determining the habitual residence have a more parent-centered or child-centered approach? There is no uniformity regarding this question. There are three different standpoints regarding this question. The first is the child centered approach, the second is the parent-centered approach and the last is the combined child's connection/parental intention approach in determining the intent.

Child-centered approach

The first approach focuses on the child and its connections with the environment. It has been accepted in the jurisprudence of the United States Court of Appeals 6th Circuit,[87] Canada in the Province of Quebec,[88] Germany,[89] New Zealand[90] and Switzerland.[91] It was primarily established in the *Friedrich v. Friedrich* case which was the first United States Court of Appeals case to consider the meaning of "habitual residence" under the Hague Convention. This case provided for five principles, which the court should weigh when determining "habitual residence". First, habitual residence should not be determined through the "technical" rules governing legal residence or common law domicile. Instead, courts should look closely at "[t]he facts and circumstances of each case (quoting In Re Bates, No. CA 122.89, High Court of Justice, Family Div'n Ct. Royal Court of Justice, United Kingdom (1989)). Second, because the Hague Convention is concerned with the habitual residence of the child, the court should consider only the child's experience in determining habitual residence. Third, this inquiry should focus exclusively on the child's past experience, future plans of the parents being irrelevant. Fourth, a person can have only one habitual residence. Finally, child's habitual residence is not determined by the nationality of the child's primary care-giver. Only *"a change in geography and the passage of time"* may combine to establish a new habitual residence.[92]

This case was the basis for further developments of the child centered approach, which was further developed as a reaction towards the parent-centered approach in determining the child's habitual residence.[93] It was based on the assumptions that the Hague Convention is intended to prevent a case where "the child is taken out of the family and social environment

---

87 Friedrich v. Friedrich, 983 F.2d 1396, (6th Cir. 1993); Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007) and Villalta v. Massie, No. 4:99cv312-RH (N. D. Fla. Oct. 27, 1999).

88 Droit de la famille 3713, Cour d'appel de Montréal, 8 septembre 2000, No 500-09-010031-003.

89 2 UF 115/02; 2 BvR 1206/98, Bundesverfassungsgericht (Federal Constitutional Court of Germany), 29 October 1998.

90 S. K. v. K. P. [2005] 3 NZLR 590.

91 5P.367/2005/ast, Bundesgericht, II. Zivilabteilung (Tribunal Fédéral, 2ème Chambre Civile).

92 Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993), III A.

93 Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007).

in which its life has developed"[94] and parental reservations of the parent about the intent to stay in a different country[95] "… turns the Hague Convention on its head".[96] Second, the consideration of the subjective intentions of the parents, empowers a future abductor to lay the foundation for abduction, by expressing reservations over an upcoming move. This is also inconsistent with the Convention's goal of "deter[ring] parents from crossing borders in search of a more sympathetic court."[97] With this, the abducting parent is given an advantage, and further complicates the return of the abducted child and it is opposite to the objectives of The Hague Convention to "secure the prompt return of children wrongfully removed".[98] Finally, the intent of the Child Abduction Convention is to protect the child's best interest and this should be interpreted in light of the "general principle ... that 'children must no longer be regarded as parents' property, but must be recognised [sic] as individuals with their own rights and needs."[99] This general principle is best given effect by a holding which honors the child's perception of where home is, rather than one which subordinates the child's experience to their parents' subjective desires.[100]

The court in determining the child's habitual residence can assert that a child acquires a new habitual residence when, focusing exclusively on the child's experience "… it is present in a new country long enough to allow acclimatization, and that presence has a degree of settled purpose."[101] To have the whole picture the Friedrich principles should be applied, but also the factual circumstances which the court must consider in determining whether or not a child's stay in a new country meets the tests of "acclimatization" and "settled purpose." These tests as in the case Karkkainen v. Kovalchuk, 445 F.3d 280 (3d Cir. 2006) can be "academic activities", "social engagements," "participation in sports programs and excursions," and "meaningful connections with the people and places".[102]All these circumstances focus on the child, not the parent's future plans or intentions. Also, focusing on the child's experience, and not the parents' subjective desires, best serves the main objectives of the Hague Abduction Convention and the protection of the best interest of the child, which in the process of determining the parental responsibilities between the parents is often forgotten.

