



INSIGHT

# JURISDICTION IN MATTERS OF PARENTAL RESPONSIBILITY BETWEEN LEGAL CERTAINTY AND CHILDREN'S FUNDAMENTAL RIGHTS

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**ABSTRACT:** The impact of the protection of fundamental rights is a factor of increasing importance for the interpretation of EU private international law. In matters of parental responsibility, the application of the rules on jurisdictional competence contained in the Regulation (EC) 2201/2003 can have a significant bearing on the rights of the child protected by Art. 24 of the Charter of Fundamental Rights of the European Union. The judgment of the Court of Justice in *UD* (judgment of 17 October 2018, case C-393/18 PPU) dealt with a case concerning the notion of habitual residence of the child, that plays a central role under the mentioned Regulation and that is related to the principle of the best interests of the child, as often remarked by the Court itself. The Court refused to provide a broad interpretation of the notion, even in a situation where the protection of fundamental rights was at stake, while highlighting the fact that the existing methods and techniques of private international law may already serve that purpose.

**KEYWORDS:** fundamental rights – jurisdictional competence – parental responsibility – rights of the child – habitual residence – Brussels IIa Regulation.

## I. PRELIMINARY REMARKS

In contemporary world, the enhanced mobility of persons and goods makes recourse to private international law a more and more pressing need. At the same time, the necessity of devising sophisticated instruments in that field has arisen, in order to cope with evolving political and social concerns. In that context, scholars have now been placing for several years an ever-increasing emphasis on the impact of the protection of fundamental rights on private international law.<sup>1</sup> The approach to problems concerning

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<sup>1</sup> See D. COHEN, *La Convention européenne des droits et le droit international privé*, in *Revue critique de droit international privé*, 1989, p. 451 *et seq.*; P. KINSCH, *Droits de l'homme, droits fondamentaux et droit international privé*, in *Recueil des Cours*, 2005, vol. 318, p. 9 *et seq.*; F. MARCHADIER, *Les objectifs gé-*

jurisdictional competence, conflicts of laws, recognition and enforcement of judgments, international legal assistance in civil matters is by now clearly influenced by principles relating to human rights, that are undeniably shaping the interpretation of private international law rules.<sup>2</sup> Not unexpectedly, this is especially so in sensitive matters, like family and children law, where issues relating to fundamental personal rights and legal relationships are often at stake.<sup>3</sup>

The mentioned tendency is also shared by EU private international law and is strongly developing, especially after the Charter of Fundamental Rights of the European Union (Charter) has acquired the same legal value as the Treaties. In recent years, express references to the need to apply private international law rules in accordance with requirements concerning fundamental rights began to appear in EU measures concerning judicial cooperation in civil matters.<sup>4</sup> In addition, the reliance on the principles enshrined in the Charter has become a common method of interpretation in the case-law of the Court of Justice of the European Union,<sup>5</sup> in order to ensure that EU legislative acts be interpreted in such a way as not to affect their validity and in conformity with primary law as a whole.<sup>6</sup>

However, in matters of parental responsibility that practice even pre-dates the Lisbon Treaty, as the preamble of the Council Regulation (EC) 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<sup>7</sup> already contained an express mention of Art. 24 of the Charter concerning the rights of the child.<sup>8</sup> Several judgments of the Court built on that reference in order to develop a rights-oriented interpretation of the rules of the Regulation.<sup>9</sup>

*néraux du droit international privé à l'épreuve de la Convention européenne des droits de l'homme*, Bruxelles: Bruylant, 2007.

<sup>2</sup> L.R. KIESTRA, *The Impact of the European Convention on Human Rights on Private International Law*, Berlin: Springer, 2014, p. 4 *et seq.*

<sup>3</sup> R. BARATTA, *Derechos Fundamentales y Derecho Internacional Privado de Familia*, in *Anuario español de derecho internacional privado*, 2016, p. 103 *et seq.*

<sup>4</sup> See e.g. Art. 38 of Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

<sup>5</sup> On the relevance of the Charter as an interpretative tool, see F. BESTAGNO, *I rapporti tra la Carta e le fonti secondarie di diritto dell'UE nella giurisprudenza della Corte di giustizia*, in *Il diritto dell'Unione europea*, 2015, p. 259 *et seq.*

<sup>6</sup> As explicitly remarked by Court of Justice, judgment of 31 January 2013, case C-12/11, *McDonagh*, para. 44.

