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THE CONTINUING REFINEMENT OF HABITUAL RESIDENCE: *R, PETITIONER*

The previous two years have provided fertile ground for judicial consideration of habitual residence. Since September 2013 the connecting factor has been considered twice by the Court of Justice of the European Union[1] and four times by the Supreme Court,[2] with these judgments followed by a plethora of decisions from the lower courts, particularly the Family Division of the High Court of Justice of England and Wales, in which the question of habitual residence has been considered in myriad factual circumstances. The principal focus of this analysis is the recent judgment of the Supreme Court in the Scottish case of *R, Petitioner*[3] but in order fully to understand the context in which this decision was made it is necessary first to consider the development of the law in the three earlier judgments of the Supreme Court, particularly that of *A v A*.

A. *A v A*

Between September 2013 and January 2014 the Supreme Court handed down three judgments which, while considering very different factual circumstances, all dealt with the question of how the habitual residence of a child was to be determined.[4] The most influential of these judgments has been that handed down first, *A v A and another (Children: Habitual Residence)*.[5] While this case was ultimately disposed of on other grounds,[6] the judgment nevertheless provides a detailed consideration of the law pertaining to habitual residence. In particular, the Supreme Court took the opportunity to clarify that habitual residence was intended to be, and should be interpreted contemporarily as, a factual concept, free from judicial gloss and the type of technical legal rules which so bedevil the determination of domicile.[7] Such a factual interpretation was to be achieved via a rejection of the approach which had developed following the earlier House of Lords decision in *R v Barnet London Borough Council,*

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[1] Case C-436/13 *E v B* [2015] Fam 162 and Case C-376/14PPU *C v M* [2015] Fam 116.

[2] *A v A and another (Children: Habitual Residence)* [2013] UKSC 60, [2014] AC 1; *Re L (A Child) (Custody: Habitual Residence)* [2013] UKSC 75, [2014] AC 1017; *Re LC (Children)* [2014] UKSC 1, [2014] AC 1038 and *R, Petitioner* [2015] UKSC 35, 2015 SLT 392. In addition, the Supreme Court recently handed down a judgment concerned with the meaning of *ordinary* residence: *R (on the application of Cornwall Council) v Secretary of State for Health* [2015] UKSC 46.

[3] *R, Petitioner* [2015] UKSC 35, 2015 Fam LR 54.

[4] A more detailed consideration of all three cases can be found in D Williams, "The Supreme Court trilogy: a new habitual residence rises!" [2014] IFL 84 and R Schuz, "Habitual residence of the child revisited: a trilogy of cases in the UK Supreme Court" (2014) 26 CFLQ 342.

[5] See further, D Hill, "Habitual residence in the Supreme Court" (2014) 36 JSWFL 211.

[6] In *A v A* the question as to whether the English courts had jurisdiction over the child at the centre of the dispute was determined with reference to nationality rather than habitual residence.

[7] At paras 36 and 54 per Baroness Hale. This approach was confirmed in the two subsequent cases of *Re L* and *Re LC*.

Ex p Nilish Shah,[8] in which elements of the concept of ordinary residence were transposed onto the understanding of habitual residence,[9] a clarification of the precise effect of Lord Brandon of Oakbrook's seminal judgment in *Re J (A Minor) (Abduction: Custody Rights)*,[10] and an adoption of the test propounded by the CJEU that the habitual residence of a child will be in "the place which reflects some degree of integration by the child in a social and family environment".[11]

This principle of favouring a factual, child-focussed approach led both Baroness Hale and Lord Hughes to criticise the development of the 'rule' that, where parents have equivalent rights, one parent would be unable to effect a change in a child's habitual residence through unilateral actions if such actions were not supported by the other parent.[12] Although no final conclusion was reached on this point due to the issue not being before the court, the view of the Supreme Court was later confirmed in the Court of Appeal decision of *Re H (Children)*, with Black LJ stating that "I would now consign the 'rule', whether it was truly a binding rule or whether it was just a well-established method of approaching cases, to history".[13]

B. *R, PETITIONER*

R, Petitioner involved the not uncommon situation of a family unit being fragmented across two jurisdictions. The mother, a British and Canadian citizen who had been born in Canada to a Scottish mother, lived in France with her French partner. The couple had two children, both of whom were born in France, and the family lived together in France until July 2013. It was in this month that the mother and the children, the elder being just under three years old, the younger having been born the previous month, relocated to Scotland, with the father's agreement, so that they could spend the twelve months of the mother's maternity leave close to her parents, who now lived in Scotland.

Following the mother's discovery of the father's infidelity in November 2013 she ended their relationship and launched proceedings in Scotland seeking a residence order in respect of the children and an interdict against the father removing them from Scotland. In response, the father sought an order under the Child Abduction and Custody Act 1985 for the children's return to France on the basis that the mother's actions constituted the wrongful retention of the children under article 3 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction. Essential to the father's case was that, for the retention to be considered wrongful, the children must have retained their habitual residence in France. At first instance the Lord Ordinary considered that

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[8] [1983] 2 AC 309.
[9] At para 54 per Baroness Hale.
[10] [1990] 2 AC 562.
[11] Case C-523/07 *Proceedings Brought by A* [2010] Fam 42 at para 44 and Case C-497/10PPU *Mercredi v Chaffe* [2012] Fam 22 at para 56.
[12] At paras 39-40 per Baroness Hale and paras 76-79 per Lord Hughes.
[13] *Re H (Children)* [2014] EWCA Civ 1101, [2015] 1 WLR 863 para 34 per Black LJ.

the children had not lost their habitual residence in France. This decision was reversed by an Extra Division of the Inner House of the Court of Session which held that the children had lost their habitual residence in France and were now habitually resident in Scotland.[14] On appeal to the Supreme Court the decision of the Court of Session was affirmed with the father's appeal dismissed on the basis that, as the children were now habitually resident in Scotland, they had not been retained wrongfully.