---

94 Determination of the child's habitual residence according to the Brussels II bis RegulationPerez Vera Report, par. 12, pg. 428.

95 Ruiz v. Tenorio, 392 F.3d 1247, 1253 (11th Cir. 2004).

96 Robert v. Tesson, 507 F.3d 981, pg. 9.

97 Friedrich II, 78 F.3d at 1064.

98 Article 1 of the Hague Abduction Convention.

99 Perez Vera Report, par. 19, pg. 430.

100 Robert v. Tesson, 507 F.3d 981, pg. 9.

101 Ibid., pg. 12.

102 Karkkainen v. Kovalchuk, 445 F.3d at 293–294.

Parent-centered approach

This approach was highly influenced by the United States Court of Appeals 9th Circuit case Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001). This case starts from the premise that a person can have only one habitual residence[103] and that "…the first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind."[104] In this case the Court reached a conclusion that "where children have not attained an age and degree of maturity at which it is appropriate to take account of their views the relevant settled intention is that of the person or persons entitled to fix their place of residence."[105] The Court also left the possibility that "… given enough time and positive experience, a child's life may become so firmly embedded in the new country as to make it habitually resident even though there be lingering parental intentions to the contrary."[106] However, in the cases where both parents have the right to fix the child's place of residence and where they are not in agreement on that question, there is a lack of the type of settled intention, which enables habitual residence to be changed quickly. Accordingly it will take a considerable period of time for a child to acquire a new habitual residence after a wrongful removal.[107]

With this approach, the main goal is to discourage the abductions by tying the change of the habitual residence with the intent of the both parents. The function of a court applying the Convention is not to determine whether a child is happy where it currently is, but whether one parent is seeking unilaterally to alter the status quo with regard to the primary locus of the child's life.[108] The court reached a conclusion that "Children can be remarkably adaptable and form intense attachments even in short periods of time – yet this does not necessarily mean that the child expects or intends those relationships to be long-lived. It is quite possible to participate in all the activities of daily life while still retaining awareness that one has another life to go back to. In such instances one may be "acclimatized" in the sense of being well-adjusted in one's present environment, yet not regard that environment as one's habitual residence."[109, 110]

---

[103] Although it recognizes that there may be rare exceptions in split habitual residence between two territories as in Johnson v. Johnson, 493 S.E.2d 668, 669 (Va. Ct. App. 1997).

[104] Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001) IV A.

[105] Ibid. IV B.

[106] Ibid. IV C.

[107] Ibid.

[108] Ibid.

[109] Ibid.

[110] In another Case Holder v. Holder, 392 F.3d 1009 (9th Cir 2004) reaching a similar conclusion the Court had stated: "…we emphasize that cultural attachments are not the *sine qua non*e of a habitual residence determination: Attending Oktoberfest does not make one a habitual resident of Germany. Conversely, a child whose parents intended to resettle in the United States and who spends a decade living in San Francisco's Chinatown would undeniably

The approach taken in the Mozes case is criticized, because it can lead to radical situations. For example in Ruiz v. Tenorio, 392 F.3d 1247, 1253 (11th Cir. 2004) the habitual residence was retained in the USA, although a time period of 32 mounts had elapsed,[111] visiting the United States only twice. A number of objective facts pointed towards acclimatization in Mexico: the family had moved there, they brought nearly all of their possessions with them to Mexico, the father had undertaken employment, a new house was being built for them and the sojourn was of considerable length, the children had enrolled in Mexican school and played with Mexican friends. The Court based its decision on the intent of the parents, saying that the parents "never had a shared intention to abandon the prior United States habitual residence and to make Mexico the habitual residence of their children". The Court also considered the following facts: the mother retained an American bank account, credit card, had mail forwarded to the United States, transferred her nursing license to Florida, and the father briefly searched for an American job on the internet. In the end three years of living in a Mexican home and attending a Mexican school were outweighed by the subjective intentions of the children's parents.

