In Practice

The new Canadian test for habitual residence in the Hague Convention

Steven Bookman, LLB, PhD, *Barrister & Solicitor. Founding Partner at Bookman Law Professional Corporation, Toronto, Canada*

In its recent ground-breaking decision, *Office of the Children's Lawyer v Balev*, 2018 SCC 16, the Supreme Court of Canada redefined the Canadian approach to the *Convention on Civil Aspects of International Child Abduction*, better known as the Hague Convention.

The decision of the Supreme Court of Canada to even hear the appeal in *Balev* sent a signal of that court's intention to change the legal landscape in Hague Convention proceedings in Canada which relied heavily on the parental intention approach to the determination of habitual residence. Well prior to that case being heard and before any substantive materials had been filed by counsel, the Supreme Court ruled that the appeal was moot. There was therefore no reason to hear the appeal except for the purpose of revisiting and revising the approach by Canadian courts to the Convention itself.

Prior state of Canadian law

Article 3 of the Convention provides that a retention of children is wrongful where it is in breach of rights of custody attributed to a person, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention and at the time of the removal or retention those rights were actually exercised by the person or would have been exercised but for the removal or retention of the child.

The concept of 'habitual residence' is the foundation of the convention which dictates that children who have been wrongfully removed or wrongfully retained should be promptly returned to their state of habitual residence to permit that jurisdiction to determine issues of custody and access.

The unknown element in the Hague Convention has always been the lack of a definition for 'habitual residence'. Given that the underpinning of a proceeding under this convention is founded in the need to determine a child's habitual residence, the lack of a definition has created a degree of international confusion and controversy.

Article 5(a) of the Convention specifically provides that rights of custody include the right to determine a child's place of residence. 'Rights of custody' is an important concept in the Hague Convention and in prior decisions much emphasis has been placed on the factual determination of custody and its connection to the court's finding of the place of the children's habitual residence.

Prior to the *Balev* decision, Canadian courts largely relied on the definition set out by the Ontario Court of Appeal in *Korutowska-Wooff v Wooff* [2004] 242 D.L.R. (4th) 385, which found that:

(1) the question of habitual residence is a question of fact to be decided based on all of the circumstances;

(2) the habitual residence is the place where the person resides for an appreciable period of time with a 'settled intention';

(3) a 'settled intention' or 'purpose' is an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment, family, etc.; and

(4) a child's habitual residence is tied to that of the child's custodian(s).

The Ontario Court of Appeal in *Wentzell-Ellis v Ellis*, 2010 ONCA 347, also found that it was an error of principle to discount the left-behind parent's residence

when that parent also had custodial rights because the children's habitual residence must be determined with reference to that of both parents. Similarly, the Ontario Superior Court of Justice in *Maharaj v Maharajh*, 2011 ONSC 525, emphasised that the habitual residence of both custodial parents is critical in determining the habitual residence of a child, finding that '[g]iven that the father had custodial rights there the child's habitual residence must be determined with reference to that of both parents.' The term 'custody' as it is used in the Convention is a broad term that covers many situations.

In *Maharaj* the court noted that 'unless the mother can establish a shared parental intention to change the child's habitual residence to Ontario at the time that she moved here then the child's habitual residence on October 5 was in Trinidad' The court ordered the return of the child to Trinidad because even if at one time both parents had intended to move to Canada, it was clear that at the time the mother left with the child the father no longer shared that intention, and as a result 'at the time of removal there was no shared intention of the parents that the child's habitual residence would be changed to Ontario.'

International jurisprudence has also recognised that allowing one parent to change the habitual residence of the child would be inconsistent with the purposes of the Convention. For example, in *Re: Application of Mozes v Mozes* (2001), 239 F.3d 1067 at 1079 (US COA, 9th Cir.), the United States Court of Appeals noted that where a child travels to a jurisdiction for a 'specific, delimited period' courts will refuse to find that the changed intentions of one parent results in an alteration of the child's habitual residence. The reason is that '[t]he Convention is designed to prevent child abduction by reducing the incentive of the would-be abductor to seek unilateral custody over a child in another country. The greater the ease with which habitual residence may be shifted without the consent of both parents, the greater the incentive to try.'

