

Marinos: residence, habitual residence, domicile and Athens airport

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Overview

An important decision by Mr Justice Munby in the English High Court has decided that in European Brussels II cases:

- habitual residence must be defined in accordance with European community law;
- habitual residence is more directed to a person's fixed centre of interest rather than length of residency;
- a person can only have one habitual residence at any one time but can be resident in more than one country at any one time;
- habitual residence can be lost and gained within a day akin to domicile; and previous English law on residency and habitual residency still applies in non EU cases

Introduction

In mid-October 2007 judgment was published of the decision by Mr Justice Munby, handed down on 3 September 2007, in the Brussels II forum dispute between Jane Marinos and Nikolaos Marinos, an English Greek case. The International Family Law Group acted for the wife. The procedural facts are simple. In late January 2007 the English wife flew into London with the two children after living in Greece with her Greek husband for several years. The following day she issued a petition for divorce. The husband issued in Greece and applied to stay the English proceedings for want of jurisdiction. The English judge had to decide if on the day after her arrival in this country she was habitually resident here and if she had resided here for at least six months before the divorce was issued. Her English domicile was not in dispute.

Because she had issued first in time, her petition took priority if there was jurisdiction. Any closer connection of the family with Greece rather than England was irrelevant under Brussels II.

In coming to his decision, Mr Justice Munby had to analyse the separate definitions and meanings of habitual residence and residence; terms seemingly overlapping and a source of much confusion to English family law practitioners since Brussels II was introduced in March 2001. Mr Justice Munby had to consider whether habitual residence should be construed according to existing English family law definitions or in accordance with and consistent with European community law. As habitual residence occurs in each of the available grounds of jurisdiction for divorce in England pursuant to Brussels II, save for joint domicile, it is of fundamental importance in very many cases. Moreover by coming to a conclusion that habitual residence seems remarkably close to English understanding of domicile rather than period of residency, Mr Justice Munby may have potentially opened up significantly more opportunities for English spouses to claim jurisdiction in England and Wales than might have hitherto been considered available.

On any basis, the facts led to an extremely balanced view of what could have been the outcome. Nevertheless there are many internationally mobile families with significant "residence" and other connections with two or more countries.

The decision has added to the very different English laws which pertain in international cases involving Europe and those involving the rest of the world.

Summary of the facts

The wife was English and the husband was Greek. They met here and married here in 1992 with two children born here, now aged 11 and 7. The husband, a medical professional, moved to Greece in 2002. The wife and children followed in December 2002 either for a trial period or as a temporary relocation. The children attended schools in Greece. He purchased a family home in Greece. Their two English properties were let. She and the children remained there until January 2007 when she left Greece for England. A period of four years.

However had she completely left England? She retained a room at her parents' place in the Midlands, used as an address for business and other correspondence. She had previously been employed by British Airways as a flight attendant and resumed one third of full time work in 2003, becoming one half full-time work in September 2006, requiring her often to travel to London and stay overnight before and after trips. Having undertaken a part-time law degree before she left for Greece, she took a part-time LBC course in September 2004 completing it successfully in July 2006 and requiring attendances at Law College in Birmingham about a dozen times a year. She remained registered with a doctor and dentist here and had medical treatment here. Her financial affairs were centred in England. She spent a considerable amount of time in England for work, education and leisure. This is a pattern not unlike a number of spouses living abroad but maintaining strong links with home.

Mr Justice Munby found that she spent marginally more time in Greece rather than England but it was only a few percentage points.

After she left Greece and came to England in late January, the husband immediately commenced Hague convention child abduction proceedings. This was heard in the High Court in June 2007 (2007) EWHC 1404. The husband's application was dismissed. The High Court accepted that the children had been habitually resident in Greece when they left in January 2007 but also found that the wife's return to this country had been with the husband's consent. The husband's appeal to the Court of Appeal was unsuccessful. Therefore although the children were now legitimately in this country, it was against a backdrop of an admission that they had been habitually resident in Greece (for the purposes of Hague convention child abduction law) the moment the wife left Athens for England. The question for the court was whether she was habitually resident pursuant to Brussels II on the day she issued her petition and had been resident here for six months before the issue of the petition.

Brussels II jurisdiction for divorce

Brussels II dramatically changed domestic jurisdiction from the two grounds of sole domicile or 12 month habitual residence to a choice of seven grounds of jurisdiction, all but one of which required some habitual residence, some clearly overlapping and some being defined in terms of periods of residency. Confusingly, there were separate references to habitual residence and residency. Sole domicile alone, without any habitual residence and six months simple residence, was no longer available if any European Union country had jurisdiction under Brussels II.

The basis of jurisdiction relied on by the wife was the ground of jurisdiction requiring sole domicile coupled with the applicant being "habitually resident if he or she resided [in the country where the divorce was issued] for at least six months immediately before the application was made [i.e. divorce was issued]". Art 3 (1)(a).

