



# PUMP COURT

CHAMBERS

**JURISDICTION IN PUBLIC LAW PROCEEDINGS**

**AFTER BREXIT**

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Before the United Kingdom left the European Union (and during the transition / implementation period), the court determined questions of jurisdiction by reference to EC 2201/2003 ('BIIA').

The implementation period came to an end on 31 December 2020. At that moment in time, BIIA was revoked and only continues to apply in respect of proceedings initiated prior to that date.



Article 8 BIIA provided that:

“1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised”

Article 16 provided that:

“1. A court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent.”



## Article 13 BIIA:

“Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12 (prorogation), the courts of the Member State where the child is present shall have jurisdiction.”

## Article 14 BIIA:

“Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State.”



What if the alternative jurisdiction is not a member of the EU?

- *A v A and Another (Children: Habitual Residence) (Reunite International Abduction Centre and Others intervening)* [2013] UKSC 60, [2014] AC 1.

- “... the jurisdiction provisions of BIIA do indeed apply regardless of whether there is an alternative jurisdiction in a non-Member State.”



Where habitual residence is established in England and Wales the court may nonetheless transfer jurisdiction to an alternative member state under Article 15:

“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 this is in the best interests of the child:

- (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or
- (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.”



From 1 January 2021 questions of jurisdiction are governed by the 1996 Hague Convention:

Article 5:

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

(2) Subject to Article 7 (abduction), in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.



## Differences from BIIA:

- 1) No date specified as to when habitual residence needs to be established i.e. it does not say this is to be determined at the date the court is seised.
- 2) Convention specifically excludes the principle of *perpetuation fori* - 'continuation of the place of jurisdiction' – so jurisdiction can change in the course of proceedings.



## Article 6:

(1) For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5.

(2) The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established.



Warrington Borough Council v W (Care Proceedings: Jurisdiction) [2021] EWFC 68, [2022] 1 FLR 1371

Facts: Mother and child Gabonese nationals. Child born in 2014. Mother married child's step-father in Gabon in 2015. Step-father believed to have PR. Family visited UK on a number of occasions 2016-2019 and entered in December 2020 on a visitors' visa (6 month stay permitted). March 2021 mother alleged step-father was sexually abusing the child. Police exercised powers of protection 31 March 2021, care proceedings issued 12 April 2021, interim care order (Art 11) made 16 April 2021, hearing to determine jurisdiction 9 July 2021, judgment 31 August 2021.



MacDonald J comprehensively reviews jurisdictional provisions now that UK no longer an EU member state.

Starting point Part 1 Family Law Act 1986:

Court shall not make a private law (s.8) order unless it has jurisdiction under the 1996 Convention or the Convention does not apply but... (child habitually resident or present).

No equivalent provision for Part IV 1989 applications but Re R (Care Orders: Jurisdiction) [1995] 1 FLR 711 Singer J held strong policy reasons why group of children in respect of whom applications can be made should be no less extensive than under Part II.



So... now:

Jurisdiction governed by relevant provisions of 1996 Hague Convention or where it does not apply then by the habitual residence of the child in England and Wales or the presence of the child in England and Wales where not habitually resident in any part of the UK.



Under existing case law highly unlikely child will be left without a habitual residence –

Lord Wilson: Re B (A Child) (Reunite International Child Abduction Centre and Others intervening) [2016] UKSC 4, [2016] AC 606:

“I conclude that the modern concept of a child’s habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo... The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child’s roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it.”



See also now Langarde Explanatory Report on the 1996 Hague Convention – para 41:

“The change of habitual residence implies both the loss of the former habitual residence and the acquisition of a new habitual residence. It may be that a certain lapse of time exists between these two elements, but the acquisition of this new habitual residence may also be instantaneous in the simple hypothesis of a move of a family from one country to another. This is then a question of fact which is for the authorities called upon to make a decision to assess ...”



Para 4.17 of the *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention* (HCCH) states that:

“However, there are circumstances where it might not be possible to establish the habitual residence of a child. Such circumstances could include, for example: (1) when a child moves frequently between two or more States, (2) where a child is unaccompanied or abandoned and it is difficult to find evidence to establish his/her habitual residence or (3) where a child's previous habitual residence has been lost and there is insufficient evidence to support the acquisition of a new habitual residence.”



