accommodating foreign law through the back door by taking it into account so as to avoid injustice. What then is left of the legitimacy of the procedural question exception? It is submitted that much is to be said for the approach recommended by Arden LJ in *Harding v Wealands* that 'a reference to the law of the forum must be the exception, and it must be justified by some imperative which, relative to the imperative of applying the proper law, has priority. It may, for instance, be appropriate to apply the law of the forum where the court cannot put itself into the shoes of the foreign court'.[83] This approach was not accepted by the House of Lords in the context of international tort law when it comes to the quantification of damages.[84] However, in this context it may well be preferable. As noted, English courts have shown themselves more than capable to step into the shoes of the foreign judgment-rendering court. Accordingly, the application of English preclusion law as the law of the forum cannot be justified relative to the imperative of applying the proper law of preclusion. This dogmatic shift away from excluding any choice of law analysis in respect of issues of preclusion with a foreign element (here the *judgment*) need not imply that all issues are necessarily governed by foreign law; as Mance LJ (as he then was) in *Raiffeisen Zentralbank* said about the (three-stage)[85] process through which the common law identifies the appropriate law: 'The overall aim is to identify the most appropriate law to govern *a particular issue*.'[86] Accordingly, the appropriate approach would be to look at the particular preclusion issue and to designate 'in a broad internationalist spirit'[87] the preclusion law most appropriate for its resolution. This may be foreign law or the law of the forum *as appropriate*.

JACOB VAN DE VELDEN*

II. HABITUAL RESIDENCE AND THE NEWBORN—A FRENCH PERSPECTIVE

Where a pregnant woman travels and subsequently gives birth to a child abroad, should the left behind father be able to petition for the 'return' of his child under the 1980 Hague Convention on the Civil Aspects of International Child Abduction? An affirmative answer would not only presuppose that the abduction of the child had been in breach of the father's actually exercised rights of custody, but would also depend on

[83] [2005] 1 WLR 1539, [2004] EWCA Civ 1735 [52]. [84] (n 45).

[85] *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC (The Mount I)* [2001] QB 825, 840, [2001] EWCA CIV 68, [2001] 2 WLR 1344 ('(1) characterisation of the relevant issue; (2) selection of the rule of conflict of laws which lays down a connecting factor for that issue; and (3) identification of the system of law which is tied by that connecting factor to that issue . . . .').

[86] ibid (emphasis added). [87] ibid.

* Assistant Professor of European Law, University of Groningen; Member of the Advisory Panel on Private International Law, British Institute of International and Comparative Law; Rapporteur of the International Civil Litigation Committee & the Interest of the Public, International Law Association. Former Research Fellow, British Institute of International and Comparative Law. Professor Andrew Dickinson and Edward Ho kindly commented on an earlier draft of this note. Email: jaapvandevelden@gmail.com

[*ICLQ* vol 61, April 2012 pp 530–540] doi:10.1017/S0020589312000061

which country, if any, the child was habitually resident in immediately before the 'abduction'.

The notion of habitual residence lies at the heart of the 1980 Hague Convention, which aims at preventing, and providing solutions to, cross-border cases of child abduction through the application of a simple mechanism of summary return based on the cooperation of administrative authorities. Established on the premise that the best interest of abducted children (generally) is to be sent back to their country of habitual residence (the authorities of which are deemed best placed to deal with these children's future[1]) the Convention logically restricts its geographical scope to the abduction of children from their country of habitual residence in a contracting State (Article 4) to another contracting State. An 'abduction' technically takes the form of a wrongful removal from the child's country of habitual residence or of a wrongful retention in a country other than the child's habitual residence. Whilst the determination of the wrongfulness of the removal or retention is a matter for the court seized of the return application, regard must be paid to the rights which exist in respect of the child, under the law of the latter's State of habitual residence (Article 3).[2] Thus the notion of habitual residence is used not only to determine the geographical application of the Convention but also its material scope. Such a role is in keeping with the underlying principle of the natural competence of the country of habitual residence to deal with custody issues.