English case law as long ago as *Cruse v Chittum* [1974] 2 All ER 940 emphasised that habitual residence indicated the quality of the residence rather than just its duration and required an element of intention to reside in the country in question. Nevertheless there was inevitably always some examination of the fact of the residency itself including the period of prior residency. The pre Brussels II law had required 12 months habitual residence (and not just residence). A period of time linked to the habitual nature of the

residency. This was quite different to the meaning given to habitual residence in many other European countries.

Crucially, the English family courts had decided that a person could have two habitual residences, *Ikimi* [2001] 2 FLR 1288, as could a child: *M v H* (2005) EWHC 1138. Many European countries were of the opinion that the definition of habitual residence simply ruled out the possibility of having more than one habitual residence. English specialist family lawyers dealing with international cases were divided on whether England should be following consistent English domestic law when looking at residency including the possibility of having two residencies or whether we should be following European Community law.

Mr Justice Munby stated in his judgment that a number of very important points arose on this definition of habitual residence within Brussels II. He said it was an area of law on which there had been little direct judicial authority either in England or, as far as it was known, anywhere else in the European Union. This is why the case is of such importance. Article 3 of Brussels II rests jurisdiction primarily on habitual residence yet it has not been defined judicially.

Habitual residence in European Community law

The die of the judgement was cast when both barristers in the case conceded that habitual residence within European Union cases should have a meaning derived from European community law, and that this was not necessarily the same meaning as English domestic law or Hague child abduction law. At a stroke by this concession, English family law created yet another schism between its dealings with Europe and its dealings with the rest of the world. Moreover it will be difficult now for any other English court to withdraw from this position. It might have suited both advocates, as they each perceived the strength of their cases, to make this concession. But again from micro case work arrives macro case law; here potentially impacting on the whole of the European Union. Is this the way family law should be created or defined?

Mr Justice Munby stated that he was satisfied on the existing English case law that the expression habitual residence shall be given the same meaning and effect under the laws of all contracting states within Europe, rather than necessarily the meaning under domestic law. He looked at a number of EU cases, many in the realm of employment and migrancy law. The length of this article does not permit a thorough examination of the various previous decisions but only a summary.

Several cases across Europe together with the Boras Report which was the preliminary to Brussels II place reliance on the definition given on numerous occasions by the European Court of Justice namely, "The place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence". This interpretation involves not purely a quantitative evaluation of time spent in a place but rather a qualitative evaluation of facts pertaining to an individual's links with a place. This includes the person's family situation, the reasons which have led a person to move to a country, the length and continuity of residency, the fact that the person is in stable employment and future intentions as appears from all the circumstances: *Swaddling v Adjudication Officer* (1999) 2 FLR 184.

In *Moore v McLean*, a French Cour de Cassation decision, it was held that habitual residence is defined as the place where the party involved has fixed, with the wish to vest with a stable character, the permanent or habitual centre of his or her interests.

In *L-K v K (No 2)* (2006) Singer J made it clear that European case law on habitual residence gave far less emphasis than did English domestic law on the need to spend an appreciable time in the country before a person could become established as habitual resident. The length of time was a relevant factor but not conclusive. A minimum period could not be set down. In particular he said that "habitual residence does not have to be permanent. It needs to be habitual. The emphasis is on a person's

centre of interests. The verb used is established and all relevant factors are to be taken into account. There is nothing beyond any degree of length of time in the words used except as can be ascribed to the word established. One can establish something very quickly or it may take time to establish. Once the situation is firm, it is established.”

Accordingly Mr Justice Munby in *Marinos* felt able to rely on the ECJ definition above together with the French courts definition in *Moore v McLean*.

He noted previous ECJ decisions had been in employment or related areas of law rather than family law. The place where the family home is situated, the place where the family lives as a family, is equally important in family law cases as is the place of employment in ascertaining the habitual centre of a spouse's interests.

Two habitual residences

Although English domestic law had recognised that it was possible to have a habitual residence in two countries at the same time, the judge decided that within the European law a person could have only one habitual residence. Mr Justice Munby said it was inconsistent with the definition of habitual residence within Europe as referred to above to have two separate permanent or habitual centres of interest. It was linguistically and conceptually inconsistent. The decision of the former President in *Armstrong* (2003) 2 FLR 375 was no longer good law if it suggested that it was possible to have two habitual residences within an EU case. One cannot be habitually resident in more than one EU country at the same time.

Habitual residence and residency

Two of the grounds for jurisdiction in *Brussels II* require habitual residence specified by a period of residency, 12 months on one basis and six months on another bases if also supported by sole domicile. What is the difference between habitual residency and residency? How does one align the jurisdictional requirements of habitual residency with a period of residency?

Mr Justice Munby said that what is required is two things; first, habitual residence on a particular day and secondly residency, though not necessarily habitual residency, during the relevant preceding period. The judge referred to ECJ decisions recognising that it was possible to be resident in more than one country at any one time, although not habitually resident in more than one country at any one time. The judge referred to comments in both *Dicey and Morris on Conflict of Laws* and in *Rayden and Jackson on Divorce* that habitual residence had to be shown throughout the relevant period i.e. either 6 months or 12 months as the case may be. The judge recognised that these were both works of great authority but he did not agree with them on this. Habitual residence has to be at a particular point in time.

