INSIGHT

A Spouse Can Only Have One Habitual Residence for the Application of Article 3 Brussels II-bis

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Abstract: In application of art. 3 Brussels II-bis a spouse can only have one habitual residence even if he/she share his/her time between two Member States. The court has the duty to establish his/her habitual residence taking into account the place where such person has the main centre of his or her interests and a stable presence.

Keywords: habitual residence – matrimonial proceedings – Brussels II-bis – change of habitual residence – divorce – forum-shopping.

I. Introduction

Habitual residence is the main ground of jurisdiction for the dissolution of the marital link in application of art. 3 Brussels II-bis.[1] Habitual residence may be of either one or both spouses.

Habitual residence can be very difficult to ascertain in practice and given the "race to the court" allowed by the multiple grounds of jurisdiction provided by art. 3, this increases conflicts between spouses. Despite this situation, more then 20 years have elapsed before the first CJUE judgment on habitual residence of a spouse has been handed down, while many decisions have been given[2] on the habitual residence of the child[3] in the last 15 years.

In France, by a decision of 14 December 2005,[4] the *Cour de Cassation* judged that, when applying art. 2 of Brussels II-bis, the habitual residence shall be defined pursuant to the

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[1] Regulation (EC) 2201/2003 of the European Parliament and of the Council of 27 November 2003 concerning jurisdiction and recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/200.

[2] Case C-523/07 *A.* ECLI:EU:C:2009:225; case C-497/10 PPU *Mercredi* ECLI:EU:C:2010:829; case C-512/17 *HR* ECLI:EU:C:2018:513; case C-393/18 PPU *UD* ECLI:EU:C:2018:835.

[3] The rules related to the children have been introduced in Brussels II bis – which came into force on 1 March 2005; with regards to divorce, the regulations of which were already stated in Brussels II, art. 2 – which become effective on 1 March 2001– it has been transposed into art. 3 Brussel II bis.

[4] French Civil Court of Cassation judgment 1 of 14 December 2005 n. 05-10951.

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case-law of the CJUE, as such a notion is an autonomous precept of EU law, and that this should be found to be at the place where the person has determined, with the aim of giving it a stable character, as the permanent centre of his or her interest. French scholars have criticized the *Cour de Cassation* at that time for not having taken the opportunity to refer for a preliminary ruling to the Court of Justice on the definition of habitual residence of the spouse in application of Brussels II-bis art. 2. The same approach was however later followed at least by the High Court in England[5] and the *Cour d'Appel* in Luxembourg.[6]

The case submitted to the CJUE was now the ideal case to clarify on the definition of the habitual residence of spouses. In the case *IB (Résidence habituelle d'un époux – Divorce)*[7] a couple, a French husband and an Irish wife – lived in Ireland since 2008, where they had their family house and their children. In May 2007, the husband found a job in France: he worked in Paris during the week and went back in Ireland every weekend to stay with his family. He had an apartment in Paris, he was registered with the social security in France and paid his taxes in France. At the same time, he had a house in Ireland and his family was there, whom he met every weekend. He also maintained his social activities in Ireland. In December 2018 he filed for divorce in Paris.

The wife challenged the French jurisdiction based on the fact that the husband was not habitually resident in France but in Ireland. By order dated 11 July 2019, the family judge in Paris found that it lacked jurisdiction to rule on the divorce of the spouses. The decision was grounded on the matter that the husband choice that his place of employment should be in France, was not sufficient by itself to show an intention to establish his habitual residence there, notwithstanding the fiscal and administrative consequences and lifestyle habits resulting from that choice.

As regards proof of habitual residence, in comparison with the case that was judged in 2004, it should be noted that it is much more difficult today for a spouse to collect elements that will make it possible to determine the residence of his or her spouse. Indeed, since the provisions of Regulation 2016/679[8] on the protection of personal data came into force, it has become much more difficult to collect such evidence.

On the appeal of the husband, the Court of Appeal of Paris decided to stay the proceedings and to refer for a preliminary ruling to the CJEU the following question. The referral thus runs:

> "Where it is apparent from the factual circumstances that one of the spouses divides his or her time between two Member States, is it permissible to conclude, in accordance with

[5] England and Wales High Court decision of 3 September 2007 *Marinos v Marinos* [EWHC] 2047; England and Wales High Court decision of 11 April 2019 *Pierburg v Pierburg* [EWFC] 24.

[6] Luxembourg Court of Appeal judgment of 6 June 2007 n. 31642 *F. K. c/ U. S.*

[7] C-289/20 *IB (Résidence habituelle d'un époux – Divorce)* ECLI:EU:C:2021:955.

[8] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation.

> and for the purposes of the application of Article 3 of Regulation No 2201/2003, that he or she is habitually resident in two Member States, such that, if the conditions listed in that Article are met in two Member States, the courts of those two States have equal jurisdiction to rule on the divorce?"[9]

In the view of the present author, the referral was unfortunately poorly drafted. Indeed, the Court of Justice's answer on the possibility for a person to have a dual habitual residence was quite obvious. The interest of the case was more on how to define the habitual residence of spouse. Although the Court provides some clarifications on the definition of habitual residence, it does not do so through the prism of the functional approach, although the facts of the case gave it the opportunity to do so.