Other than providing that rights of custody include 'the right to determine the child's place of residence',[3] the Convention does not contain any specification as to the meaning of habitual residence. In view of the centrality of this concept, the lack of definition could *prima facie* surprise, but this was a purposeful decision. This policy was to a large extent based on the understanding of the criterion of habitual residence as a purely factual notion.[4] The factual anchorage of this connecting factor was viewed as having two advantages over alternative legal concepts. First, it was anticipated that habitual residence, being a factual notion, would be uniformly interpreted (unlike more technical concepts the definition of which is likely to vary from State to State and the autonomous interpretation of which would be difficult to secure in the context of the decentralized application of conventions). Secondly, it was thought that the recourse to the factual notion of habitual residence had to be preferred to the legalistic notion of domicile as it would avoid the difficulty arising from the dependence of the domicile of a child on that of its guardians, guardians who may actually be domiciled in different countries. Even where it was conceded that the notion of habitual residence was rather vague, it was held that doubts as to a child's place of habitual residence would diminish if it was understood that habitual residence represented the 'effective centre of the child's life'.[5]

[1] E. Perez Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, para 66.

[2] 'The removal or the retention of a child is to be considered wrongful where – a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

[3] Art 5(a).

[4] Perez Vera (n 1) para 66; W de Steiger *Explanatory Report on the 1961 Hague Protection of Minors Convention*, 13.

[5] W. de Steiger (n 4) 13–14.

https://doi.org/10.1017/S0020589312000061 Published online by Cambridge University Press

It cannot be denied that the older the child is, the easier it should be to ascertain in which country that child's life is effectively centred and to pinpoint when a residence has become habitual. However, deciding on what basis that assessment takes place raises issues with which many courts have grappled for almost three decades: should the centre of gravity be interpreted on a short-, medium- or long-term basis? Can a child be left without any centre of gravity? What is the correct balance of objective and subjective elements of the centre of gravity (duration of residence /parental intentions)?

These related questions, when applied to the context of the identification of the habitual residence of allegedly wrongly retained[6] newborns, as a recent French *Cour de cassation* case exemplifies, bring into sharp focus the actual underlying tension as to whether habitual residence is and should be a purely factual, legalistic or hybrid concept.

A. The Decision of 26 October 2011: The Applicability of the 1980 Convention to an Allegedly Wrongfully Retained Newborn in France

On 26 October 2011, the first civil chamber of the French *Cour de cassation* dismissed an appeal against a decision of the *Cour d'appel* de Lyon which had ordered the return of a newborn child to a country in which it had never actually lived (except *in utero*). The case concerned a Franco-American family. The French mother and American father married in the USA in 2000, established their family home in Michigan and had a daughter in 2005. In November 2007 the mother, then pregnant with a second child,

[6] The issue of wrongful *removal* of newborns appears to raise fewer difficulties. This is because the place of the child's (physical) residence often coincides with the actual residence and intention of at least one of his custody holders and divorcing habitual residence from its factual roots would be an incentive to child abduction. The newborn baby is therefore usually considered habitually resident in the country in which he was born. For an example of case of a child born in the country of his parents' matrimonial home, see *Enrique Nunez-Escudero v Stephanie Rose Tice Menley*, 58 F 3d 374 (8th Cir 1995). In this case the married Mexican father and American mother, who resided in Mexico, had a child there. Less than two months after the birth, the mother took the baby to the USA. The mother, who claimed she had had no intention of remaining in Mexico but was a virtual prisoner there, argued that an infant's habitual residence followed that of his mother and that coerced residence could not be habitual residence. The Court of Appeals stressed, at p 379, that the baby had been born in Mexico and had lived only in Mexico until the mother fled to the US, adding that 'to say that the child's habitual residence derived from his mother would be inconsistent with the Convention for it would reward an abducting parent and create an impermissible presumption that the child's habitual residence is wherever the mother happens to be.' For a case in which the parents did not live in the same country, but had actually planned to create a matrimonial home in the country of refuge, see the German appellate decision made by the *Oberlandesgericht Saabrücken, 2. Senat für Familiensachen*, 9 UF 112/10, 5 November 2010. In this case, the father was habitually resident in Germany. The mother's residence was not entirely clear but she lived mainly in Belgium where she had a valid residency permit and, despite numerous trips there, she had no legal right to live in Germany. The parents, who were married, had talked about living together as a family in Germany. The child, a girl, was born in Belgium on 24 August 2009. When the child was about a week old, the father unilaterally took her to Germany. At first instance, the family court rejected the mother's return petition on the ground that the baby had, at the time of her removal, no habitual residence in Belgium (because of she had only lived in Belgium a few days and the parents had a settled intention to move to Germany). The Court of Appeal (OLG) held on the contrary, at para 28 that the child had a habitual residence in Belgium immediately prior to the removal (because the child's residence in Belgium would be and was, according to the joint intentions of the parents, for an indeterminate duration) and upheld the mother's appeal.

