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Habitual Residence: Review of Developments and Proposed Guidelines

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Abstract: Habitual residence is a key concept in the scheme of the Hague Child Abduction Convention because it determines the applicability of the mandatory return mechanism. However, the concept is not defined, and over the years there have developed different approaches thereto. In recent years, there has been increasing doctrinal uniformity as a result of wide adoption of the hybrid approach. However, there are real disparities in the way in which this approach is applied by different judges and the question of habitual residence remains one of the most litigated issues under the Convention. This article reviews recent case law developments and explains the disparities. It then proceeds to propose guidelines that might assist in increasing uniformity and ensuring that findings of habitual residence promote the objectives of the Convention.

Keywords: Hague Convention; child abduction; habitual residence

1. Introduction

Perusal of the reports and relevant preliminary documents of the various Special Commissions in relation to the Operation of the 1980 Convention on the Civil Aspects of International Child Abduction (hereinafter: "the Abduction Convention") over the years reveals that little attention has been paid to the issue of determining habitual residence.[1] In particular, whilst calls to provide a definition or guidance in relation to the concept of habitual residence were documented in the context of discussions for a protocol in preparation for the 1st part of the 6th Commission meeting in June 2011 (Prel doc 7 2011, para. 9.2), there is no record of further consideration of this issue[2] following the decision not to continue work on a protocol later that year (Prel doc 13 2012).

However, habitual residence is one of the most litigated issues under the Abduction Convention. In 2015, 21% of judicial refusals were based on a finding that the child was not habitually resident in the requesting state (Lowe and Stephens 2017), an increase on the figure in previous surveys.[3] Whilst this figure of course does not reflect the number of cases in which the dispute about habitual residence was resolved in favor of the applicant, perusal of case law in leading jurisdictions shows that habitual residence is a real issue ins a significant number of cases.[4] Disputes about habitual residence are likely to be more

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1 Prel doc 1. 2022. For the Upcoming Eight Special Commission Meeting, Draft Table of Conclusions and Recommendations from Previous Special Commission Meetings on the Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention. Available online: https://assets.hcch.net/docs/7f3076c4-b17a-49b3-a07b-09fe431525f7.pdf (accessed on 7 June 2023) does not mention the issue at all.

2 Other than in the context of coercion, Conclusions and Recommendations of 6th Special Commission at para. 58.

3 Figures of 18% (2008); 15% (2003) and 12% (1999).

4 A Lexis search carried out a few years ago (on 27 July 2017) of Abduction Convention decisions by US federal appeal courts within the previous 12 months revealed that out of 14 cases, in 8 the only or main issue was habitual residence. A similar search carried out on 29 June 2020 revealed that out of 13 cases, in 5 habitual residence was the main issue. A similar search carried out on 19 April 2023 of decisions after 1 January 2022 revealed that in 5 out of 11 cases, the only or main issue was habitual residence. It should be noted that we might have expected to see fewer appeals in relation to habitual residence in the US following the Supreme

common as widespread international travel and relocation, inter alia for purposes of work and study, increase the number of families who have real connections with more than one jurisdiction (Hodson 2018), making it more difficult to pinpoint the child's habitual residence at any given date. Indeed, one of the most common scenarios in habitual residence disputes is where—following a temporary move to another State—one parent refuses to return to the State where the parties lived previously. In such cases, the question of whether the child has become habitually resident in the new State will invariably be determinative of the return application.

The purpose of this article is to explain why there is a need for guidance in relation to determination of habitual residence in Abduction Convention cases and to provide suggestions that might form the basis of a discussion at the upcoming Eighth Special Commission meeting.[5] Section 2 of the article briefly sets out the development of the concept of habitual residence in the case law of leading jurisdictions. In Section 3, I give examples of disparities that still exist in the way in which habitual residence is determined in borderline cases, despite greater doctrinal consensus in relation to the concept. In Section 4, I propose that the problem might be tackled by the adoption of guidelines in relation to the determination of habitual residence and set out draft guidelines.

2. Habitual Residence in Abduction Convention Cases

2.1. The Role of Habitual Residence

Habitual residence is a key concept in the Convention scheme[6] because it determines the applicability of the mandatory return mechanism in two ways. Firstly, the applicant has to show that the child was habitually resident in another Contracting State immediately before the wrongful removal or retention.[7] Whilst the date of removal will not usually be disputed, in cases of retention after an agreed stay in the requested State, the retention may occur before the date scheduled for return where the taking parent has previously manifested an intention not to return the child.[8] In such cases, after determining the date of the retention, it will be necessary to determine whether the child's habitual residence had changed prior to that date. If the answer to this question is positive, the threshold conditions for engaging the return mechanism are not met, and so return will not be ordered under the Convention.

Secondly, the removal or retention will only be wrongful where it was in breach of rights of custody accorded under the law of the State where the child was habitually resident immediately before the removal or retention.[9] This will only be relevant in the relatively few cases where there are differences between the laws of different States in relation to rights of custody.

Court holding that the standard for review is clear error—*Monasky v. Taglieri, 140 S. Ct. 719, 723, (2020).* In the UK and Israel, most of the Abduction Conventions cases that have reached the Supreme Court over the years have involved a dispute about habitual residence.

5 Habitual residence is also the main connecting factor in the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, which will also be discussed at the upcoming Special Commission Meeting. However, there are few reported cases concerning determination of habitual residence for the purposes of this Convention. Whilst much of the discussion in this article is also relevant to determination of habitual residence under the 1996 Convention, the need for purposive interpretation means that there may be differences. For consideration of some of these differences, see Schuz (2001b).

6 For the origin of the concept of habitual residence and the background to its adoption in the Abduction Convention, see Schuz (2013, pp. 174–77). For a general discusion of the use of habitual residence as a global connecting factor, see Gossl and Lamont (2021).

7 Art 4. In most cases in which habitual residence is in dispute, the abductor argues that the child was habitually resident in the requested State at the relevant date.

8 Referred to in the UK as "repudiatory breach," *Re C and another* [2018] UKSC 8, and in the US as "anticipatory retention," *Abou-Haidar v. Vazquez, 945 F.3d 1208*.