MacDonald J held that, as with BIIA, 1996 Convention Rules apply notwithstanding that Gabon not a signatory to the Convention.

As with previous case law habitual residence falls to be established under the 1996 Convention by reference to the extent to which the child is, as a matter of fact, sufficiently connected to the jurisdiction in question. For the child to be habitually resident the residence of the child “must reflect some degree of integration in a social and family environment”.



Paras 38 and 39 set out a useful summary of the factors to be considered by a court in determining habitual residence. This emphasises that all that needs to be established is some degree of integration, not full integration. It is the stability of the child's residence as opposed to its permanence which is relevant. Requisite degree of integration can develop quite quickly but the deeper the integration in the old state the less fast the development of this in the new state. Parental intention relevant but not determinative.



But at what date is the determination to be made?

MacDonald J followed the obiter view of Cobb J in *Re HN (1996 Child Protection Convention: Habitual Residence)* [2015] EWHC 2299 (Fam) – at the date of the hearing.

“... the question of habitual residence for the purposes of Arts 5 and 6 of the 1996 Hague Convention falls to be decided as at the date on which the question comes before the court for determination, in this case at this hearing.”



“The corollary of this conclusion is, of course, that it will be important that the question of habitual residence in cases engaging the 1996 Hague Convention is determined without delay, in order to avoid the question of habitual residence being determined simply by mere effluxion of time over the course of protracted proceedings.”



Timeline in case:

December 2020 entered UK (previous visits relevant) – but mother’s evidence intended to live in France and step father claimed intention to return to Gabon.

31 March 2021 child taken into foster care.

12 April 2021 proceedings initiated.

9 July 2021 Hearing.

31 August 2021 Judgment.

MacDonald J found decision ‘finely balanced’ – determined “at the date of this hearing” child habitually resident in England and Wales.

Would decision be different depending on date of determination??



To what extent purposeful determination?

Where non-contracting state transfer provisions of Articles 8 and 9 do not apply and court falls back on *forum conveniens*. In practice, no competing proceedings in Gabon so what would be effect of saying habitually resident there?

So welfare / policy imperative to find jurisdiction?

Impact in other cases:

M and F have long-standing substance abuse issues.  
Violent argument.

December children removed by family members to  
safety in France on temporary basis.

January LA commences proceedings.

March court determines jurisdiction. By that time  
children enrolled in boarding school and parents saying  
plan to relocate permanently to France.



Impact in other cases:

Long standing proceedings concerning M and F. F found to have raped and been violent towards M and to have placed her at risk of modern slavery.

F has daughter from previous relationship in Czech Republic.

March daughter comes to live with F in England with agreement of her mother.

April LA becomes aware of daughter's presence. Issues proceedings – daughter placed in foster care.

May court determines jurisdiction.



MacDonald J:

Foster placement following commencement of proceedings could demonstrate requisite degree of integrations – problematic?

Potential for change of habitual residence shortly after initial determination?



## Art 15 BIIA:

“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 this is in the best interests of the child:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or

(b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5”



Art 8 1996 Convention:

“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, may either

- request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or
- suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.”

Wording similar but ? different test?

Art 15 need to show a) particular connection b) better placed and c) in child's best interests.

Art 8 just need to show better placed to determine child's best interests.

Lagarde Report and Explanatory Handbook make clear that court will still need to consider connection of child to other state and best interests.



In *Child and Family Agency of Ireland v AB* [2021] EWHC 1774 (Fam) Keehan J held that there are no differences or distinctions of material significance between the provisions of Art 15 of Brussels IIR and Art 8 of the 1996 Hague Convention.

In practice how willing will courts of foreign state be to assume jurisdiction where child habitually resident here?

## TRANSFER OF PROCEEDINGS

Where other state is not a signatory to 1996 Convention transfer provisions cannot apply.

Court determines question by reference to principles of forum conveniens – *Spiliada Maritime Corp v Cansulex Ltd The Spiliada* [1987] AC 460.

Stay granted where court satisfied some other forum available where the case may be more suitably tried for the interests of all the parties and the ends of justice. Child's best interests important but not paramount.