travelled to France with the daughter to visit the terminally ill grandfather. After the death, mother and daughter remained in France with the father's permission. Their stay was extended and the mother gave birth to a boy in February 2008. Very soon thereafter, she applied for a divorce in France. On 13 March 2008, the father seized the US Central Authority of a return petition. The first instance and appellate courts of Lyon both ordered the immediate return of both children to Michigan. The *Cour de cassation* rejected *inter alia* the mother's argument that the baby could not be habitually resident in Michigan since he had never even left France, and it confirmed the return order.

B. The Case's Approach—A Focus on the Acquisition of a Residence as Opposed to the Habitual Residence

When confronted with comparable English authorities, the French decision appears to uphold a legalistic approach to habitual residence which is completely at odds with the factual nature of the connecting factor. Indeed in decisions involving the alleged retention of a neonate child, the High Court has, in child abduction cases,[7] tended to uphold a factual interpretation of habitual residence and accepted that the 1980 Hague Convention shall not offer a remedy. Two cases illustrate this trend.[8] In *W and B v H (Child Abduction: Surrogacy)*,[9] an English woman had entered into a surrogacy agreement with an American couple. Although it had been initially agreed that the surrogate mother would give birth in California and almost immediately hand over the child she later learnt that she was expecting twins. This led to serious debates between the parties; late in the pregnancy, the mother went to England, gave birth and refused to give the children to the Californian couple. A return petition was issued, but Hedley J found that the children had no habitual residence at the date of their retention, stressing 'these children, whatever the legal connections may be, simply are not habitually resident in California nor have ever been. In my view to say that they are so resident involves a degree of artificiality inconsistent with a proposition of fact. They are not in California and have never been so.'

[7] In other areas of the law, some first instance decisions have admitted that physical presence is not necessary to establish habitual residence: see *Re JS (Private International Adoption)* [2000] 2 FLR 638; *B v H (Habitual Residence: Wardship)* [2002] 1 FLR. 388; *Re P (Children),* sub nom *P v P* [2007] 2 FLR 439. This tendency must though now be considered in the light of the Court of Appeal's decision in *SH v HH* [2011] EWCA Civ 796: 'The wardship in relation to SH is discharged because there is no jurisdiction over a child who is not and has never been habitually resident or present here' para 52, per Thorpe LJ.

[8] See also *Re F (Abduction: Unborn Child)* [2006] EWHC 2199 (Fam) [2007] 1 FLR 627: 'Now of course residence is not lost by temporary absence but there must be some physical presence', [2007] 1 FLR 627 para 8 630. Although also seized after the alleged wrongful retention of a child born in a country to which the mother had gone whilst pregnant, this case differs from the previous two authorities in that the starting point of the retention was much later, when the child was 11 months old, thus reinforcing the legitimacy of a factual approach.

[9] *W and B v H (Child Abduction: Surrogacy)* [2002] 1 FLR 1008 para 25. The children were found to have no habitual residence in England either as 'although they are with H who in English law is their mother, they have no biological connection with her. They have always been intended to be American children and their future in that regard remains wholly undecided. On the singular facts of this case I have come to the conclusion that at the moment these children have no place of habitual residence and I so find', ibid.