Combined child's connection/parental intention approach

This approach is a compromise between the intent of the parent and of the child and combines them both. First it determines the child's habitual residence on the basis of the place where he or she has been physically present for an amount of time sufficient for acclimatization and in which he/she has shown a "degree of settled purpose" from the child's perspective. Second in the determination whether any particular place satisfies this standard –, during the analysis the focus is on the child and child's circumstances in that place, but also on the parents' presence, having in mind the shared intentions regarding their child's presence there.[112] This approach tries to have a more realistic methodology, focusing on the settled purpose from a child perspective, but still taking into account the intent of the parents. In these cases however, the highlight is given to the child.[113]

---

be habitually resident in the United States even if she had never watched a baseball game or had a slice of apple pie. Indeed, if cultural ties were held paramount, then countless expatriate children around the globe would already have satisfied a significant component of the requirements for becoming habitual residents of the United States based on an affinity for McDonalds, Mickey Mouse, and Michael Jordan. Therefore, our conclusion that the H. children were not habitual residents of Germany is not driven by the fact that they did not, to quote J., "wear liederhosen."

111 In another case Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045 (E. D. Wash. 2001) the time period was 27 months spent in Greece.

112 Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995).

113 Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995); Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003); Karkkainen v. Kovalchuk, 445 F.3d 280 (3rd Cir. 2006).

Although the primary question is the child's whereabouts during a certain period of time,[114] the main focus is the settled purpose from a child's perspective. Settled intention from a child's perspective means that this approach considers a child's contacts and experience in its surroundings, focusing on whether she "develop[ed] a certain routine and acquire[d] a sense of environmental normalcy" by "form[ing] meaningful connections with the people and places [she] encountered" in a country prior to the retention date.[115] In most of the cases the children are well acclimatized in their surroundings, attending preschool and enrolling in kindergarten,[116] enrolling in school, preparatory academic work or photography classes.[117]

The view of the parents is significant because "the child's knowledge of these intentions is likely to color its attitude to the contacts it is making".[118] This relates to the "settled intent from a child's perspective" because it is a significant part of forming a perspective of their habitual residence. This means that in situations, including the family's change in geography along with their personal possessions and pets, the passage of time, the family abandoning its prior residence and selling the house, the application for and securing of benefits from the State,[119] or buying a house and renovation work, seeking of employment, and plans for immediate and long term schooling[120] reasonably assures the children that this will be their habitual residence for some period.

The proportion of the child aspect and the parent aspect in these cases is very hard to propose, because 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.[121] However, some distinction is drawn between the situation of very young children, where particular weight was placed on parental intention,[122] and that of older children where the impact of parental intention was more limited.[123]

---

114 Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003).

115 Ibid.

116 Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995).

117 Karkkainen v. Kovalchuk, 445 F.3d 280 (3rd Cir. 2006), pg. 25.

118 Ibid.

119 Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003).

120 Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995).