Prior to the *Balev* decision of the Supreme Court of Canada, that very court in prior decisions emphasised the importance of considering both parents' custody rights when determining habitual residence. This was apparent in the 1996 Supreme Court of Canada decision in *DS v VW* [1996] 2 S.C.R. 108 wherein the court stated that 'rights of custody within the meaning of the Act cannot be interpreted in a way that systematically prevents the custodial parent from exercising all the attributes of custody, in particular that of choosing the child's place of residence, but, on the contrary, must be interpreted in a way that protects their exercise.'

Another critical component in considering whether habitual residence had shifted to a new jurisdiction was the existence, where applicable, of time-limited consents. In the Ontario case of *Cornaz v Cornaz-Nikyuuw* (2005) 142 A.C.W.S. (3d) 633, the father consented to the mother temporarily leaving Switzerland with the children to pursue an educational opportunity in Canada for a one-year period of study subsequently extended for a further year. After that period the mother refused to return to Switzerland with the children. The court was absolutely explicit that '*[o]ne parent cannot change the habitual residence of a child without the agreement of the other parent having custody rights*' (emphasis added0. The Court concluded that '[i]n this case there is no evidence that the applicant consented or acquiesced to the children remaining in Ontario beyond December, 2004' and ordered the return of the children to Switzerland. Justice Glithero in that case found that '[t]he consent to the children being abroad for a particular purpose for a particular time period, but not beyond, in my view does not operate so as to effect a change in the habitual residence of the children'.

The Supreme Court of Canada *Thomson v Thomson* [1994] 3 S.C.R. 551 clearly defined the meaning of 'wrongful retention' in the context of the Convention. The Supreme Court held that 'a wrongful retention begins from the moment of the expiration of the period of access, where the

original removal was with the consent of the rightful custodian of the child.' The Court approvingly cited the explanatory report on the Convention, which provides that '[t]he fixing of the decisive date in cases of wrongful retention should be understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension of the child's stay in a place other than that of its habitual residence'(para 76).

The new hybrid approach

The Supreme Court in *Balev* considered three approaches: the parental intention approach, the hybrid approach and the child-centered approach. The court adopted the hybrid approach, and made the following statements:

> '[59] The hybrid approach best fulfills the goals of prompt return: (1) deterring parents from abducting the child in an attempt to establish links with a country that may award them custody, (2) encouraging the speedy adjudication of custody or access disputes in the forum of the child's habitual residence, and (3) protecting the child from the harmful effects of wrongful removal or retention.
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> [60] The hybrid approach deters parents from attempting to manipulate the Hague Convention. It discourages parents from attempting to alter a child's habitual residence by strengthening ties with a particular state . . . for two reasons: (1) parental intent is a relevant consideration under the hybrid approach, and (2) parents who know that the judge will look at all of the circumstances will be deterred from creating "legal and jurisdictional links which are more or less artificial" . . .
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> [62] The hybrid approach also promotes prompt custody and access decisions in the most appropriate forum, and thus offers the best hope of prompt return of the child. . . . The parental intention approach in practice often leads to detailed and conflicting evidence as to the intentions of the parents . . . When parents disagree as to their intentions, the application judge may be faced with a large volume of evidence, including oral evidence, on those intentions.'

The Court went on to explain:

> '[70] The reality is that every case is unique. The application judge charged with determining the child's habitual residence should not be forced to make a blinkered decision that disregards considerations vital to the case under review. Nor should an approach that tolerates manipulation be adopted ... In the end, the best assurance of certainty lies in following the developing international jurisprudence that supports a multi-factored hybrid approach.
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> [71] I conclude that the hybrid approach to habitual residence best conforms to the text, structure, and purpose of the Hague Convention. There is no reason to decline to follow the dominant trend in Hague Convention jurisprudence. The hybrid approach should be adopted in Canada.'