<sup>7</sup> The Regulation is currently under revision, pursuant to the Commission Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final.

<sup>8</sup> See recital. 33 of the preamble.

<sup>9</sup> See e.g. Court of Justice: judgment of 23 December 2009, case C-403/09 PPU, *Detiček*, para. 53 *et seq.*; judgment of 5 October 2010, case C-400/10 PPU, *McB.*, para. 45 *et seq.*; judgment of 22 December

A recent case gave the Court the occasion to clarify to what extent the protection of fundamental rights can play a role in the interpretation of EU rules concerning jurisdictional competence in family matters. As will be seen later, the Court rejected the suggestion of the referring court to broaden the notion of habitual residence for the alleged purpose to comply with fundamental rights of the child. Accordingly, it is worth examining whether the judgment can be regarded as an acceptable compromise between the general aims and techniques of judicial cooperation in civil matters and the need to take into account the protection of fundamental rights.

## II. THE FACTS OF THE CASE AND THE PRELIMINARY RULING

The case was referred by the High Court of Justice, which was dealing with the application of a Bangladeshi national, requesting that her child, aged two months, be made ward of court. The applicant had entered into marriage with a British national and had then moved to the United Kingdom. When she was pregnant, she returned to Bangladesh with her husband, who allegedly forced her to give birth to the child in that country and to remain there with the child, while he moved back to the United Kingdom.

The applicant instituted the proceedings in the United Kingdom, claiming that the child was habitually resident in that State; the jurisdiction of the referring court was contested by the father. Before making any finding of fact, the High Court of Justice requested a preliminary ruling concerning the interpretation of Art. 8 of Regulation 2201/2003: it asked whether the physical presence is an intrinsic requirement of habitual residence and whether the alleged coercion of the father, colliding with the fundamental rights of the mother and of the child, should be taken into consideration in order to assume or to decline jurisdiction.

At first, the Court of Justice dismissed the exception raised by the United Kingdom as to its jurisdiction in the light of the fact that the case involved only one Member State and one third State. The Court noted that neither the general provisions of Regulation 2201/2003 nor Art. 8 thereof contain limitations as to the scope *ratione personae* of jurisdictional competence based on the habitual residence of the child, and also referred to its previous ruling in *Owusu*.<sup>10</sup>

The Court then examined the preliminary question raised by the referring court, recalling its established case-law about the need for an autonomous interpretation of the

2010, case C-491/10 PPU, *Aguirre Zarraga*, para. 59 *et seq.* Cf. N. LAZZERINI, *Il controllo della compatibilità del diritto nazionale con la Carta dei diritti fondamentali secondo la sentenza McB.*, in *Rivista di diritto internazionale*, 2011, p. 136 *et seq.*

<sup>10</sup> Court of Justice, judgment of 1st March 2005, case C-281/02, *Owusu* [GC]. The case concerned the application of the provisions of the 1968 Brussels Convention to a dispute having connections only with a Member State and a third State: the Court held that even in such cases uniform rules on jurisdiction can contribute to the proper functioning of the internal market.

notion of “habitual residence”.<sup>11</sup> That notion implies that physical presence is a necessary requirement, even though other factors may be taken into account in order to verify the non-temporary nature of that presence. Accordingly, in establishing the habitual residence of the child, the physical presence of the child in that Member State is crucial, even if the location of the child is the result of coercion by another party.

In the Court’s view, this conclusion cannot amount to a violation of the fundamental rights of the child, insofar as the court of the place of the habitual residence is the closest court to the child and the best placed to rule on parental responsibility matters. In addition, under Art. 14 of the Regulation a domestic court can establish its jurisdiction according to its national rules, even when the child is not habitually resident in that Member State; in that connection, the Court remarked that English courts were apparently allowed to exercise jurisdiction in the instant case on the ground of domestic rules.

