Bye-bye Brussels? Hello Hague?

When drafting orders in the Family Court, one of the most well-known precedents to put on the order is "Jurisdiction". For most cases, this seems like a formality, as the Judge will be satisfied that the child is "habitually resident" in England and Wales and they can therefore decide the case.

However, some cases do need the Court to scrutinise whether a child is, in fact, habitually resident (which could be described as 'ordinarily resident') here or elsewhere. The outcome of this inquiry can affect where the case regarding the child should be heard. It may lead to a transfer of public child law proceedings to another jurisdiction; the process of which is governed by two near parallel international regimes.

This article aims to give a summary of the law on habitual residence and some of the necessary considerations for the Courts when answering this question. It will give an overview of the two regimes for transferring proceedings, namely Brussels IIA[1] and the Hague Convention 1996[2]. With the Brexit transition period now having ended and Brussels IIA having previously taken precedence in proceedings linked with EU states, the future will largely now lie with Hague.

Habitual residence

The Court when noting that a child has lived in another jurisdiction should consider where the child was habitually resident when proceedings began. This is a question of fact, as Lady Hale confirmed in *Re A (children) (jurisdiction: return of child)* [2013] UKSC 60[3]. Paragraph 54 of this judgment provides a useful summary of considerations.

The considerations for habitual residence reaffirmed by the Supreme Court in 2013 were based partly on some authorities from the European Court of Justice (ECJ)[4]. The approach of the ECJ was summarised by the Supreme Court:

> "[Habitual residence being] the place which reflects some degree of integration by the child in a social and family environment in the country concerned. This depends on numerous factors, including reasons for the family's stay in the country in question[5]."

The Court confirmed that if the case involves a young child or infant, then it is necessary to look at the integration of the family whom they are dependent on too[6]. However, where the child is older or an adolescent, this inquiry into integration becomes more "child-focused"[7].

It has been clarified by the Supreme Court in *Re B* [2016] that this integration does not necessarily mean "fully integrated". Indeed, "only a degree" of integration is needed in a state[8].

Hayden J in *Re B* [2016] said that the Court should conduct a wide-ranging evaluation of the child and noted that other factors in the evaluation include:

> "The child's day to day life and experiences, family environment, interests and hobbies, friends, and an appreciation of which adults are most important to the child. This approach must always be child-driven.[9]"

Further factors which had been identified in the ECJ case of *Proceedings brought by A* are as follows:

> "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 relationship of the child in that State[10]"

The Supreme Court again offered more guidance in *Re B* in 2016. Lord Wilson laid out three more observations that should be considered:

> "(a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;
>
> (b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and
>
> (c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it.[11]"

There was for a while a question mark over how decisive the parent's intention as to their child's habitual residence is. Lady Hale in *Re KL* clarified that it is one of many factors to be looked at[12]. Later guidance from Keehan J suggests that while relevant, it is not wholly determinative of a finding of habitual residence[13]. In effect, it becomes just another piece of the jigsaw.

In relation to a child's state of mind about their residency, the majority of the Supreme Court in *Re LC* determined that this is a relevant consideration for older and adolescent children only[14] and held that a child's state of mind is explicitly distinct from a child's "wishes and feelings".

An interesting point to consider is the observation of McFarlane LJ in *Re R*[15]. His Lordship noted that a Judge does not need to be satisfied that a child is happy somewhere for it to be found as their habitual residence, but that it forms part of wider considerations for the Court. His Lordship said:

> "When determining habitual residence there is no requirement that, to be sufficient to support a finding, the individual needs to be happy, well cared for or free from abuse. The 'social and family environment' into which a child might be integrated may include both positive and negative factors. These will not be irrelevant.[16]"

As shown above, there are a plethora of factors to be borne in mind by the Court when deciding where a child is habitually resident and requires a holistic factual inquiry into the child's circumstances to be undertaken.

<u>Transfer of proceedings</u>

The inquiry into habitual residence does not always stop there. It may be that a Court decides that it should make a request that proceedings are transferred to another jurisdiction to resolve. The other state involved, and now the date that proceedings started, will dictate which route can be used to make this request; either Brussels IIA or the Hague Convention.

<u>Brussels IIA</u>

Recital 12 of the Regulations confirms that jurisdiction is "shaped in the light of the best interests of the child, in particular the criterion of proximity".

The starting point under Brussels IIA is found in Article 8. Where the child is habitually resident when the Court is seised (i.e. takes possession of the case) becomes the state which has jurisdiction over the proceedings. Where a court determines on its factual inquiry that it has no jurisdiction over a case but another State does, then it must make a declaration to that effect under Article 17. It is also worth

noting that if a child has moved to another State and becomes habitually resident there, then the State of former habitual residence retains jurisdiction for up to 3 months in certain circumstances under Article 9.

It may be that the Court finds that a child is habitually resident in England and Wales. However, considering jurisdiction does not simply stop there. It has been emphasised that the Court should nonetheless consider whether another State is exceptionally better placed to hear the case and to request its transfer under the exception of Article 15 (as emphasised by Munby P in *Re E)*[17]. Article 15 allows a request for transfer of proceedings where:

> "by way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where that is in the best interests of the child"

Breaking this down into three criteria for the Court to examine when considering transferring proceedings:

(1) The child must have a "particular connection" to this other State. This is a factual matter for the Court. Under Article 15(3), a particular connection can be shown by either the State becoming the habitual residence of the child, being the place of former habitual residence of the child, being the State of their nationality, it being the habitual residence of someone with Parental Responsibility of the child, or that property of the child is there and the case concerns protection of the child relating to their property.