The Supreme Court was clearly influenced by the hybrid approach which has been adopted to varying degrees in the Court of Justice of the European Union, some states in the United States, and in Australia and New Zealand. A good example of an analysis of all approaches with the ultimate adoption of the hybrid approach may be found in the New Zealand Supreme Court decision in *Punter v Secretary for Justice* [2007] 1 NZLR 40. As explained in the *Balev* decision:

> '[52] The Supreme Court of the United Kingdom followed suit in *A v A*, abandoning the parental intention approach to habitual residence in favour of the hybrid approach. Baroness Hale of Richmond concluded that the European

approach was preferable to that earlier adopted by the English courts, which had incorrectly shifted the focus of the habitual residence inquiry "from the actual situation of the child to the intentions of his parents": para. 38. The purposes and intentions of the parents are "merely one of the relevant factors": para. 54. The Supreme Court recently confirmed the hybrid approach in *In re R*.

[53] ... The New Zealand Court of Appeal, in *Punter v. Secretary for Justice*, [2007] 1 N.Z.L.R. 40, expressly rejected counsel's submission that parental purpose should determine a child's habitual residence: see paras. 91–108. Instead, the court described the considerations relevant to habitual residence in these terms (at para. 88):

... the inquiry into habitual residence [is] a broad factual inquiry. Such an inquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration. In this catalogue, . . . settled purpose (and with young children the settled purpose of the parents) is important but not necessarily decisive . . .

[54] The High Court of Australia approved Punter in L.K. Notably, that court observed that while Punter's references to "settled purpose" directs attention to the intentions of the parents, the question of habitual residence must still be decided "by reference to all the circumstances of any particular case": para. 44, quoting *In re J. (A Minor) (Abduction: Custody Rights)*, [1990] 2 A.C. 562 (H.L.), at p. 578'

Some would argue, as did the extremely vigorous dissent in *Balev*, that the hybrid approach results in confusion and benefits would-be abductors at the expense of the left-behind parent's custody rights.

As stated at paras 130 and 131of the dissent:

'[130] The majority's hybrid approach blurs the distinction between custody adjudications and Hague Convention applications and undermines the Convention's goals. We cannot escape the conclusion that the majority's approach is, in substance, a determination of who should be awarded custody.

[131] Assessing this approach in light of (1) the text and structure of the Convention, (2) the purpose of the Convention, and (3) policy concerns, we conclude that the majority's reasons bring about unnecessary confusion in the determination of habitual residence and undermine the certainty that the Convention seeks to create.'

The EU and UK Difference

The courts of the European Union and the United Kingdom are guided by and bound to adhere to the principles set out in the Brussels II bis Regulation enacted in 2003. The Brussels II bis has the impact of reversing the burden of proof regarding children's objections. Courts are obliged to inquire whether the children object to return. The Regulation requires that the court give the child the opportunity to be heard so long as they have reached a level of age and maturity that the court deems appropriate.

In Re D (Abduction: Rights of Custody) [2006] UKHL 51, [2007] 1 FLR 961, a British appellate court suggested that this approach of the Brussels Regulation should apply universally to all Hague Convention hearings.

The Brussels Regulation is distinct from any law or regulation that governs the approach of a Canadian court. However, the Supreme Court of Canada gave consideration to EU jurisprudence. The Court was clear that

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adopting the hybrid approach would harmonise Canadian law with that of other progressive countries throughout the world who were signatories to the Convention.

Conclusion

The hybrid approach adopted in Canada by the Supreme Court of Canada over-empowers application judges by broadening their discretion to a point difficult for an appellate court to review. It will take years for Hague Convention cases to work their way through various levels of appeal in Canadian provincial appeal courts before a comprehensive set of legal constructs are established that can be relied upon by Hague litigants.