9 Art 3.

2.2. Developing Models of Habitual Residence in the Case Law

Despite the critical importance of the concept of habitual residence, the Convention does not define it. The reason given for this is that it is a question of fact and should not be treated as a technical legal term (Perez-Vera 1982, para. 66). However, reality has shown that this assumption is naïve, and over the years it became possible to discern different approaches in relation to this concept (Schuz 2001a). Originally, the prevalent model in the common law world treated the intention of the parent or parents who has/have the right to decide where the child lived as determinative. The other model, prevalent in civil law jurisdictions, focused primarily on the length of the child's residence in the State in question and other objective factors. Moreover, even within the parental intention model, there were different approaches in relation to the content of those intentions. Under the UK version, it was sufficient that the parents were living in the new country with a settled, albeit temporary, purpose, such as employment or studies (Schuz 2013, p. 187). In contrast, under the US version, a child's habitual residence would not change unless both parents had the intention of abandoning the habitual residence in the base country (Schuz 2013, pp. 189–92).

Since the second decade of the current century, many jurisdictions have adopted a combined approach, which I have referred to as a hybrid model (Schuz 2013, pp. 192–95). These jurisdictions include the European Union,[10] UK,[11] Canada,[12] US,[13] Israel,[14] South Africa,[15] Australia,[16] New Zealand, Argentina,[17] Japan,[18] and Jamaica.[19] The hybrid model takes a factual child-centered approach, but treats the intention of the parents as a relevant factor (Schuz 2013, pp. 192–95). The Supreme Court of Canada has held that the hybrid approach best conforms to the text, structure, and purpose of the Convention inter alia because it recognizes that the child is the focus of the analysis but acknowledges that it may be necessary to consider parental intention in order to assess properly the child's connections to a country.[20]

Subtle differences can be found between the various formulations of the hybrid approach, although it is not clear that they are significant. For example, the Supreme Court of Canada states that the court has to determine "the focal point of the child's life."[21] The CJEU describes the concept of habitual residence as "the place which reflects some degree of integration by the child in a social and family environment,"[22] and the US Supreme Court takes the view that habitual residence is the child's home or the place where the child is "at home."[23] More significantly, whilst in most jurisdictions, the formulation includes a

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10 *Proceedings in Re A C-523/07* [2010] Fam. 42, 69.

11 *A v A (Children: Habitual Residence)* [2013] UKSC 60.

12 *OCJ v Balev*, [2018] S.C.J. No. 16 (2018).

13 *Monasky v Taglieri* 140 S.Ct. 719 (2020). This case resolved the split between those circuits that had adopted the objective approach and those that had adopted the parental intention approach.

14 RFamA 7784/12 *Plonit v Ploni* (28.7.13, Israeli Supreme Court).

15 CB v. LC 20/18381, High Court of South Africa Gauteng Local Division, Johannesburg, 15 September 2020 (incadat ref: HC/E/ZA 1504) [63].

16 LK v. D-G, Department of Community Services, [2009] HCA 9 [25].

17 K. K. J C/P. C.S S/*RESTITUCIÓN INTERNACIONAL* 13.2.20 (Incadat ref: HC/E/AR 1520).

18 2019 (Ra) No. 636 Appeal case against an order to return the child (Incadat ref: HC/E/JP 1527).

19 DW v MB—[2020] JMSC Civ 230 (Incadat ref: HC/E/JM 1497).

20 *OCJ v Balev*, [2018] S.C.J. No. 16 (2018), [68].

21 Id at [43]. However, later case law has understood the decision in *Balev* as meaning that the "focal point of the child's life" does not end the analysis and that it is still necessary to consider the entirety of the circumstances. See e.g., *A.M. v. A.K.* 2020 ONSC 3422 [35].

22 *Proceedings in Re A* above n. 11.

23 *Monasky* above n. 14 at 726–727. Justice Alito gives a more precise definition: "The place where the child in fact has been living for an extended period—unless that place was never regarded as more than temporary or there is another place to which the child has a strong attachment, id at 734. Subsequent case law applies the "at home" test. See e.g., *Rosasen v. Rosasen, 2023 US App. LEXIS 408*.

list of factors to be taken into account,[24] the US Supreme Court simply refers to the "totality of the circumstances" standard.[25] The implications of this generality will be seen below.

The widespread adoption of the hybrid approach is a positive development, and it is gratifying to see that some judges have internalized the need to conduct the enquiry from the perspective of the child. Nonetheless, perusal of case law from a number of jurisdictions reveals disparities in the way in which the approach is implemented by different courts. These will be discussed in the next section.

3. Disparities

Four main issues can be identified in relation to which there is lack of uniformity in applying the hybrid approach. The first and perhaps most significant of these relates to the relative weight to be placed on parental intentions. The second relates to the assessment of the factual connections with the States in question and in particular the length of residence required for a change in habitual residence. The third is whether a child can be habitually resident in a place without ever having been physically present there (new baby problem), and the fourth is whether a child can have more than one habitual residence at any given time. I will consider each of these issues in turn, giving examples from the case law.

3.1. Parental Intention

The hybrid approach recognizes, on the one hand, that habitual residence should not be determined purely by parental intentions, and on the other hand, that these intentions cannot be ignored in assessing the quality of the child's connections with the State that is claimed to be his or her habitual residence. However, the approach leaves a considerable amount of leeway in relation to the weight that is given to those intentions, where they appear to point in a different direction than the factual connections. The most common scenario in which this issue has arisen is where at the date of removal or retention, the child has been living on a temporary basis in the requested State with the consent of both parents and one parent then refuses to return to the State where the family had previously been living.

The variations in relation to the weight to be attached to parental intentions in such a situation can be illustrated by comparing UK and Israeli case law. Since the adoption of the hybrid approach by the UK Supreme Court in 2013, there have been a number of cases in which fathers gave consent for mothers to spend a limited time in the UK with their children and in which it was held that the children had become habitually resident in the UK after a few months, despite the undisputed intentions of the parents that the stay was temporary.[26] Take, for example, the case of *AR V RN*,[27] which concerned a French father and Canadian mother who lived together in France. After the birth of their second child, the father agreed that the mother could spend her one-year maternity leave with her family in Scotland. After four months, the mother discovered infidelity on the part of the father and applied for a residence order. The father then applied under the Convention, claiming unlawful retention, as the children were still habitually resident in France. The UK Supreme Court dismissed the application on the basis that that the children had already become habitually resident in Scotland because their lives there had the requisite degree of

[24] The CJEU's list in *Proceedings in Re A* above n. 12 at [39] is particularly helpful: "To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration." In UK case law, the applicable principles have been distilled into twelve propositions, *Re M (Children) (Return Order: Habitual Residence)* [2020] EWCA Civ 1105 [63], approving most of the propositions set out by Hayden J in *Re B (Habitual Residence)* [2016] EWHC 2174. However, perhaps ironically, at the end of the day, Heyden J explains his decision on the basis that the child would clearly think that her home was in London with her father, id at [32].