121 Karkkainen v. Kovalchuk, 445 F.3d 280 (3rd Cir. 2006), pg. 17.

122 Baxter v. Baxter 423 F.3d 363 (3rd Cir. 2005) [INCADAT cite: HC/E/USf 808].

123 Karkkainen v. Kovalchuk, 445 F.3d 280 (3rd Cir. 2006).

IV. Practice of the ECJ

A. A (Case C-523/07)(2009) ECR I-2805

In this judgment of 2. 4. 2009, the European Court of Justice referred to the problem of "habitual residence". In December 2001, the children C, D and E settled in Sweden accompanied by their mother, Ms A, and their stepfather, Mr F. Previously, D and E had been taken into care by municipality X in Finland. The reason for their being taken into care was their stepfather's violence, but that measure was subsequently discontinued. In the summer of 2005, the family left Sweden to spend the holidays in Finland. They stayed on Finnish territory, living in caravans, on various campsites, and the children did not go to school. On 30 October 2005, the family applied to the social services department of the Finnish municipality Y for social housing. By decisions of the Welfare Committee of 16 November 2005, adopted on the basis of Law 683/1983, the children C, D and E were taken into immediate care in Finland and placed in a foster-family on the ground that they had been abandoned. Ms A and Mr F applied for the decisions relating to the urgent taking into care to be quashed. By decisions of 15 December 2005, the Welfare Committee rejected the application and, under Paragraph 16 of Law 683/1983, took the children C, D and E into care and ordered them to be placed in a childcare unit. Ms A brought an action before the courts, seeking to have those decisions quashed, and requested that her children should be returned to her custody. The courts dismissed the action and upheld the contested decisions. Ms A lodged an appeal against that decision before the Supreme Administrative Court (Finland), alleging that the Finnish authorities lacked competence. In that connection, Ms A stated that the children C, D and E had, since 2 April 2007, been Swedish nationals and that their permanent residence had for a long time been in Sweden. Therefore, the case fell within the jurisdiction of the Swedish courts. The Supreme Administrative Court decided to stay the proceedings and to refer some questions to the European Court for a preliminary ruling. The second question that was proposed stated:

"How is the concept of habitual residence in Article 8(1) of the regulation, like the associated Article 13(1), to be interpreted in Community law, bearing in mind in particular the situation in which a child has a permanent residence in one Member State but is staying in another Member State, carrying on a peripatetic life there?"

The European Court of Justice reached the following conclusion: The concept of 'habitual residence' under Article 8(1) of Regulation No 2201/2003 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.[124] To that end, in particular the duration, regularity, conditions and

[124] This position was also reaffirmed in the *Barbara Mercerdi v. Richard Chaffe* (Case C-497/10 PPU), para. 47.

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.[125]

To reach such conclusion first, the European Court of Justice (basing its assumptions on the differences between the Article 8(1) and Article 13 of the Brussels II bis Regulation) affirmed that mere physical presence in a Member State was not sufficient to establish the habitual residence of the child.[126] Following that assumption the ECJ reached for "… need for uniform application of Community law and from the principle of equality" and that the "terms of a provision of Community 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 autonomous and uniform interpretation throughout the European Community". After reaching for uniform application of Community law and the principle of autonomous and uniform interpretation the ECJ concluded that *"… it is for the national court to establish the place of the children's habitual residence"*[127] having in mind the guidelines that are given by the ECJ.

The habitual residence should be established on the basis of all the circumstances specific to each individual case,[128] but a distinction was made with the case-law of the Court relating to the concept of habitual residence in other areas of European Union law and that this could not be directly transposed in the context of the assessment of the habitual residence of children for the purposes of Article 8(1) of the Regulation.[129]

The child's habitual residence should correspond with the place where the child has some degree of integration in a social and family environment.[130] This position was further elaborated by several general indicators such as duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State. Also, several specific indicators such as the child's nationality, the place and conditions of attendance at school,

---

125 Judgment of the Court (Third Chamber) of 2 April 2009 (reference for a preliminary ruling from the Korkein hallinto-oikeus (Finland)) — proceedings brought by A (Case C-523/07), Official Journal of the European Union C 141/14-15 of 20. 6. 2009.