In *Re G (Abduction: Withdrawal of Proceedings, Acquiescence, Habitual Residence)*,[10] the High Court equally upheld a factual interpretation of habitual residence in a case which bears a striking resemblance to the French situation. Whilst pregnant, the mother of a young girl had travelled to England for what was initially supposed to be a holiday with her family. The stay was extended several times, the father eventually consenting to the mother remaining in England until a period of at least three weeks after the birth. Having established that the wrongful retention in respect of the baby had started when she was seven weeks old, and that habitual residence is an issue of fact to be decided in all the circumstances of the case by reference to the intentions and actions of the parents of the child[11] the court found, on the facts, that the baby had 'acquired upon her birth the mother's habitual residence in England for that first period of her young life'.

How therefore did the *Cour de cassation* come to confirm the application of the Hague Convention in respect of a baby who had only ever lived in one country? The answer lies in the fact that the courts did not deal with habitual residence generally but focused solely on how the child had acquired its first residence.

1. The Cour de cassation did not deal with habitual residence in a general sense

The *Cour de cassation* did not expressly apply legalistic principles divorcing habitual residence from presence: it simply confirmed the *Cour d'appel*'s decision that the retention of the children (including the baby) had been wrongful.

As a cassation court, the *Cour de cassation* does not review the substance of the decisions made by inferior courts, but intervenes solely to control the specific legal elements of the decision subjected to its scrutiny by the parties. A *Cour de cassation* decision can thus only be properly understood if the reasoning followed by the appellate court and the legal arguments levelled against it are clarified.

To order the return of the children to Michigan, the *Cour d'appel* de Lyon first had to establish that the children had been wrongfully retained in France, ie retained in breach of custody rights under the law of the child's State of habitual residence. In the case of the baby,[12] the starting point for the court was Article 5 of the Convention;[13] a child's residence, according to the *Cour d'appel* de Lyon, was determined by its parents, who were married and had joint parental responsibility. In the present case the parents had chosen to establish their matrimonial residence and (after the birth of their eldest child) their family residence in Michigan. Mother and daughter had come to France with the father's approval for what was supposed to be a limited period. When their stay was subsequently extended, this was again with the consent of the father and, until the birth of the second child, there had been no separation procedure on-going either in France or in the USA. On that basis, the *Cour d'appel* de Lyon had stated 'it cannot be presumed

[10] ibid para 101.

[11] *Re G (Abduction: Withdrawal of Proceedings, Acquiescence, Habitual Residence)* [2007] EWHC 2807 (Fam), 2007 WL 4190656, para 99.

[12] As the mother did not contest the applicability of the Convention to her eldest daughter, the court of cassation did not discuss the habitual residence of the five-year-old.

[13] Art 5 provides: 'For the purposes of this Convention – a) ''rights of custody'' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence; . . .'.

that the parents had decided that the residence of their second child would be in France rather than at their family *domicile*.'[14]

The mother claimed, *inter alia*, that the *Cour d'appel* de Lyon had erred in finding that the Hague Convention was applicable to the baby. The mother presented two arguments. First both a removal and a retention implied in her view that the child had to travel from one contracting State to another contracting State, which had not happened. Secondly, it was the mother's case that the *Cour d'appel* had in essence confused habitual residence and *domicile* thus had relied on an inoperative argument to justify its decision[15] and had contradicted itself in considering the child habitually resident in Michigan after having established that he was born in France and had never been to the USA.

a) The *Cour de cassation* did not rule that a removal or retention does not imply an element of travel

In rejecting the mother's claim that a retention (or removal) implies an element of cross-border travel that the child had never undertaken, the *Cour de cassation* did not affirm that travel was not an intrinsic element of a removal or retention. Instead, in its reasoning, the *Cour de cassation* indirectly pointed to the existence of an element of travel in the present case and implicitly considered that *in utero*[16] travel was enough. It was precisely because the baby had travelled, albeit in the mother's womb, for what was supposed to be a temporary, time-limited stay that he was born in a country other than that of his family residence.

b) The *Cour de cassation* did not state that presence is an unnecessary precondition of (habitual) residence

The mother's next suggestion that there had been confusion between *domicile* and habitual residence was not without basis. Indeed it may be noted that the *Cour d'appel*

[14] The French notion of domicile differs markedly from the common law understanding of the term, see P Schlosser**,** *Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, signed at Luxembourg, 9 October 1978, OJ C 59, 5 March 1979* para 71ff. For a discussion of the close proximity of both notions under French law, with *résidence* being a factual notion and *domicile* a legal concept, P Hammje**,** *Répertoire de Droit International* (Dalloz 2003) V *Domicile*, specifically para 17ff.