[25] *Monasky* above n. 14 at 722.

[26] See e.g., *Re G-E* (children) (Hague Convention 1980: repudiatory retention and habitual residence), [2019] EWCA Civ 283 (holding the habitual residence had changes after 5 months in the UK).

[27] *AR v RN* [2015] UKSC 35.

stability. The reasoning does not seem to give any weight at all to the parental intentions[28] or the temporary nature of the stay in Scotland.[29] This is particularly surprising, since generally, more weight is given to parental intentions where the children are young.[30]

This case can be contrasted with a number of Israeli cases in which it was held that children's habitual residence had not changed after a period of more than six months in Israel, primarily because of the parental intentions.[31] Take, for example, the Supreme Court case of Plonit (2019),[32] which concerned an Israeli lesbian couple who traveled to California for the purpose of Y's post-doctoral studies. Each then got pregnant from the same Israeli sperm donor and gave birth in California—Y to twins—and each adopted the other's child(ren). The post-doctorate took much longer than the two years originally expected, but C stayed and worked for an additional four years in order to enable Y to finish, even after the relationship between them broke down. Just before the scheduled return to Israel, Y told C that she wanted to stay in the US. In the end, Y agreed to return to Israel if C would sign an agreement (drafted by Y's lawyer), providing inter alia that the move to Israel was for a trial period of nine months and that the habitual residence of the children would remain in the US. A few months before the end of the trial period, Y stated that she wanted to return with the children to the US at the end of that period. When C refused to agree to this, Y applied for a return order on the basis of C's hwrongful retention. The Israeli Supreme Court upheld the finding that the children were still habitually resident in the US, in light of the fact that they had lived there most of their lives and the trial nature of the return to Israel. Whilst paying lip service to the hybrid approach, in practice, conclusive weight was given to the agreement between the mothers that the return to Israel was for a trial period of nine months, and little account seems to have been taken of the fact that the children (aged five to six) had been led to believe that the move was permanent, had become fully integrated in Israel where all their extended family lived, and had severed all connections with the US. It is difficult to avoid the conclusion that this case would have been decided differently by an English court, in the light of integration and stability of the children's lives in Israel, where they were living with both parents.

An additional example of divergent approaches to parental intention can be found in an Irish case,[33] in relation to which a reference was made to the CJEU.[34] The case concerned a child born in France to a British mother and French father. When the child was four, the parents divorced and the French court held that the child's residence should be with the mother. The mother then moved with the child to Ireland, but seven months later the French court allowed the father's appeal and held that the child's residence should be with the father. When the latter applied to the Irish court for return of the child under the Hague Abduction Convention, that court held that the child was already habitually resident in Ireland at the date of the alleged wrongful retention (i.e., the day on which the appeal judgment was given), because the reality of her day-to-day life was centered

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[28] In the case of *Re G-E (Children)* [2019] EWCA Civ 283 at [70], Moylan LJ does recognize the force of the argument that insufficient weight was given to the parental intentions, but holds that the finding of the first-instance judge was open to her in the light of the particular facts of the case.

[29] And thus seems inconsistent with the CJEU's comment that the presence should not be temporary, *Re A* above n. 11 at [38].

[30] See e.g., *Monasky* above n. 14 at 727; *Balev* above n. 21 at [45]; Order issued by Koblenz Higher Regional Court—13 UF 67/20 Incadat ref: HC/E/DE 1491). See also US case of *Kenny v. Davis, 2021 US Dist. LEXIS 88556* (upheld on appeal, Kenny v Davies (9th Cir) 2022 US App. LEXIS 4466) in which the court, whilst referring to the "totality of circumstances" standard, largely based its decision that the one-year-old child had acquired a habitual residence in Alaska after four months on the parents' shared intent to live there indefinitely.

[31] See, e.g., FamC 15-07-17354 *Ploni v Plonit* (Jerusalem Family Court, 11.10.15), (children's habitual residence held to be US, even though they had been living with their mother in Israel for three years pursuant to a rotating custody agreement); *P.A. v P.A.* (Jerusalem Family Court, 16 December 2019) (children who had been living in New Jersey with their parents for three years were held not to have become habitually resident there inter alia because the move had been for a trial period for the purpose of solving the marital problems).

[32] RFamA 5041/19 *Plonit v Plonit* (Supreme Court, 8 August 2019).

[33] *G v G* [2015] IESC 12.

[34] Case C-376/14 *PPU.*

in Ireland and her mother was habitually resident there.[35] The Irish courts then referred questions to the CJEU concerning the finding of habitual residence in these circumstances. In their response, the CJEU held that in assessing the reasons for the child's stay in Ireland, it was important to take into account the existence of the appeal, because this impacted on the mother's intention that the stay be permanent and so was not conducive to a finding that habitual residence had changed.[36] Nonetheless, the Irish Supreme Court upheld the finding that the child had already become habitually resident in Ireland at the date of the appeal judgment on the basis "that there was sufficient evidence before the High Court concerning integration, family environment and the nature of the relationship between the child, H, and her parents, such as to allow the High Court judge to come to the conclusion she did." In my view, the Irish courts correctly understood that the emphasis has to be on the child's perspective, which was not affected by the existence of the appeal proceedings. In any event, the case highlights the scope for disparities in relation to the assessment of parental intention and the weight to be placed thereon under the hybrid approach, even where exactly the same formulation for determining habitual residence is being used.

Finally, Australian research provides evidence of divergent approaches within a single jurisdiction (Easteal et al. 2016). An analysis of all reported cases on habitual residence since adoption of the hybrid approach in LK v D-G of Community Services[37] reveals that most focused on the intention of the parents. Only in a minority of cases did courts undertake a broader factual enquiry, as required by that case, and consider the child's perspective.