126 A (Case C-523/07) (2009) ECR I-2805, para. 33.

127 A (Case C-523/07) (2009) ECR I-2805, para. 42.

128 A (Case C-523/07) (2009) ECR I-2805, para. 37.

129 A (Case C-523/07) (2009) ECR I-2805, para. 36.

130 In addition to the physical presence of the child in a Member State, other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment. A (Case C-523/07) (2009) ECR I-2805, para. 38.

linguistic knowledge and the family and social relationships of the child in that State must be taken into account.[131] In the end, the judgment of the ECJ directly referred to the Opinion of the Advocate General and broadened the indicators for determination of the child's habitual residence with the parents' intention to settle permanently with the child in another Member State, which was manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State. Another indicator that was mentioned that could be taken into account was lodging of an application for social housing with the relevant services of that State.[132] The short term stay or the "peripatetic life" as it was referred in the judgment does not constitute a situation, which could lead to change of habitual residence from one State to another.[133]

A more precise interpretation of habitual residence was given in the opinion of A-G Kokott regarding this case.[134] This opinion again affirmed the autonomous interpretation of the term "habitual residence" and the differences between habitual residence and mere presence.[135] What was important with this opinion was that it directly, undoubtedly linked the Hague Conventions and their case-law with the Regulation Brussels II-bis stating that *"…coordination also makes a uniform understanding of the concept of habitual residence necessary."*[136] This opened the doors for the huge data base of cases from the Hague Conference that can be used for uniform understanding and determining habitual residence.[137]

In this opinion, the Advocate General positions the concept of habitual residence in Article 8(1) of the Regulation to the actual center of interests of the child.[138] The understanding of the habitual residence of the children and in family law is distinguished with that of other cases[139] since in these cases the highlight is on the intention of the person concerned.[140] This is evident in the distancing from the proposed understanding of the habitual residence given in the Borrás Report.[141] The basic indicators are categorized according to the duration and regularity of residence and according to the familial and social situation of the child.

---

131 A (Case C-523/07) (2009) ECR I-2805, para. 39.

132 A (Case C-523/07) (2009) ECR I-2805, para. 40.

133 A (Case C-523/07) (2009) ECR I-2805, para. 41.

134 Delivered on 29 January 2009, A (Case C-523/07) (2009) ECR I-2808.

135 A (Case C-523/07) (2009) ECR I-2808, para. 17 and 20.

136 A (Case C-523/07) (2009) ECR I-2808, para. 30.

137 http://www.incadat.com.

138 A (Case C-523/07) (2009) ECR I-2808, para. 38.

139 Such as social law, law of the officials of the EU.

140 A (Case C-523/07) (2009) ECR I-2808, para. 36.

141 Ibid.

The duration of the residence is the factor that distinguishes presence from habitual residence. There is no time frame given in the Regulation so this should be determined on the circumstances of the individual case. A direct link is positioned with the age or the maturity of the child[142] and the familial and social circumstances that influence the duration of the transformation from mere presence into habitual residence.[143]

Regarding the regularity of the stay, the residence does not have to be uninterrupted. Temporary absence of the child, for instance during the holidays, does not call into question the continuation of habitual residence. However, if a return to the original place of residence is not foreseeable in view of the actual circumstances, habitual residence can no longer be assumed.[144] Another factor that influences the duration of the transformation from mere presence into habitual residence is the lawfulness of the stay. If the move is lawful, habitual residence can shift to the new State even after a very short period.[145] The intention of the parents is also an important circumstance. An indication that the habitual residence has shifted may in particular be the corresponding common intention of the parents to settle permanently with the child in another State. The parents' intention may manifest itself, for example, in external circumstances such as the purchase or lease of a residence in the new State, notifying the authorities of the new address, establishing an employment relationship, and placing the child in a kindergarten or school. As a mirror image, abandoning the old residence and employment and notifying the authorities of departure suggest that habitual residence in the former State is at an end.[146] If the move is unlawful (as in the cases of international child abduction) the duration of the transformation is of a longer period. Although under article 10 there is a continuing jurisdiction of the courts of the former habitual residence, it is ascertain that in

---

142 In the case *Barbara Mercerdi v. Richard Chaffe* (Case C-497/10 PPU) it was positioned that the child's age is liable to be of particular importance. "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.", para. 56.

