

CJEU rules that child's physical presence is a necessary condition for habitual residence

On 8 June 2017 the CJEU has rendered another opinion regarding the interpretation of the concept of 'habitual residence' of the child under the Brussels II bis Regulation.

The facts of the case, C-111/17 PPU, indicate that OL, an Italian national, and PQ, a Greek national, married in Italy in 2013 and that they resided together in Italy. When PQ was eight months pregnant, the couple travelled together to Greece so that PQ could give birth there. On 3 February 2016 PQ gave birth, in Greece, to a daughter, who has remained since her birth in that Member State with her mother. After the birth of the child, OL returned to Italy. According to OL, he had agreed that PQ should stay in Greece with their child until May 2016, when he expected his wife and child to return to Italy. However, in June 2016 PQ decided to remain in Greece, with the child. OL brought an application before the *Monomeles Protodikeio Athinon* (Court of First Instance of Athens, Greece), for the return of that child to Italy, the Member State where the child's parents resided together before the birth of the child.

Having emphasised the importance of the primary caretaker's situation for determining the child's habitual residence, the CJEU stresses that it is nevertheless important to bear in mind that linking the child's habitual residence to that of his primary caretakers should not result 'in making a general and abstract rule according to which the habitual residence of an infant is necessarily that of his parents'. To adopt the position suggested by the father in OL v PQ, that the intention originally expressed by the parents as to the return of the mother accompanied by the child from Greece to Italy, which was the MS of their habitual residence before the birth of the child, constitutes an preponderant element in determining the child's habitual residence would go beyond the limits of that concept. Allowing the initial intention of the parents that the child resides in Italy prevails over the fact that she or he has been continuously resident in Greece since her or his birth would render the concept of 'habitual residence' essentially legal rather than fact-based.

The CJEU rules that Article 11(1) of the Brussels II bis Regulation, must be interpreted as meaning that, in a situation in which a child was born and has been continuously residing with his or her mother for several months in accordance with the joint agreement of the parents in a Greece, while in Italy they had their habitual residence before birth, the initial intention of the parents as to the return of the mother accompanied by the child in Italy cannot allow the child to be regarded as having his or her habitual residence in Italy. The CJEU concludes that in such a situation the refusal of the mother to return to Italy accompanied by the child cannot be regarded as an 'unlawful displacement or non-return' within the meaning of Article 11(1).

This case seems to resolve the dilemma, dividing national courts, as to whether the physical presence of the child in the territory of a state is a necessary precondition for establishing the child's habitual residence.