II A spouse can only have one habitual residence

The question asked by the Court of Appeal was inspired by the *Hadadi*[10] case in which the CJEU, for the application of art. 3(1)(b) Brussels II-bis, accepted that the spouse's double nationality confer jurisdiction on multiple Member States. But the solution given to dual nationality cannot be transposed to dual habitual residence. And indeed, in a case related to the Succession Regulation, the Court had already found that a person could have only one habitual residence.[11]

Regarding Brussels II-bis, such a conclusion is now grounded on the following five arguments:

i) a textual argument. The Court notes that "Article 3(1)(a) of that regulation nor any other provision of that regulation refers to that concept in the plural" (para 40). Undeniably, habitual residence is always referred to in the singular and the regulation never says that a person, spouse or child may have more than one habitual residence;

ii) the term "habitual" reflects a permanence or regularity and, in case of transfer of a person's habitual residence to another Member State, the intention of the person to establish there the permanent centre of his or her interest should be demonstrated. Therefore, such a definition and approach are not compatible with the possibility to have two habitual residences;

iii) the objective of the rules laid down at art. 3 Brussels II-bis is to strike a balance between the free movement of persons within the European Union and legal certainty. The text establishes a number of alternative criteria without hierarchy between them in order to facilitate the possibility for the petitioner to file for divorce. The possibility for a person to have more than one habitual residence would extend these criteria and would undermine legal certainty;

[9] *IB* cit. para 23.
[10] Case C-168/08 *Hadadi* ECLI:EU:C:2009:474.
[11] Case C-80/19 *E.E. (Jurisdiction and law applicable to inheritance)* ECLI:EU:C:2020:569.

iv) the determination of jurisdiction based on art. 3 Brussels II-bis has consequences on other ancillary matter because the court for divorce would also have jurisdiction for maintenance between spouses and also, probably, for the partition of the matrimonial property regime. It is therefore crucial that jurisdiction on divorce is established on a strong ground, which also implies that a person shall have only one habitual residence;

v) this arrangement will not affect the solution of the *Hadadi* case because the concept of habitual residence and nationality are quite different, and the decisions adopted for the first one cannot be transposed to habitual residence.

These considerations take the CJEU to conclude that, although a spouse can have a few residences, he or she may have at a given moment, only one *habitual* residence for the purposes of art. 3(1)(a) Brussels II-bis.

III. Some clarifications on the definition of habitual residence

The Court then focused on the definition of habitual residence. In this regard, it refers to its case law on the definition of the child's habitual residence, and in particular the need to identify the place where the person concerned has the permanent centre of his or her interests, which in the case of an adult will necessarily be more numerous than those of a child, without requiring that they all be located in one and the same State.

To summarize, the Court considers that the concept of "habitual residence" is characterized, in principle, by two factors, namely, first, the intention of the person concerned to establish the habitual centre of his or her interests in a particular place and, secondly, a presence which is sufficiently stable in the Member State concerned.

It deduced that in this case, husband integration in France, where he carries out a professional activity during the week and owns an apartment, was indeed demonstrated. However, it considers that in order to admit that the husband has his habitual residence in France, it will be necessary to show whether he had the intention to transfer his habitual residence there.

On a critical appraisal, the Court's approach allows for some scepticism. In the judgment the Court clarifies that habitual residence "has to be given an autonomous and uniform interpretation, taking into account the context of the provisions referring to that concept and the objectives of that regulation".[12] In our view, the objectives of the Regulation are instead not at all addressed in the decision.

Indeed, while it was undeniable in this case that the husband had his habitual residence in France from a professional and social point of view, from a family point of view everything suggested, as the first judge in France had held, that his habitual residence remained in Ireland. This functional approach to the concept of habitual residence seems to have been completely underestimated by the Court of Justice. Admittedly, this was not the question posed by the Court of Appeal in Paris. However, after answering the first

[12] *IB* cit. para 39.

question related to the possibility of dual habitual residence, the Court turned to the definition of the spouse's habitual residence. In this context, it is regrettable that it did not, as it seemed to recommend in para. 39,[13] analyse the situation in the light of the objectives of the Regulation at issue. Indeed, this functional approach to the concept of habitual residence is advocated in the context of Regulation No 650/2012[14] of 4 July 2012 on succession. In the preamble to such Regulation a functional approach is expressly advocated with regard to the interpretation of the concept of habitual residence. Para. 24 states:

> "In certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the center of interests of his family and his social life was located".[15]

The present case gave the CJEU the opportunity to rule on this approach to habitual residence in the context of the Brussels II-bis Regulation. It is regrettable that it did not do so.

[13] *Ibid*.

[14] Regulation (EU) 2021/650 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

[15] *Ibid*. para 24.