[15] «*en ordonnant… le retour immédiat de l'enfant… au domicile de son père sis aux Etats-Unis d'Amérique, au motif que la résidence habituelle de l'enfant s'y trouvait pour cela qu'avait sa naissance ses parents y avaient fixé leur domicile, la cour d'appel… a statué par des motifs inopérants*»

[16] This is not to say that an *in utero* abduction had taken place. It is generally considered that the Convention does not apply to such cases; see *Re F (Abduction: Unborn Child)* [2006] EWHC 2199 (Fam) [2007] 1 FLR 627 para 5 'Dr F acknowledged that, given the state of domestic law, he would not make out a case of wrongful removal. In that I am sure he is right. Our law generally confers no independent rights or status on a foetus and in my judgment it is not possible in law to abduct a foetus so as to constitute a wrongful removal within the terms of Art 3 of the Hague Convention.' See also the case which gave rise to the Supreme Court of Israel's decision of 3 June 2009 in *Leave for Family Appeal 2338/09 P v P* (available at http://www.incadat.com/index.cfm?act=search.detail&cid=1037&lng=1&sl=1).

https://doi.org/10.1017/S0020589312000061 Published online by Cambridge University Press

de Lyon did not once in the course of its discussion of the country in which the baby was resident, refer to the notion of *habitual* residence;[17] instead it repeatedly used the unqualified word 'residence' and equated on one occasion *résidence* and *domicile*. Had the *Cour d'appel* de Lyon not in truth confused the factual proposition of *résidence* with the legal proposition of *domicile*?

This claim was not taken seriously by the *Cour de cassation* for whom it was clear from the terms of the *Cour d'appel* that it was indeed the issue of residence that had been considered, despite the one reference to the word *domicile*. The *Cour de cassation* in effect dismissed the confusion as more apparent than real. In its view, what the *Cour d'appel* had wanted to say and had justified, referring seven times to the word *résidence*, was that the parents had, within their rights of custody, chosen to establish the family *résidence* in the USA and this encompassed the baby. As the *Cour de cassation* was not specifically asked to state whether, as a matter of principle, presence is an intrinsic element of habitual residence, it did not address this point.

The mother also alluded to a confusion of substance, although she framed it as a contradiction between the factual findings and the legal ruling of the *Cour d'appel* de Lyon which had on the one hand conceded that 'it could not be contested that [the baby] had never resided on the American continent' and on the other hand ordered his return to the United States on the ground that his residence was in Michigan. Again the *Cour de cassation* did not engage with the essence of the argument as such (the issue of whether presence is a necessary precondition of (habitual) residence) but simply checked that the *Cour d'appel* had appropriately justified its conclusion that the child was resident in the United States. In this it implicitly accepted the *Cour d'appel*'s legal starting point that the residence of a newborn child coincides with that of his family and considered that the appellate court had (appropriately) motivated its decision that that residence had not changed simply because the child had been born abroad and due to the mother's unilateral will to remain abroad (bearing in mind that the father had only authorized a one-off temporary stay abroad[18]).

Upholding the decision to order the return of the baby to Michigan, the *Cour de cassation* did not express support to a legalistic interpretation of *habitual residence*; indeed it did not deal with the issue of when a residence actually becomes habitual.

2. The French judgments only concentrated on how a newborn's residence is first established

a) The *Cour d'appel* de Lyon had not concerned itself with the issue of the habitual residence of the baby, rather it had concentrated on the question whether, and if so where, the newborn had his residence

To do so, it had first relied on Article 5 of the Hague Convention and stressed that rights of custody encompass the right to determine the place of residence of a child. Both

[17] In the 370 words used to discuss the place of residence of the child, the word 'habitual' (habituelle) does not appear once.

