

CJEU on the EU-third State child abduction proceedings under article 10 of the Brussels IIA Regulation

This post was written by Vito Bumbaca, PhD candidate/ Assistant Lecturer, University of Geneva

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Introduction:

The Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels IIA Regulation) still applies to the United Kingdom in EU cross-border proceedings dealing with parental responsibility and/ or child civil abduction commenced prior to the 31 December 2020 (date when 'Brexit' entered into force). Moreover, the Court of Justice of the European Union (CJEU) is entitled to exercise its jurisdiction over such proceedings involving the UK.

The decision of the High Court of England and Wales (Family Division, 6 November 2020, EWHC 2971 (Fam)), received at the CJEU on 16 November 2020 for an urgent preliminary ruling (pursuant to article 19(3)(b) of the Treaty of the European Union, art. 267 of the Treaty of the Functioning of the European Union, and art. 107 of the Rules of Procedure of the Court of Justice), and the CJEU judgment (*SS v. MCP*, C-603/20, 24 march 2021) are taken as reference in this analysis.

Question for a CJEU urgent preliminary ruling:

'Does Article 10 of [Regulation No 2201/2003] retain jurisdiction, without limit of time, in a Member State if a child habitually resident in that Member State was wrongfully removed to (or retained in) a non-Member State where she, following such removal (or retention), in due course became habitually resident?'

Contents of the EWHC (Family Division) judgment:

This judgment involved an Indian unmarried couple with a British daughter, born in England (2017), aged more than three (almost four at the time of the CJEU proceedings). Both parents held parental responsibility over their daughter, the father being mentioned as such in the birth certificate. The mother and the child left England for India, where the child has lived continuously since 2019. The father applied before the courts of England and Wales seeking an order for the return of the child and a ruling on access rights. The mother contested the UK jurisdiction (EWHC 2971, § 19).

The father claimed that his consent towards the child's relocation to India was temporary for specific purposes, mainly to visit the maternal grandmother (§ 6). The mother contended that the father was abusive towards her and the child and, on that basis, they moved to India (§ 8). Consequentially, she had requested an order (Form C100 'permission to change jurisdiction of the child', § 13). allowing the child's continuous stay in India. Accordingly, the mother wanted their daughter to remain in India with her maternal grandmother, but also to spend time in England after the end of the pandemics.

In the framework of article 8, Brussels IIA, the Family Division of the Court of England and Wales held that the habitual residence assessment should be fact-based. The parental intentions are not determinative and, in many circumstances, habitual residence is established against the wishes of the persons concerned by the proceedings. The Court further maintained, as general principles, that habitual residence should be stable in nature, not permanent, to be distinguished from mere temporary presence. It concluded that, apart from British citizenship, the child did not have factual connections with the UK. Therefore, according to the Court, the child was habitually resident in India at the time of the proceedings concerning access rights initiated in England (§ 16).

The Family Division extended its analysis towards article 12(3) of the Regulation concerning the prorogation of jurisdiction in respect of child arrangements, including contact rights. For the Court, there was no express parental agreement towards the UK jurisdiction, as a prerogative for the exercise of such jurisdiction, at the time of the father's application. It was stated that the mother's application before the UK courts seeking the child's habitual residence declaration in India could not be used as an element conducive to the settlement of a parental

agreement (§ 32).

Lastly, the Court referred to article 10 of Brussels IIA in the context of child abduction while dealing with the return application filed by the father. In practice, the said provision applies to cross-border proceedings involving the EU26 (excluding Denmark and the United Kingdom (for proceedings initiated after 31 December 2020)). Accordingly, article 10 governs the 'competing jurisdiction' between two Member States. The courts of the Member State prior to wrongful removal/ retention should decline jurisdiction over parental responsibility issues when: the change of the child's habitual residence takes place in another Member State; there is proof of acquiescence or ultra-annual inaction of the left-behind parent, holding custody, since the awareness of the abduction. In these circumstances, the child's return would not be ordered in principle as, otherwise provided, the original jurisdiction would be exercised indefinitely (§ 37).

In absence of jurisdiction under Brussels IIA, as well as under the Family Law Act 1986 for the purposes of inherent jurisdiction (§ 45), the High Court referred the above question to the CJEU.

CJEU reasoning:

The Luxembourg Court confirmed that article 10, Brussels IIA, governs intra-EU cross-border proceedings. The latter provision states that jurisdiction over parental responsibility issues should be transferred to the courts where the child has acquired a new habitual residence and one of the alternative conditions set out in the said provision is satisfied (*SS v. MCP*, C-603/20, § 39). In particular, the Court observed that article 10 provides a special ground of jurisdiction, which should operate in coordination with article 8 as a ground of general jurisdiction over parental responsibility (§ 43, 45).

According to the Court, when the child has established a new habitual residence in a third State, following abduction, by consequently abandoning his/ her former 'EU habitual residence', article 8 would not be applicable and article 10 should not be implemented (§ 46-50). This interpretation should also be considered in line with the coordinated activity sought between Brussels IIA and the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the

Protection of Children (§ 56).

Ultimately, the Court maintained that article 10 should be read in accordance with recital 12 of the Regulation, which provides that, as one of its fundamental objectives, parental responsibility issues should be decided by the courts that better suit the principle of factual proximity in the child's best interests (§ 58). Accordingly, the courts that are closest to the child's situation should exercise general jurisdiction over parental responsibility. To such an extent, article 10 represents a balance between the return procedure, avoiding benefits in favour of the abductor parent, and the evoked proximity principle, freezing jurisdiction at the place of habitual residence.