3.2. Assessment of Factual Connections

The different approaches in relation to the degree of factual connection and in particular the length of residence required to acquire habitual residence in relation to both adults and children have been well documented (e.g., Beaumont and McEleavy 1999, pp. 106–10). Whilst some judges have taken the view that a new habitual residence can be acquired in a day,[38] others have required "an appreciable period of time,"[39] an inherently uncertain concept. Adoption of the hybrid approach does little to clarify the issue.

Even where both parents intend a move to be permanent, it should still be necessary to assess the degree of integration of the child. However, perusal of the case law suggests that in such cases (which are relatively rare), the factual threshold for acquisition of habitual residence is low,[40] and the CJEU has held that provided that the parents are sufficiently integrated, a young child may acquire a new habitual residence within a few days.[41] This approach can perhaps be justified on the basis of the undesirability of holding that a child's habitual residence is different from that of both parents.

In contrast, where there is no joint intention that the move is permanent, the assessment of the factual connections become a corollary of the weight to be attached to the parental intentions. The more weight attached to those intentions, the higher will be the threshold for length of residence and degree of integration. Thus, in the Israeli Supreme Court case of *C v Y*,[42] the considerable emphasis placed on the fact that the children had only been in Israel for six months at the time of the alleged wrongful retention reflects the weight given to the parental agreement that the stay was temporary, even though this agreement was

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35 *G v G* above n. 34 at [48].

36 Case C-376/14 *PPU* at [55].

37 *LK v D-G for Community Services* above n. 17.

38 E.g., *A v A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and Others Intervening)* [2013] UKSC 60, [44] per Lady Hale.

39 See e.g., Re J (A Minor)(Abduction: Custody Rights) [1990] 2 AC 562, 579 per Lord Brandon. In civil law jurisdictions, six months residence was usually required. See sources cited in Schuz 2013, p192 (fn 125).

40 See, e.g., Kenny v Davies above n. 31. Similarly, in *TY v HY* [2019] EWHC 1310, it seems that six weeks would have been considered sufficient time for acquisition of habitual residence in England and Wales by a two-year-old, but for the fact that the parents' relationship was disintegrating during this time (id at [57]).

41 *Mercredi v Chaffe* Case C-497q10 PU [2011] 1 FLR 1293. In this case, the taking mother had sole parental rights. It would not have been possible to rely solely on the mother's integration if the father had also had parental rights, as can be seen from the later case of Case C-512/17, *In Proceedings brought by HR.*

42 *Plonit* (2019) above n. 33.

not in any way reflected in the daily lives of the children. If there had not been any such agreement,[43] it seems inconceivable that the court would not have held that their habitual residence had changed, given the integration of the whole family, their deep cultural and family connections with Israel and the severing of connections with the US In contrast, in the case of AR v RN,[44] the UK Supreme Court's holding that the children's habitual residence had changed after only four months in Scotland with the mother indicates a low threshold for factual connections as well as little regard for parental intentions.

3.3. Need for Physical Presence

The question arises whether a child can be habitually resident in a place without ever having lived there. This issue has usually arisen in cases involving babies who were born during a stay abroad.[45] Under the parental intention model, it was possible for the child's habitual residence to be in the State where the parents had previously been habitually resident together (Schuz 2013, p. 201).[46] However, the factual element in the hybrid model would seem to make it impossible for a child to be habitually resident in a place without ever having set foot there, as explained by Lady Hale in A v A *(Children: Habitual Residence)*.[47] Whilst this view has now been confirmed by the CJEU,[48] it does not seem to be universally held (see, e.g., Beaumont and Halliday 2021). In *A v A* itself, Lord Hughes did not agree with Lady Hale's view (Schuz 2014, pp. 350–51). It also appears that under the "totality of circumstances" approach adopted by the US Supreme Court in *Monasky*,[49] physical presence is not a prerequisite. Indeed, in that case, the US Supreme Court stated that an infant's "mere physical presence is not a dispositive indicator of an infant's habitual residence."[50] Moreover, the reason for the rejection of the mother's argument that the eight-week-old child who had been born in Italy was habitually resident in the US was not simply lack of physical presence there, but rather because the mother failed to show that there had been an intention that the child would be raised in the US.

More recently, relying on *Monsasky,* the Texas Court of Appeals, overturning the decision of the first-instance court, held that twins who were born in Israel and brought by their American mother to the US when they were twenty months old were habitually resident in the US.[51] The court, applying the "totality of circumstances test," took into account the fact that when the mother went into labor two weeks after arriving in Israel, she was in the process of seeking medical permission to fly back to the US. In addition, the court took the view that since throughout the time they lived in Israel, they had been in the mother's care, with limited contact with the Israeli father, they had no real integration into a social or family environment in Israel.[52] With respect, this conclusion is untenable, inter alia because the court does not explain how the twins could have any real integration into

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43 Especially in view of the fact that the mothers declared that they were returning residents and obtained tax benefits on the basis thereof.

44 AR v RN above n. 28.

45 For more details see (Fiorni 2021).
2012 in which the court ordered return of a child who had been born in France during a temporary stay there by the mother to the US, where the mother had lived previously with the father.

46 However, some courts were reluctant to take this approach. See, e.g., *W and B v H (Child Abduction: Surrogacy)* [2002] 1 FLR 1008*W* (holding that children born to an English surrogate mother were not habitually resident in California, where the intended parents lived, because they had never been there).

47 *A v A (Children: Habitual Residence* [2013] UKSC 60.

48 Case C-111/17 PPU OL v PQ; *Proceedings in Re A* above n. 11 [38]. However, it should be noted that neither of these cases involved the 1980 Abduction Convention.

49 *Monasky* above n. 14.

50 *Monasky* id at 729, cf the view of Boggs J in the District Court en banc decision 907 F. 3d at 411, in that case holding that "absent unusual circumstances, where a child has lived exclusively in a single country, especially with both parents, that country is the child's habitual residence."

51 *In the Int. of A.Y.S.,* 2022 Tex. App. LEXIS 1925. Petition for Review against this decision was denied by the Supreme Court of Texas on 14.10.22.