(2) The Court should consider if the other State would be better placed to hear the case, or part of it. The ECJ in *Child and Family Agency v D*[18], stated that there must be a rebuttal of the strong presumption that the child should remain where they are habitually resident. The original Court is not to consider whether the substantive law of the other country is 'better', but whether there will be "genuine and specific added value, with respect to the decision to be taken in relation to the child, as compared to the case remaining where it is"[19].

(3) And, but as a separate consideration, it is in the child's best interests. This is not necessarily the same as the traditional domestic considerations of welfare. However, the Court can consider the impact of the transfer of the proceedings on the child, both in the long and short term[20]. The Court must further look at the views expressed by the child in light of their maturity and age[21].

A Court may choose to consider transfer by its own volition, or may be invited to by the parties or indeed by an application from another Member State's Court. Once a Court decides that a transfer is the best course of action given the above, then the other Member State's Court should seise jurisdiction within 6 weeks, otherwise it defaults to the original Court. (For detailed guidance on how to request a transfer of proceedings, see FPR 12.61-67 and the President of the Family Division's Guidance for the Judiciary on transfer of proceedings[22].)

It should not be forgotten either that currently under Article 20, for urgent matters, the Court can take provisional and protective measures in relation to the child; even if another State is found to have jurisdiction. This has included interim care orders[23].

There are numerous 'backstops' to establish jurisdiction under Articles 12, 13 and 14 of Brussels IIA if habitual residence fails to be established by the above routes.

Hague Convention 1996

But what of Hague? It appears that there is a sparse amount, if any, case law on transfer of proceedings under the Hague Convention; despite a wealth of case law involving Brussels IIA.

Habitual residence is not defined under Hague, and is to be dealt with by consideration of the facts in light of the objectives of the Convention and can be assisted by domestic law. Under Article 5, jurisdiction normally lies with the Contracting State where the child is habitually resident. However, jurisdiction moves immediately with the child when a child's habitual residence lawfully changes.

Requests for transferring proceedings to another contracting State to the Hague Convention can be made under Article 8 of the Hague Convention (with Article 9 dealing with receiving a request for transfer).

Article 8 is set out in very similar terms to Article 15 Brussels IIA. It reads:

> "By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child"

However, contracting States which can be contacted about requesting a transfer are found in Article 8(2). They are States where the child is a national, property of the child is located, authorities of that State are seised of an application for divorce or legal separation of the child's parents or an annulment, or the child has a substantial connection.

An important feature of Hague is under Article 9(3). When a request for transfer of proceedings is made, before it can go ahead, the other State must have "accepted the request".

What happens now after Brexit?

Brussels IIA is a set of EU Regulations and is used where proceedings were transferred to another Member State of the EU. Brussels IIA also has precedence over Hague where both may apply. However, since the end of the Brexit transition period, the use of Brussels IIA for transfers may become increasingly oblique. Yet it has been confirmed that Brussels IIA can continue to apply in public child law proceedings[24].

There is a catch however. It only applies to proceedings commenced before 31st December 2020 (i.e. the end of the transition period) and for the duration of those proceedings. Any proceedings started after that will have to be transferred under Hague. It is fortunate that all EU Member States are also contracting States of the Hague Convention. Given that public child cases aimed to be resolved within a 26-week timetable, it is possible that we will be seeing the last few occasions of Brussels IIA being used within the next year.

There are of course slight differences between the two regimes despite their great similarities and these may have practical impacts on transfers of proceedings. A dilemma may arise if two children are in consolidated proceedings, where proceedings for one child started before the end of the Brexit transition period and the other afterwards. It will be interesting to see how these two regimes would interact together in the same proceedings, and hopefully the Courts will be giving more clarity on that issue and on the Hague Convention 1996 in due course. It appears that for now at least, its bye-bye Brussels, and hello Hague.

Sophie Keegan
Pupil Barrister

[1] Council Regulation No 2201/2003
[2] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children
[3] *Re A (a child) (jurisdiction: return of a child)* [2013] UKSC 60, paragraph 54, particularly (i) and (vii)
[4] *Proceedings brought by A* [2010] Fam 42 and *Mercredi v Chaffe* [2012] Fam 22
[5] See n.3, paragraph 54(iii)
[6] See n.3, paragraph 54(vi)
[7] *AB v CD* [2018] EWHC 1021, paragraph 5(vi)
[8] *Re B (a child)* [2016] UKSC 4, paragraph 39
[9] *Re B (a minor)* [2016] EWHC 2174, paragraph 18
[10] *Proceedings brought by A* [2010] Fam 42, paragraph 39
[11] See n.8, paragraph 46
[12] *Re KL (a child)* [2013] UKSC 75, paragraph 23
[13] See n.7, paragraph 5(iii)
[14] *Re LC (children)* [2014] UKSC 1, paragraph 37
[15] *Re R (a child)* [2015] EWCA Civ 674
[16] Ibid, paragraph 47
[17] *Re E (a child)* [2014] EWHC 6 (Fam), paragraph 35
[18] *Child and Family Agency v D* (Case C 428/15) [2017] 2 WLR 949, paragraph 45
[19] Ibid, paragraph 57
[20] *Re N (Children) (Adoption: Jurisdiction) (AIRE Centre and others intervening)* [2016] UKSC 15, paragraph 44
[21] *Medway Council v JB and others* [2015] EWHC 3064, paragraph 41
[22] https://www.familylaw.co.uk/docs/pdf-files/Judicial_guidance_-_cross-border_transfer.pdf
[23] *Re B (a child)* [2013] EWCA Civ 1434, paragraph 85
[24] Article 67 of Title VI of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community Order 2019