143 A (Case C-523/07) (2009) ECR I-2808, para. 41.

144 A (Case C-523/07) (2009) ECR I-2808, para. 42.

145 A (Case C-523/07) (2009) ECR I-2808, para. 43. This is evident from the Article 9(1) of the Regulation which is based on the idea that even before three months have passed there may be habitual residence in the new place of residence, so that a rule on jurisdiction is required, as an exception to Article 8, for the benefit of the courts of the former place of habitual residence. See also European Commentaries on Private International Law: Brussels II bis Regulation, U. Magnus, P. Mankowski – 2007 – Sellier, European Law Publishers, pg. 116-119.

146 A (Case C-523/07) (2009) ECR I-2808, para. 44.

a longer period of time under some strict conditions transfer of habitual residence from one State to another can occur.[147]

The second categories of indicators are referred to as "Familial and social situation of the child". These indicators provide the court with a clear picture of the stability which distinguishes habitual residence from mere presence. In its opinion the Advocate General stated that "It is for the referring court to obtain an overall picture of this, taking account of all factors, whose relevance may vary according to the children's age."[148] The concrete manifestation of familial situation are the persons with whom a child lives at the place of residence or is in regular contact, in other words parents, siblings, grandparents or other close relatives[149]; and for social integration, circumstances such as school, friends, leisure activities and, above all, command of language are taken into consideration.[150]

V. Conclusion

The habitual residence of a child as jurisdictional criteria gives great space for subjectivity to the Courts in determining the place in which the child adapted to on a voluntary or involuntary bases. The child was positioned by its parents to create social, cultural, lingual, and educational bonds with an environment and in that environment he/she feels familiar. Jurisdiction is based on this criterion because habitual residence ties the child to the place where he feels at home and that legal system is most closely connected to the child itself. However close this connection is, it must be properly determined. Due to the fact that habitual residence is a factual concept, which is determined in each case individually, it is very important for the court to have in mind all of the facts and not to approach it selectively. This is especially important regarding the intent of the children. The focus must be positioned on the child, but not neglecting the fact that the child is more or less connected to the parents, depending

---

147 A (Case C-523/07) (2009) ECR I-2808 para. 46. Article 10 describes two situations. First the situation where both parents acquiesced with the removal, and second where a period of one year has passed. However, the one-year period is not the sole deciding factor here. The transfer of jurisdiction depends rather on the circumstances listed additionally in points (i) to (iv) of Article 10(b).

148 A (Case C-523/07) (2009) ECR I-2808, para. 47, see also (Case C-497/10 PPU), para.53.

149 For younger children and particularly infants their dependence on the primal caretaker (usually the mother) creates a position that the family environment is determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of. As far as infants are concerned. they 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. For that reason 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. (Case C-497/10 PPU) para. 54 and 55.

150 A (Case C-523/07) (2009) ECR I-2808, para. 48.

on his/her maturity. To an extent, the child receives the understanding of the meaning of its home from its parents. Their behavior influences the speed at which a child adapts to a new environment.

In a way this is made easier by the affirmed connection between the Hague Conventions and the Regulation Brussels II bis. With its 30 years application of the Child Abduction Convention, the Hague Conference established a solid basis for a proper interpretation of habitual residence. The INDICAT base of cases is the fundamental basis for the uniform application of the Conventions and the Regulation. This doesn't mean that the determination of habitual residence shifts from a factual concept determined on a case-by-case basis, towards a more rigid concept – this simply means that the courts must have some solid structure, some guidelines that can ease their task.

UDC 341.94:343.433
Pravni letopis 2013, pp. 57–81

M.SC. ILIJA RUMENOV

Determination of the Child's Habitual Residence According to the Brussels II bis Regulation