[18] So that the stay in France beyond that date was wrongful.

parents being married, and in the absence of any separation proceedings, it was possible to consider, whatever law governed that issue, that the parents had joint rights of custody. They could therefore jointly determine the place of residence of their child. As the parents had established a (stable) family home in Michigan, it was possible for the court to presume that the parents' (initial) joint intention had been that the new baby would also live in Michigan with them. This presumption had to be maintained, according to the court, as matrimonial proceedings were not on-going between the parents: in other words there was no reason to consider that the parents had planned for the baby to live in a country other than that in which the family, as a whole, was established. The child's place of birth, as 'the combined result of chance and of the unilateral will of the mother'[19] could not alone displace this presumption either. This was confirmed by the *Cour de cassation.* This is logical; since a joint intention is needed to establish it, a joint intention is needed for it to end.

b) The *Cour de cassation*, whilst restating much of the previous decision's terms, added the word 'habitual' to the summary of the appellate court's judgment

The *Cour* indeed stated that the newborn was to be considered *resident* at the *habitual* residence of his family and went on to accept that maintaining the child in France (a country other than that of the family residence) was sufficient to characterize a wrongful retention. The addition was surreptitious but it showed that the *Cour de cassation* was happy that the *Cour d'appel* had treated the intended residence of this particular newborn as his habitual residence. It did not however state in general terms that the habitual residence of newborns should necessarily coincide with that of their family: all the *Cour de cassation* did was to confirm that it was satisfied that, in finding the newborn in question habitually resident in the USA, the *Cour d'appel* had correctly applied the law.

C. Evaluation and Conclusions

With this decision, the *Cour de cassation* ultimately recognizes a limited principle: the habitual residence of a newborn child is the place in which he has his intended residence at birth. In the present case, where the parents were married and the family had a stable habitual residence, the residence of the newborn was at the family habitual residence, despite the birth taking place in a different country.

This principle should be approved, but it cannot be extended beyond its very limited scope.

1. The French case may be approved: the habitual residence of a newborn may be the place of his intended residence at birth

The degree of artificiality contained in this approach should not be overestimated. In a 'normal' situation (as opposed to the extreme situations which end up in court), the

[19] «Le lieu de naissance de l'enfant est le fait conjugué du hasard et de la seule volonté de la mère à demeurer sur le sol français.»

https://doi.org/10.1017/S0020589312000061 Published online by Cambridge University Press

intended residence of a neonate will either coincide with his place of birth or, where a baby is born prematurely in another country, for example during a family holiday, the intended residence will shortly thereafter become, in a factual sense, the habitual residence. As regards extreme cases it is necessary to recognize that a newborn baby's situation differs from that of other children: their actual physical presence anywhere is by definition short and they do not have the requisite awareness of, and ability to acclimatize to, their territorial surroundings[20]. They relate to the persons around them (the mother, however central, being just one of them)[21] rather than to external elements (beyond the most immediate ones): the effective centre of their lives cannot be appropriately expressed in terms of territory but rather in terms of persons. Upholding a factual understanding of habitual residence would lead either to the designation of the country of birth as the country of habitual residence even though the place of birth may be due to chance or manipulation and thus be hardly 'habitual',[22] or to the finding that the neonate has no habitual residence (yet) even though for the duration of his (albeit short) life, he has been present in only one country. These results may arguably be as arbitrary and artificial as the legalistic connection of the newborn to somebody else's habitual residence.

The congruence of the intended residence and the habitual residence of a newborn has of course, the added advantage of enabling the application of the 1980 Hague Convention to respond to cases of wrongful removal or retention. This application is both in the best interest of the baby in question[23] and of neonates generally as it guarantees the Convention's deterrence effect even in respect of newborns. Refusing to accept this congruence leads in effect to the negation of the wrongfulness of a newborn's removal or retention simply on the basis of the baby's very young age and in doing so operates as if there was a minimum age for the application of the Hague Convention.[24]

2. The French case may not be generalized

a) Newborns v older babies

The designation of the intended residence of newborns[25] as their habitual residence does not, and should not, apply to older babies, whose physical presence and factual ties are

[20] Whilst newborns have all five senses, their vision is very limited, with an ability to focus only at very close range (the size of somebody's arms holding them).