Mr Justice Munby then again analysed the facts of the case, setting out the contrary positions for the evidence of a settled, fixed and established intent of habitual residence. He found that the wife in the six months prior to the issue of the divorce petition, in other words prior to that date she arrived in this country, had been resident in both Greece and in England. Indeed, he thought she had been jointly resident in both countries for 12 months or more. However the issue was where she was habitually resident the day she arrived in England, or more precisely the following day when she issued the divorce petition. He said that this was a very finely balanced case with the wife spending approximately equal time in each country. He decided that she was habitually resident in England. It was the combination of the particular facts in this case which were unlikely to be identical in any other case, such is the nature of family law. He emphasised that in one case one factor may weigh more heavily than another in deciding habitual residence. He thought the centre of gravity of the wife's life was here rather than Greece. Although her children were in Greece, her career and planned future career was in England.

Habitual residence and domicile

It is established law that one can lose one's domicile of choice within a moment, almost certainly then reverting to one's domicile of origin until the new domicile of choice has been established. But what of habitual residence? Mr Justice Munby referred to the established understanding that habitual residence could be lost in a day but couldn't be gained in a day. The understanding was that some habitual nature of the residency was needed. In this case, that habitual nature was less than 24 hours between her arrival in England and the issue of the petition.

The judge found that in a case of a planned, purposeful and permanent relocation from one country to another, especially in which there was already existing simple residency, it was possible to acquire habitual residence contemporaneously or virtually contemporaneously with the loss of one's previous habitual residence. Hence there was nothing in European community law to prevent the conclusion that she lost her habitual residence in Greece as the aircraft in which she and the children were travelling took off from Athens airport in the same way she acquired her new habitual residence as the aircraft touched down at Heathrow.

It was always said that an English spouse, leaving their spouse abroad, reacquired their domicile of origin, alternatively acquired a domicile of choice, as she crossed over the white cliffs of Dover. Domicile was capable of such immediacy. The same now applies to habitual residence. It can be lost in a day. In particular circumstances, probably including when there is already simple residence even jointly shared with another country, habitual residence can be acquired in a day. This is very new in English law.

Moreover, it now begs the question of the differences between domicile and habitual residence in its European Union meaning. Both require elements of settled intent, strong connections, perhaps some simple residency, real commitment and long-term establishment with a particular country. One particular basis of Brussels II jurisdiction is sole domicile coupled with habitual residence if six months simple residency. Domicile is now remarkably close to the EU habitual residence definition. This particular basis of jurisdiction is now no longer so much the coming together of the concept of domicile and the concept of habitual residence but more a general element of the committed connectedness with a particular country. We need further judicial elucidation on distinctions between domicile and habitual residence. They are becoming very close.

Conclusion: when two worlds drift apart

Since Brussels II, there has been a fundamental difference between our dealings with Europe and our dealings with the rest of the world. Paramount is the criteria for priority of issue of proceedings. Across Europe, it is simply which party is first to issue in time. In *Leman-Klammers v Klammers* [2007], the petitions were issued in England and France on the same day, a matter of hours apart. Such small differences in time can have dramatic differences in financial outcomes: this is the utter unfairness of Brussels II. But in cases with the rest of the world, England condemns the unilateral issuing of proceedings without prior notice and instead operates a discretionary stay jurisdiction, looking at the country which has the closest connection with the family and where justice and fairness can most easily be done. A totally different approach.

Marinos has given us further distinctions. It is possible to have two habitual residences, in England and elsewhere in the world, when dealing with non European Union countries. However in Brussels II cases, there can only be one habitual residence. This requires a settled intent and examination of the centre of someone's interests. It does not necessarily require any period of residency, especially any period of sole residency. It is possible to be resident in two European Union countries at the same time. Habitual residency can be lost immediately but in particular circumstances, especially if coupled with existing simple residency, can be acquired immediately.

Of particular interest will be whether English domestic law on residency and habitual residency now changes to become aligned with European Community law, but thereby making significant changes for other countries outside the European Union with which England has frequent dealings and many of which also use the non EU definitions and meanings of residency and habitual residency.

Brussels' strong pressure on the United Kingdom to adopt applicable law has made England realise that whilst many other international family law cases concern Europe, very many still concern other countries, primarily English speaking and closely linked with England by a common history and heritage. Our inevitable closeness now with other European family law jurisdictions including the concepts, principles and definitions deriving from Brussels II is creating tensions with our very historic and jurisprudentially close ties with many other countries around the world. Many international families in England have close connections with Europe, often through employment. However very many international families in England have close connections with non European countries, often going back several generations.

Whereas Brussels has strong and powerful lobbying and can exert political pressure on England, these other historically linked countries have no combined voice. Those of us practising in family law must make our government and Brussels aware that England has looked and will continue to look both towards Europe but also towards our historic and continuing globally close connections in many other countries. This judgement in *Marinos* affects these other countries indirectly just as it very directly affects all European Union family law jurisdictions.

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