52 Id at 32.

a social or family environment in the US, when they had lived in Israel for all their lives.[53] In my view, this case illustrates the problematic nature of the "totality of circumstances" standard. Whilst this standard seems to have been intended to represent a combination of the parental intention and objective approaches that had been adopted by different circuits, it does not adequately convey that the emphasis has to be on circumstances relating to the child's connections with the countries in question. It is noteworthy that under neither of these previous approaches would the child's habitual residence in this case have been in the US.[54] The aftermath of this case also illustrates the consequences of lack of uniformity. The twins had actually been returned to Israel following the first-instance decision, and so after winning the appeal, the mother applied to the Israeli court requesting their return, claiming that the father was now unlawfully retaining them in Israel in breach of the decision of the Texas Court of Appeal. The Israeli Supreme Court rejected her request,[55] inter alia on the basis that it could not simply adopt the finding of the Texas Court of Appeal in relation to habitual residence and advised her to bring custody proceedings in Israel. [56]

It has been argued that it is necessary to amend the Convention in order to resolve the problem of habitual residence of newborn children (Lowe 2019, p. 218). Whilst indeed there are cases in which a rigid rule requiring physical presence is likely to cause undesirable results, in many it will be possible to avoid them by other means. In cases where the child was abducted from the place of birth to the intended State of residence shortly after birth, an application for return to the place of birth can be resisted on the basis that the child does not have any habitual residence yet, since the connections with the place of birth are not sufficient, bearing in mind the temporary nature of the stay there and the lack of integration of the mother in that State (Schuz 2013, p. 202).[57] Thus, in the case of A.Y.S., if the mother had brought the children to the US a couple of months after they were born, it would have been reasonable to hold that they had no habitual residence and so the Convention did not apply.[58]

Another example would be where a family moves to a new country for a temporary purpose and an additional child is born after the move. The baby will be habitually resident in the new State, but the older children might remain habitually resident in the State where they lived previously. This means that if one parent unilaterally returns to the original place of residence, the Convention would apply to the baby, but not to the older children. However, the court could avoid ordering return on the basis that separating the baby from her older siblings would create a grave risk of harm (Schuz 2014, pp. 355–58).

It should be noted that in the case of A.Y.S. itself, it appears that return could have been prevented without an absurd finding about habitual residence on the basis of the exception in Art 12(2), since the father's Convention application was submitted two years after the abduction.[59] It is not clear why the Texas Court of Appeals chose to deal with her

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53 The mother had applied for permission for immigration status in Israel in order to convert, but this request was refused.

54 The trial court's decision that the children were habitually resident in Israel was based on shared parental intent because the father never agreed to them being habitually resident in the US.

55 RFamA 6762/22 *Plonit v Ploni* (17 November 2022). The mother's request for a further hearing was denied, ACH 8020/22 *Plonit v Ploni* (29 January 2023).

56 I would suggest that the US courts take note of this decision when considering whether to grant a stay of return in cases where there is an appeal against habitual residence, as it belies their assumption that other Member States will return children if an appeal is allowed (see e.g., *Argueta v. Argueta-Ugalde* 2023 US App. LEXIS 6221, 5–6).

57 See e.g., *Delovye v Lee* 329b F3d 330 (3rd Cir 2003). The disadvantage of this approach is that it would leave the child "unprotected" in the case of abduction to a third State.

58 The period of time during which it might be reasonable to hold that the newborn has no habitual residence because he or she is not integrated in the environment in the country of birth is dependent not only on the lack of integration of the mother in that country where the child was born, but also on the degree of connection of the child with the father and the latter's integration there. See, e.g., *Michnea v Romania* (Application No. 10395/19) in which the ECtHR held that the Romanian court's finding that a 5-month-old child born in Italy to Romanian parents was habitually resident in Romania was a breach of the father's right to family life because it did not take into account that the child had been living with both parents in Italy, where the father was working, and so had to some degree been integrated into a social and family environment there.

59 Re A.Y.S. above n.52 at 4. The mother also relied on the grave-risk exception, id at 5.

appeal against the finding of habitual residence rather than to address her claim that this exception was established.[60]

3.4. More Than One Habitual Residence

Whilst it seems to be widely accepted that it is possible for a child to have no habitual residence at a given point in time, the prevailing view is that it is not possible to have more than one habitual residence concurrently. This is no doubt the reason why only rarely has it been argued that a child has dual habitual residence. The main argument in favor of this view is that the Abduction Convention and the Preamble refer to the State of the child's habitual residence in the singular rather than the plural, and so clearly envisage that a child will only have one habitual residence at any one time. In addition, it is claimed that the concept of habitual residence is simply not compatible with the notion that there may be two or more such residences.[61]

However, some support for the possibility of two habitual residences can be found in the literature (Beaumont and McEleavy 1999, p. 91; Lowe et al. 2004, p. 72)[62] and case law.[63] As I have argued in the past (Schuz 2013, pp. 178–79), the arguments against the possibility of dual habitual residence are not convincing. Some people do genuinely live in more than one country, moving on a regular basis between their two homes, and this phenomenon has become more widespread in recent years (Hodson 2018). Artificially finding that only one of those countries is the habitual residence is inconsistent with the factual nature of habitual residence (Lowe et al. 2004, p. 72). Indeed, case law in other areas of law has recognized the possibility that a person may have more than one habitual residence.[64] Furthermore, where the child does genuinely have a home in more than one country, it is inappropriate for the Convention to apply to removals or retentions between those two countries. Since the child is now in one of his or her "homes," this is not an emergency situation requiring a first-aid remedy.[65] Where the removal or retention is to a third country, the operative habitual residence for the purposes of the Convention will be the State that is requesting return of the child, and so it is irrelevant that there might also be another habitual residence.

4. Proposed Guidelines

The disparities illustrated above create considerable uncertainty, which discourages parents from resolving disputes without litigation. This is unfortunate, because litigation often intensifies the dispute in a way that is harmful to children. In addition, the lack of certainty may impact on decisions that parents make in relation to foreign travel (Schuz 2021, p. 29) and is liable to reduce the deterrent effect of the Convention (Easteal et al. 2016, p. 207). Whilst the fact-intensive nature of the determination of habitual residence and the infinite number of possible factual matrices make it difficult to provide clear-cut guidance, the prevailing view is that the determination of habitual residence is a mixed question of fact and law (Schuz 2013, pp. 179–80; Beaumont and Halliday 2021, p. 32).[66] Thus, it is possible to formulate general principles that will inform courts' assessment of the facts when making determinations in relation to habitual residence. Such principles should increase uniformity and certainty. Whilst perhaps ideally such principles should be contained in a

[60] Id at 33 (fn. 7).