The Court further held that if the courts of the EU Member State were to retain jurisdiction unconditionally, in case of acquiescence and without any condition allowing for account to be taken concerning the child's welfare, such a situation would preclude child protection measures to be implemented in respect of the proximity principle founded on the child's best interests (§ 60). In addition, indefinite jurisdiction would also disregard the principle of prompt return advocated for in the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (§ 61).

The Court concluded that insofar as the child's habitual residence changes to a third State, which is thus competent over parental responsibility, and article 12 of the Regulation is not applicable, the EU courts seised of the matter should apply the rules provided in the bilateral/multilateral instruments in force between the States in question or, on a subsidiary basis, the national Private International Law rules as indicated under article 14, Brussels IIA (§ 64).

Comment:

Considering the findings of fact, the CJEU reasoning and, prior to it, the EWHC judgment, are supported in that the daughter's habitual residence at the time of the parental *de facto* separation (EWHC 2971, § 6-10) was in India; and remained there at the relevant date of the father's application for return and access rights. If we assume, as implicitly reported in the decisions, that the child was aged less than one at the time of the first relocation from England to India, and that she lived more than two years (18 months between 2017-2018 and almost fully 2019-2020, (EWHC 2971, § 25)) within the maternal family environment in India,

including prior to the wrongful act, her place of personal integration should be located in India at the above relevant date. Such a conclusion would respect the factual proximity principle enshrined in recital 12 of Brussels IIA, according to which habitual residence is founded on the child's best interests. Recital 12 constitutes a fundamental objective applicable to parental responsibility, including access rights, and child abduction proceedings. As a result, the courts of the EU26 should be bound by it as a consequence of the Brussels IIA direct implementation.

The CJEU has not dealt with specific decisive elements that, in the case under analysis, would determine the establishing of the child's habitual residence in India at a relevant time (the seisin under art. 8 and the period before abduction under art. 10 of the Regulation). Considering the very young age (*cf.* CJEU, *SS v. MCP*, C-603/20, § 33: 'developmentally sensitive age') of the daughter at the time of the relocation, the child's physical presence corresponding to the mother's and grandmother's one as the primary carers prior to the wrongful act (retention) and to the return application, as well as the Indian social and family environment at the time of the seisin, highlighted by the EWHC, should be considered determinative (*cf.* CJEU, *UD v. XB*, C-393/18, 17 October 2018, § 57) – the Family Division instead excluded the nationality of the child as a relevant factor. The regularity of the child's physical presence at an appreciable period should be taken into account, not as an element of *temporal* permanent character, but as an indicator of *factual* personal stability. In this regard, the child's presence in one Member State should not be artificially linked to a limited duration. That said, the appreciable assessment period is relevant in name of predictability and legal certainty. In particular, the child's physical presence after the wrongful act should not be used as a factor to constitute an unlawful habitual residence (Opinion of Advocate General Rantos, 23 February 2021, § 68-69).

Again, in relation to the child's habitual residence determination in India, the child's best interests would also play a fundamental role. The father's alleged abuse, prior to the relocation, and his late filing for return, following the wrongful retention, should be considered decisive elements in excluding the English family environment as suitable for the child's best interests. This conclusion would lead us to retain India as the child-based appropriate environment for her protection both prior to the wrongful retention, for the return application, as well as at the seisin, for access rights.

In sum, we generally agree with the guidance provided by the CJEU in that factual proximity should be considered a fulfilling principle for the child's habitual residence and best interests determination in the context of child civil abduction. In this way, the CJEU has confirmed the principle encapsulated under recital 12, Brussels IIA, overcoming the current debate, which is conversely present under the Hague Convention 1980 where the child's best interests should not be assessed [comprehensively] for the return application (HCCH, Guide to Good Practice Child Abduction Convention: Part VI – Article 13(1)(b); a *contrario*, European Court of Human Rights, *Michnea v. Romania*, no. 10395/19, 7 October 2020). However, it is argued (partly disagreeing with the CJEU statement) that primary focus should be addressed to the mutable personal integration in a better suited social and family environment acquired within the period between the child's birth and the return application (*cf.* CJEU, *HR*, C-512/17, 28 June 2018, § 66; *L v. M*, 2019, EWHC 219 (Fam), § 46). The indefinite retention of jurisdiction, following abduction, should only be a secondary element for the transfer of jurisdiction in favour of the child's new place of settlement after the wrongful removal/ retention to a third State. In practice, it is submitted that if the child had moved to India due to forced removal/ retention by her mother, with no further personal integration established in India, or with it being maintained in England, founded on the child's best interests, the coordinated jurisdictional framework of articles 8 and 10 (and possibly article 12.4) of the Brussels IIA Regulation might have still been retained as applicable (*cf.* Opinion of Advocate General Rantos, § 58-59; as a comparative practice, see also *L v. M*, and to some extent Cour de cassation, civile, Chambre civile 1, 17 janvier 2019, 18-23.849, 5^o). That said, from now on the CJEU reasoning should be binding for the EU26 national courts. Therefore, article 10 shall only apply to intra-EU26 cross-border proceedings, unlike articles 8 and 12 governing EU26-third State scenarios.