The child's habitual residence is becoming one of the most important jurisdictional criteria in the area of private international family law. Its adoption as the primary basis of jurisdiction under the Brussels II bis Regulation, confirms its significance. However, even after one hundred years of its first use in the substantive law of the Hague Convention on Guardianship of 1902, two outstanding issues remain. The criterion is still considered a factual concept and, as a consequence, most of the legal sources that deal with private international law have not provided its definition. In recent years, following the "A" case of 2009, this position has changed because the European Court of Justice stressed that "…it follows from the need for uniform application of Community law and from the principle of equality that the terms of a provision of Community 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 autonomous and uniform interpretation throughout the European Community". In another case, Rinau, it was affirmed that the guiding principles of the 1980 Hague Convention concerning the interests of children were taken over, in matrimonial matters and matters of parental responsibility, by the Regulation. Advocate General Kokott held in her opinion in the "A" case that "[b]oth provisions pursue the aim that abducted children should return immediately to the State in which they had their habitual residence before the unlawful removal. That coordination also makes a uniform understanding of the concept of habitual residence necessary".

The article analyses the practice of the Hague Conference of Private International Law and tries to give an insight into the thirty years of implementation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, and the problems that have emerged from it. This will help in creating a uniform application of this jurisdictional criterion and a uniform understanding of the concept of habitual residence. The article also gives comparative insight into the recent emergence of definitions of the habitual residence in the national codifications of the private international law.

Keywords: child's habitual residence, jurisdiction, private international law, family law, Brussels II bis regulation, 1996 Hague Child Protection Convention, 1980 Hague Child Abduction Convention.

UDK 341.94:343.433
Pravni letopis 2013, str. 57–81

MAG. ILIJA RUMENOV

Ugotavljanje otrokovega običajnega prebivališča po Bruseljski uredbi II bis

Običajno prebivališče otroka postaja eno glavnih meril za določitev pristojnosti na področju mednarodnega zasebnega družinskega prava. Sprejem tega merila kot temelja pristojnosti po uredbi Bruselj II bis potrjuje njegov pomen. Vendar pa tudi po sto letih od njegove prve uporabe v materialnem pravu Haaške konvencije o skrbništvu iz leta 1902, ostajata odprti dve vprašanji. Merilo se še vedno obravnava kot dejanski koncept in posledično večina pravnih virov, ki se ukvarjajo z zasebnim mednarodnim pravom, ne določa njegove opredelitve. V zadnjih letih, po primeru »A« iz leta 2009, se ta položaj spreminja, ker je Sodišče EU poudarilo, da »je iz zahtev po enotni uporabi prava Skupnosti in iz načela enakosti razvidno, da je treba izraze določbe prava Skupnosti, ki se pri opredelitvi smisla in obsega ne sklicuje posebej na pravo držav članic, navadno razlagati samostojno in enotno v celotni Skupnosti«. V primeru Rinau pa je Sodišče potrdilo, da je bila usmeritev Haaške konvencije iz leta 1980 glede koristi otroka v zakonskih sporih in sporih v zvezi s starševsko odgovornostjo povzeta v Uredbi. Generalna pravobranilka Kokottova je v svojem mnenju v zadevi »A« menila, da se »[z] obema predpisoma […] zasleduje cilj, da se ugrabljeni otroci nemudoma vrnejo v državo, v kateri so imeli običajno prebivališče pred protipravnim dejanjem. To povezovanje prav tako zahteva enotno razumevanje pojma običajnega prebivališča.«

Članek analizira prakso Haaške konference o mednarodnem zasebnem pravu in skuša prikazati trideset let uveljavljanja Konvencije o mednarodni ugrabitvi otrok iz leta 1980 in Konvencije o varstvu otrok iz leta 1996 ter probleme, ki so pri tem nastali. To bo pripomoglo k enotni uporabi tega merila pristojnosti in enotnemu razumevanju koncepta običajnega prebivališča. Članek vsebuje tudi primerjalni pregled nedavnega pojava opredelitev običajnega prebivališča v nacionalnih zakonodaja s področja mednarodnega zasebnega prava.

Ključne besede: otrokovo običajno prebivališče, pristojnost, mednarodno zasebno pravo, družinsko pravo, Bruseljska uredba II bis, Haaška konvencija o varstvu otroka iz 1996, Haaška konvencija o mednarodni ugrabitvi otrok iz 1980.