[61] *SS-C v GC* [2003] RDF 845 (SC).

[62] In the second edition of their book, Lowe and Nicholls (2016, p. 33) do not express a view about the possibility of a dual habitual residence, but state that it is an unresolved question.

[63] See, e.g., *Sec Depart of Family and Community Services v. Padwa*, [2016] Fam CAFC 57; *LK v. D-G, Department of Community Services* above n. 15.

[64] E.g., *Ikmi v Ikmi* [2001] EWCA Civ 875, relying on the dictum of Lord Scarman in *R v Barnet London Borough Council, Ex p Nilish Shah* [1983] 2 AC 309, but cf case law from CJEU, Case C-289/21 IB (Habitual residence of a spouse—Divorce).

[65] For the same reasons that the Convention does not apply where the removal or retention is to a single habitual residence, see Re C *and another* above n. 9.

[66] See also *Monasky* above n. 14.

Good Practice Guide (Beaumont and Halliday 2021, p. 36), if the guidelines are relatively simple and short, they could be adopted in the Conclusions and Recommendations of a Special Commission meeting. Accordingly, I set out below some draft guidelines, with a brief explanation, in the hope that they might provide a starting point for discussion at the upcoming Eighth Special Commission meeting. The guidelines do not attempt to define habitual residence or to set out a list of factors so as not to give preference to the case law of any one jurisdiction. Rather, they set out general principles that can be applied in implementing any of the formulations. Whilst designed with the Abduction Convention in mind, the proposed guidelines can also be used for determining habitual residence of children in the context of other instruments, both international and domestic, provided that appropriate adjustments are made. In particular, the impact of purposive interpretation, the implications of a child not having a habitual residence or having dual habitual residence, and the burden of proof may vary from instrument to instrument (Schuz 2001b).

4.1. Proposed Guideline 1—Canons of Interpretation

Courts should ensure that findings of habitual residence are consistent with the ordinary meaning of the words "habitual" and "residence." In cases where it is not clear whether the child's habitual residence has changed, in making their decision, courts should take into account the purpose of the Convention, and primarily the objective of protecting children from the harmful effects of international child abduction.

Explanation

This guideline accords with Article 31 of the Vienna Convention on the Law of Treaties,[67] which states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." One of the implications of the draft guideline is that physical presence is a prerequisite for habitual residence, because it is an abuse of language to hold that a child is resident in a State where he or she has never set foot.

Where a finding that a child is habitually resident in either of two States is a reasonable use of language, the court should decide between them by reference to the object and purpose of the Convention. The draft guideline does not purport to set out exhaustively the objectives of the Convention[68] and refers only to the main objective, viz protection of child from the harmful effect of international child abduction, as provided for in the Preamble to the Convention. The US Supreme Court recently gave a much-needed reminder that this objective does not require pursuit of return at all costs.[69]

The normative premise underlying the Convention's mechanism is that the best way to protect children who have been uprooted from their habitual environment is by returning them as soon as possible to that environment (Perez-Vera 1982, para. 12, 25). This premise does not apply where the child was not uprooted from his or her habitual environment, and this is why removal of a child to or retention in such an environment is not treated as abduction. In such a case, there is no need for a summary return procedure to protect the child and the courts of the requested State can resolve the substantive dispute on the basis of the child's best interests.[70] Accordingly, in borderline cases, where the requested State might equally well be seen as the child's habitual environment at the time of the removal or retention, the normative premise does not apply, and on the contrary, invoking the return mechanism might cause the very harm that the Convention was designed to prevent. Thus,

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[67] Drafted in Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.

[68] For discussion of other relevant policy considerations, see Schuz (2001b).

[69] "The Second Circuit's rule, by instructing District Courts to order return "if at all possible" improperly elevated return over the Convention's other objectives. The Convention does not pursue return exclusively or at all costs. Rather, the Convention is designed to protect the interests of children and their parents . . . and children's interests may point against return in some circumstances. Courts must remain conscious of this purpose . . . " (*Golan v Saada* 569 US (2022)).

[70] *Re C and another*, above n. 9.

the main objectives of the Convention are more likely to be realized by a finding that the child was not habitually resident in the requesting State.[71]

4.2. Proposed Guideline 2—Burden of Proof

The applicant has to prove on a balance of probabilities that the child's habitual residence was in a Member State, other than the requested State, immediately before the unlawful removal or retention. Accordingly, in cases of doubt, the applicant will not be able to satisfy the burden of proof and so return will not be ordered under the Convention.

Explanation

The applicant has to prove the threshold conditions for triggering the mandatory return mechanism, and one of these is that the child was habitually resident in a Member State other than the requested State. Thus, in cases where it is not clear where the child was habitually resident at the relevant date—typically whether the child was habitually resident in the requested State or the requesting State—the court will have to dismiss the application for return under the Convention. However, some courts have largely neutralized the burden of proof by relying on a presumption that the Convention should apply, so as to ensure that the child is protected from abduction, and so in borderline cases find that the child's habitual residence was in the requesting State at the date of the wrongful removal or retention (Schuz 2021, p. 23). This approach is misconceived (Beaumont and McEleavy 1999, p. 90; Schuz 2013, pp. 207–8).

As explained above, the inclusion of the requirement of habitual residence as a threshold condition reflects the limits of the basic premise underpinning the Convention mechanism and so effectively restricts the concept of abduction as understood by the Convention to cases where at the time of the wrongful removal or retention the child was habitually resident in the requesting State.[72] Thus, in borderline cases in which it is not clear where the child was habitually resident, the very question to be determined is whether this is a case in which there is considered to be an abduction and so whether there is indeed a need to protect the child therefrom. Accordingly, reliance on a presumption that the Convention should apply, so as to protect the child, for the purposes of determining habitual residence is illogical and circular reasoning.[73]

It should be remembered that the Convention mechanism is an exception to the usual principle that issues concerning children should be determined according to their individual best interests. The basis for this exception is the assumption that the interests of children will usually be best served by returning them promptly to their social and family environment. However, where that environment was in the requested State at the time of the abduction, this justification for departure from the best-interests standard disappears. On the contrary, a return order will inevitably cause the child upheaval, and where there is a real doubt in relation to the child's habitual residence, his or her interests are likely to be best served[74] by staying in the requested State until there has been adjudication on the merits of the dispute or an agreement is reached between the parties. Thus, in such cases, courts should be prepared to hold that the applicant has not satisfied the burden of proving

[71] In such a case, return is not required in order to restore the status quo, and the requested State is often an equally convenient forum for adjudication on the merits.