C. PARENTAL INTENT

R, Petitioner provided the Supreme Court with the opportunity to consider the relevance of parental intent in the determination of a child's habitual residence, an issue previously discussed in *A v A* and now crucial in the disposal of the present case. In holding that the Lord Ordinary at first instance had erred in finding the absence of a joint parental intent to reside permanently in Scotland as determinative, and by approving the decision of the Court of Appeal in *Re H (Children)*, the Supreme Court has removed any last vestiges of the no unilateral change 'rule' from a contemporary understanding of habitual residence.[15]

This finding is unsurprising when considered in the overarching context of the desire to return habitual residence to its factual origins but this does not mean that parental intentions no longer have a role to play. Instead, parental intentions will be a relevant factor, albeit not the only relevant factor.[16] This approach does, however, raise as a corollary the question of just how relevant is relevant? Where children are young, such as in *R, Petitioner*, it could reasonably be expected that parental intentions will take on a greater relevance but in this case the father's intentions appear to have been of only minimal relevance when weighed against other factors. Ultimately, the answer to this question is one that will depend very much of the facts of the particular case, as is the nature of habitual residence, therefore adding an extra layer of complexity to what can already be a laborious process, complexity which, for all its attendant criticisms, is not present under an approach whereby one parent is normally unable to change the habitual residence of a child unilaterally.[17]

D. THE CORRECT DECISION?***

The assessment of habitual residence can arise in a multitude of factual situations. *R, Petitioner* presented the question in the difficult context of a move which, while agreed to by both parents, was somewhat tentative in that it was subject to a specific time period and the views of the parents diverged as to what would occur at the end of this period. In affirming the approach of the Court of Session in finding that the children had become

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[14] [2014] CSIH 95, 2014 SLT 1080.
[15] Para 17.
[16] Para 21.
[17] While noting the developments in the UK Supreme Court, the United States Court of Appeals for the Ninth Circuit affirmed an approach whereby shared parental intent is a key, if not always dispositive, consideration in *Murphy v Sloan* 764 F.3d 1144 (9th Cir. 2014).

habitually resident in Scotland after four months of the agreed twelve month period the Supreme Court has continued to espouse a child centred approach in which parental intentions remain a relevant, but potentially marginalised, consideration.

While such an approach has been embraced by commentators,[18] it is hard not to feel some sympathy for the father upon discovering that, after four months of what both parents agreed was likely to be a short-term relocation to Scotland, his children had become habitually resident in that jurisdiction and, consequently, his reliance on the 1980 Hague Child Abduction Convention was doomed to failure. While four months is not an insignificant period in the assessment of habitual residence, particularly in light of the comments of Baroness Hale and Lord Hughes in *A v A* that habitual residence could potentially be established at the time of arrival in a country,[19] it is a factor that must be understood in the broader context. Thus, the reasons for the residence in the country in question and, if appropriate, parental intentions will both necessarily affect the integration of the child, particularly when this question is asked following a relatively short period of residence.

The Lord Ordinary at first instance clearly erred by treating the absence of proof of a joint decision to leave France and settle permanently in Scotland as an absolute bar to the acquisition of a Scottish habitual residence. However, it is submitted that the Court of Session tipped the balance too far in the opposite direction in finding that the children had become integrated in Scotland after four months[20] in light of the particular circumstances of the case.[21] Instead, a more realistic finding in light of the evidence provided by each parent could perhaps have been that the children had no habitual residence at the point the question was raised in November 2013, it being apparent that the family wished to leave France but remained undecided as to a final location.

E. CONCLUSION

The Supreme Court has reiterated in *R, Petitioner* that the question of habitual residence is a factual one which seeks to identify the place in which the child is integrated into a social and family environment without recourse to artificial legal rules. A central tenet of this approach is the rejection of the idea that parental intent can absolutely be determinative with regard to the loss or acquisition of habitual residence. However, courts must bear in mind that, although not determinative, parental intentions are still relevant and must be weighed appropriately along with

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[18] For example, Schuz (n 4) at 360 describes the approach as a "logical progression…and is to be warmly welcomed".

[19] *A v A* at para 44 per Baroness Hale and para 74 per Lord Hughes. See also E M Clive, "The Concept of Habitual Residence" [1997] JR 137 at 142-146.

[20] Indeed, in its judgment the Court of Session hints that the same answer would have been reached if the question was asked after two months (para 14).

[21] This decision can be compared with the older Scottish case of *Cameron v Cameron* 1996 SC 17 in which two children were found to be habitually resident in France after three months but in the context of much stronger evidence that the stay in France was intended to be permanent and to extend indefinitely for a number of years.

all other material factors. As the Supreme Court acknowledged,[22] there were sound policy reasons underlying the no unilateral change rule and it is important that these practical reasons are not lost in the drive towards a more child centred assessment.[23]

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[22] *A v A* at paras 76-78 per Lord Hughes.
[23] Professor McEleavy has argued that in certain circumstances parents should be able to reach a formalised agreement which would fix a child's habitual residence for 12/18 months in particular circumstances: P McEleavy, "A protocol for the 1980 Hague Convention?" [2010] IFL 59 at 65.