[21] cf CJEU in C-497/10 PPU *Mercredi v Chaffe* [2012] Fam. 22 para 55: 'An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent.'

[22] cf the requirement of voluntariness in the establishment of a habitual residence.

[23] Should a return to the habitual residence of the family not be in the best interest of the individual child, the Convention's exceptions will apply.

[24] cf the various arguments developed by the *Cour d'appel* de Lyon, albeit in the course of a discussion of a possible art 13(1)(b) exception. The court had adopted a very critical stance of the attitude of the mother stating most forcefully 'the behaviour of the mother is gravely dangerous as she has wrongfully distanced the children from their father and has led father and authorities to face the absolute power that she considers to be hers as the mother, thus showing anything but her understanding of her parental responsibilities.'

[25] In medical terms, a newborn is a baby until the age of 28 days—*Mosby's Medical Dictionary* (8th edn, Elsevier, 2009).

more meaningful than those of neonates and in relation to which a factual approach to habitual residence has much greater significance.

b) Residence v habitual residence

The solution promoted by the *Cour de cassation* cannot be taken to have a more general application because the provision on which much of the reasoning was based does not apply to habitual residence generally (a) and because the reliance on it was the result of a logical inversion and of assumptions which could only be made in the factual context of the particular case (b).

(a) Article 5 of the 1980 Hague Convention does not specify, and should not be interpreted as providing, that rights of custody include the right to determine the *habitual* residence of a child. The preparedness of the *Cour de cassation* to treat a newborn's intended place of residence as his habitual residence should not be taken to apply to other children in other circumstances. In older children cases a habitual residence remains a residence that is (or has become) habitual. Nothing in the French decision can be used to say otherwise. And nothing in the decision suggests that the evaluation of whether a child's residence has become habitual is (or should be) *generally* linked to the joint intention of the parents/custody holders instead of, or in preference to, factual ties.

(b) That Article 5 could be used as the starting point of the reasoning in the present case, thus giving an essential role to the intentions of parents, was the result of a logical inversion which was only possible because of the conjunctions of a number of factual elements and assumptions made in the case. In the system of the 1980 Hague Convention, the clarification of the issue of the habitual residence of a child in principle logically predates the issue of the rights of custody in respect of this child. Indeed the question whether a person has rights of custody is governed by the law of the State in which the child was habitually resident immediately before the removal or retention. It is thus in principle necessary to assess where a child is habitually resident before considering who may have had rights of custody in relation to the child (and whether these rights may have been breached). The intention of custody holders should not have anything to do with the child's habitual residence as until the latter is established, the identity of the former cannot be ascertained for sure. In the present case, such uncertainties did not exist. It was presumed that since the parents of the child were married, they held rights of custody *ex lege* whether under the law of the State of refuge or of the State of origin (as it is generally the case that married parents are joint custody holders). It was further presumed, since there was no procedure of separation ongoing between the parents at the time of birth, that these rights of custody arising *ex lege* had not been altered by reason of a judicial or administrative decision, or by reason of an agreement having legal effect.[26] If the parents had not been married or indeed if they had been married but in the process of separating, these assumptions could not have been made. Finally the intended residence of the newborn could not have been assumed to be at the family home if the family had led a peripatetic life until the

[26] Art 3 *in fine*, see (n 2).

https://doi.org/10.1017/S0020589312000061 Published online by Cambridge University Press

birth. In other words, had there been any uncertainty as to who had rights of custody in respect of the baby, or had there not been a stable family residence until the pregnant mother travelled to France, the courts could not have used an (unclear or contested) newborn's intended residence as his habitual residence for the purposes of applying the 1980 Hague Convention.

AUDE FIORINI*

* Dundee University Law School. E-mail: a.r.fiorini@dundee.ac.uk

https://doi.org/10.1017/S0020589312000061 Published online by Cambridge University Press