[72] Whilst the word "abduction" does not appear in the text itself, the Preamble specifically refers to the objective of protecting children from the harmful effects of international child abduction.

[73] Such a presumption also means that the finding of habitual residence might depend on whether the child is removed or retained. Assume, for example, that at the end of an agreed stay abroad for work or study, the father refuses to allow the children to return to the State where they were living before. If the mother unilaterally takes them back to that State, applying the presumption will result in a finding that the children have become habitually resident in the new State. However, if instead, she applies to the court in the new State alleging wrongful retention, then the presumption will result in a finding that the children are still habitually resident in the old State. See also example at Schuz (2013, p. 206).

[74] It might be noted that the ECtHR envisaged that best interests of the child should be taken into account when determining habitual reisdence. *Michnea v Romania* above n. 59 at [51].

that the habitual residence is in another Member State[75] and expedite the hearing on the substantive dispute.

4.3. Proposed Guideline 3—Child's Perspective

The child's habitual residence should be determined by a comparative evaluation of the child's connections with the States in question, on the basis of the relevant facts, including parental intentions. This evaluation should be undertaken from the child's perspective.

Explanation

As already explained, the purpose of the Abduction Convention is to protect a child who has been removed "from the social and family environment in which his life has developed" (Perez-Vera 1982, para. 11). Only if this is determined from the perspective of the child can we legitimately assume that return is in the child's best interests, and it is this assumption that forms the basis for the Convention's mandatory return mechanism (Schuz 2013, p. 97). Thus, as one US Court has said in the context of habitual residence, "the child's perspective should be paramount in construing this Convention whose very purpose is to protect children."[76] Similarly, Lady Hale reminds us that the reality is that of the child and not of the parents and that this child-centric approach accords with "our increasing recognition of children as people with a part to play in their own lives, rather than as passive recipients of their parents' decisions."[77] This reasoning is not limited to adolescent children, but applies to all children who are capable of forming independent contacts with the environment in which they live.[78] Even young children develop meaningful ties with the family and community in which they are living that deserve to be protected, and so account should be taken of the meaning children give to the relationships and events in their life, which may be different from that which adults might expect (Ronen 2004, pp. 158–63). Nonetheless, age and maturity will usually be relevant in determining the weight to be given to their perceptions.

A good example of reference to the child's perspective can be found in the decision of the US Court of Appeals for the Eighth Circuit in the case of *Silverman v Silverman*,[79] where the majority, in overruling the District Court's decision, which had given weight to the mother's unexpressed reservation, stated:

> The court should have determined the degree of settled purpose **from the children's perspective,** including the family's change in geography along with their personal possession and pets, the passage of time, the family abandoning its prior residence and selling the house, the application for and securing of benefits only available to Israeli immigrants, the children's enrolment in school and, to some degree, both parent's intentions at the time of the move to Israel. (my emphasis, R.S.)

The Israeli Supreme Court has also referred expressly to the requirement to conduct the examination of the facts from the viewpoint of the child. Justice Hendel suggests that when the court places its finger on the map of the world in order to point to the country that is the place of habitual residence of the child, it should have in mind the child's world map, with the mosaic of facts of which it is composed.[80] Moreover, Justice Hendel expressly states that whilst parental intentions are part of the factual picture, courts should make sure to keep their focus on the child and not the parents.[81] In other words, at least in relation

[75] As in, e.g., *CB v. LC* above n 16 (father did not prove integration of children during their 13/14 months in Canada).

[76] *Stern v Stern* 639 F.3d 449. (8th Cir 2001) 452.

[77] *Re LC (Reunite: International Child Abduction Centre Intervening)* [2014] UKSC 1, [87]. See also comment of Heyden J in *Re B (a minor ((habitual residence))* [2016] EWHC 2174 (Fam) [18] that habitual residence of a child is all about his or her life and not about the parental dispute.

[78] Lady Hale in *Re LC* ibid at [62].

[79] *Silverman v Silverman* 338 F3d 886 (8th Cir 2003).

[80] *Plonit* 2013 above n. 15 at [9].

[81] Id.

to older children, what is important is how the child would have understood the parents' intentions, based on their actions and conversations with them.

It is worth emphasizing that evaluation of habitual residence from the child's perspective is not inconsistent with the summary nature of Convention proceedings. On the contrary, it is likely to be easier to ascertain the child's perspective than to decide between the parents' conflicting versions as to their intentions (Schuz 2013, p. 212). Ideally, children's perspectives should be presented by an independent lawyer who represents them (Schuz 2013, chp. 15).[82] Also, children should be given an opportunity to be heard directly or indirectly (Schuz 2013, chp. 14), and in the course of such hearing should be asked questions that shed light on their perspective in relation to their connections with the relevant States. Even where the child is not represented or heard, the judge can consider from an objective point of view on the basis of the evidence available how a child is likely to have perceived his or her connections with the States in question.[83] There is no need for any expert evidence about the welfare of the child.

The reference to a comparative assessment recognizes that the speed with which children become integrated into a new environment is invariably connected to the depth of their connections with their previous environment.[84]

4.4. Proposed Guideline 4—Parental Agreements

Whilst parents do not have the power to create a habitual residence that does not match the factual situation of the child,[85] significant weight should be given to parental agreements as to their intentions in relation to the child's habitual residence in cases where these intentions are not inconsistent with the factual situation from the child's perspective.

Explanation

The Report of the Third Special Commission (1997, para. 16) expressly rejected the power of agreements or court orders (for example, in cases involving shuttle custody arrangement) to determine a habitual residence that differs from the factual habitual residence of the child, and this approach has been adopted in most of the few cases in which such agreements have been considered. For example, in the case of *Barzilay*, the Court of Appeals for the 8th Circuit said:

> [D]etermination of habitual residence under the Hague Convention is a fact intensive inquiry particularly sensitive to the perspective and circumstances of the child . . . . Perez-Vera Report at 445 (habitual residence is "a question of pure fact"). To allow parents simply to stipulate to any habitual residence they choose would render these factual considerations irrelevant. Moreover, while our cases recognize parental intent as "relevant," . . . to enforce the agreements in this case would render it dispositive . . . Any idea that parents could contractually determine their children's habitual residence is also at odds with the basic purposes of the Hague Convention.[86]

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[82] As in the case of *Re LC* above n. 78.

[83] Justice Hendel in *Plonit* 2013 above n. 15 expressly referred to this objective assessment of the child's perspective.

[84] As expressed in Lord Wilson's seesaw analogy, in *Re B (A Child) (Habitual Residence: Inherent jurisdiction)* [2016] 1 FLR 561, [45]. See also McDonald J's helpful explanation in *E v D* [2022] EWHC 1216 (Fam) [21] ("The deeper the child's integration in the old state, probably the less fast his or her achievement of the requisite degree of integration in the new state. Likewise, the greater the amount of adult preplanning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his or her achievement of that requisite degree. In circumstances where all of the central members of the child's life in the old state to have moved with him or her, probably the faster his or her achievement of habitual residence. Conversely, where any of the central family members have remained behind and thus represent for the child a continuing link with the old state, probably the less fast his or her achievement of habitual residence").

[85] Third Special Commission Report at para. 16.

[86] *Barzilay* 600 F3d 912 (8th Cir, 2010), 920 approved in *Cohen v Cohen* 858 3d 1150 (8th. Circ, 2017) (also concerning an Israeli couple who had signed an agreement requiring the mother to return to Israel on the occurrence of a specific event) cf *Johnson v Johnson* 26 Va App 135, 493 SE2d 668, 672 (1997) (upholding an agreement that

This approach is clearly correct, but it does not mean that no effect should be given to agreements between parents recording their intentions in relation to habitual residence of children. As we saw above, parental intentions are a relevant factor in determining habitual residence under the now widely adopted hybrid approach, and as I will explain below, there are advantages in recording these intentions in an agreement.[87] Thus, it is appropriate to refer to such agreements in the proposed guidelines.

The main advantage of an agreement is that it spells out clearly the intentions of the parties and so prevents a dispute as to those intentions. Moreover, courts can be expected to try to honor agreements (Schuz 2001b, pp. 135–38)[88] provided that they were made voluntarily (Schuz 2021, p. 34). Accordingly, an agreement stating the parties' intention that the child's habitual residence should not change following a temporary relocation should increase the weight given to those intentions in determining the habitual residence of the child (HCCH Revised Draft Practical Guide 2019, Explanatory Note 27) as long as it is not clearly inconsistent with the child's reality at the relevant date.[89]

Peter McEleavy (2010) has proposed that agreements preserving habitual residence should be effective for a period of up to 12 or 18 months, in order to promote certainty for families who are traveling abroad for a temporary period. Clearly, this suggestion cannot be adopted without an amendment to the Convention, but the suggested guideline might be seen as a soft-law way of partially implementing this idea. The drawback from the parents' perspective is that they cannot know in advance whether effect will be given to their intentions, since they cannot foresee what the factual situation from the child's perspective at a future date will be. However, they can be advised as to steps they can take in order to increase the chance that the child's perspective will not be inconsistent with their agreement, at least for a certain period of time, for example, by ensuring that the child is aware of the temporary nature of the move and that he or she retains meaningful connections with the country of habitual residence. In addition, financial sanctions, such as undertakings to pay for legal costs, can be inserted into agreements between parties in order to create a disincentive to unilateral removal or retention of the child or alleging change of habitual residence in breach of the agreement.

5. Summary

This article has shown how in some ways, the concept of habitual residence might be seen as the "Achilles' heel" of the Convention. Whilst the drafters seemed to have assumed that there would no difficulty in determining habitual residence, which they saw as a pure question of fact, this expectation has proven to be unrealistic, and different approaches to the concept soon developed. Whilst today there is greater doctrinal uniformity as a result of widespread adoption of the hybrid approach, there are still real disparities in implementing this approach. Moreover, the very general tests that have been formulated by some courts in order to give effect to this hybrid approach, such as "totality of the circumstances,"[90] and "global analysis,"[91] give very broad discretion to courts, and so may have expanded the scope for uncertainty, which is liable to increase litigation (Kucinski 2020, p. 38). The problems inherent in the concept of habitual residence are exacerbated by the impact of globalization and the growing number of transnational families. Indeed, this phenomenon would seem to challenge the traditional assumption that each family fits

US courts had exclusive jurisdiction and that children's place of residence for purpose of adjudication would remain in Virginia, despite fact that children had lived for two years with mother in Sweden, but the Swedish court held that the children were now habitually resident in Sweden and so there was no wrongful retention). See also *Rifkin (Central Authority for) v. Peled-Rifkin* [2016] N.B.J. No. 256).

87 For more detailed discussion, see Schuz (2021, pp. 31–33).

88 See also e.g., *A v T* [2012] EWHC 3882; *Wilson v Huntley* (2005) ACWSJ 7084 [58].

89 As in *AM v AK* 2020 ONSC 3422, in which the agreement to return to Australia after the mother finished her training was outweighed by the length of the children's residence in Canada (6 years) and their full integration there.

90 See note 25.

91 CJEU Case C-512/17, *Proceedings brought by HR with the participation of KO* [2018] 3 WLR 1139 [54].

into one geopolitical unit, on which the Abduction Convention is premised (Hacker 2017; Hodson 2018).

It is clearly not possible to solve all these problems by soft-law means within the framework of the existing Convention. Moreover, the fact-intensive nature of the habitual residence enquiry limits the scope for concrete rules. Nonetheless, formulation of general guidelines should go some way to increasing uniformity and ensuring that determinations of habitual residence promote the objectives of the Convention. I would suggest that the Special Commission is the appropriate body to adopt these guidelines. Accordingly, in this article, I have suggested some draft guidelines that might be used as a starting point for discussion of the topic, in the hope that it will be placed on the agenda at the upcoming Eighth Special Commission meeting.

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