### III. THE IMPACT OF THE RIGHTS OF THE CHILD ON JURISDICTION RULES UNDER THE REGULATION (EC) 2201/2003

It is by now generally accepted that rules on jurisdictional competence should be in conformity with the principles underlying the right to a fair trial under Art. 6 of the European Convention on Human Rights and the right to an effective remedy under Art. 47 of the Charter.<sup>12</sup> In that context, the determination of jurisdiction must be made in such a way as to prevent violations of the right of the claimant to have access to a tribunal,<sup>13</sup> but also of the rights of defence. Nonetheless, the relevance of those principles in matters of jurisdiction does not go as far as to demand the use of specific regulatory models, but requires mainly that access to a tribunal be granted in the State to which the dispute has a particularly close connection and that jurisdiction is not exercised when the dispute is devoid of any connection to the State of the forum.<sup>14</sup>

However, in matters of parental responsibility fundamental rights considerations cannot focus only on the parties to the proceedings (usually the parents or the holders of custody rights), but must especially take into account the position of the child. As anticipated, the reference to the rights of the child enshrined in Art. 24 of the Charter has

<sup>11</sup> A. BORRÁS, *Article 8*, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIa Regulation*, Munich: Sellier, 2012, p. 109 *et seq.*

<sup>12</sup> J.J. FAWCETT, M. NÍ SHÚILLEABHÁIN, S. SHAH, *Human Rights and Private International Law*, Oxford: OUP, 2016, p. 112 *et seq.*; L.R. KIESTRÁ, *The Impact of the European Convention*, cit., p. 94 *et seq.*

<sup>13</sup> H. GAUDEMÉT-TALLON, *Le “droit au juge” à l’épreuve des règles de compétence judiciaire internationale (matière civile et commerciale)*, in P. LÉGER (ed.), *Le droit à la mesure de l’homme*, Paris: Dalloz, 2006, 173 *et seq.*

<sup>14</sup> On the requirement of “sufficient connection” in order to exercise jurisdiction by necessity, see A. MILLS, *Rethinking Jurisdiction in International Law*, in *British Yearbook of International Law*, 2014, p. 187 *et seq.*

been widely used as an interpretative tool in the case-law of the Court of Justice,<sup>15</sup> which had several occasions to underline the special relevance of those rights for the application of Regulation 2201/2003, even if the outcomes were sometimes unconvincing.<sup>16</sup> In this regard, the Court often recalled the general principle, arising from Art. 3 of the 1989 New York Convention on the Rights of the Child and expressly reiterated in Art. 24, para. 2, of the Charter,<sup>17</sup> that in all decision-making processes affecting children their position and their best interests must be the focal point.<sup>18</sup>

In cross-border cases, such a general principle can obviously come into play even at the preliminary stage of the determination of jurisdiction. The necessary compliance with that principle does not require the adoption of given solutions, as the only capable to grant adequate consideration of the best interests of the child, but different methods can be envisaged to that aim. In fact, the principle of the best interests of the child forms the theoretical basis for all the rules on jurisdictional competence in matters of parental responsibility contained in the Regulation 2201/2003, even though they rely on different techniques.

On one hand, the approach of the Regulation moves from the assumption that jurisdiction must depend on a connection, having possibly various degrees of effectiveness, between the child itself and the State of the forum. The underlying idea is that, when such a close connection exists, the interests of the child may be best taken into account by the competent court. For this reason, in accordance with the proximity principle<sup>19</sup> and having in mind the objective of legal certainty, it is for the legislator to single out the connection that, in the abstract, is seen as the most consistent with the best interests of the child, while domestic courts are only expected to verify its existence in each case.

On the other hand, some special rules entail mechanisms allowing domestic courts to establish their jurisdiction if its exercise in the instant case is in the best interests of the child, as it happens with the prorogation of jurisdiction under Art. 12<sup>20</sup> and with the

<sup>15</sup> See e.g. Court of Justice: judgment of 24 February 2008, case C-244/06, *Dynamic Medien*, para. 41; judgment of 6 June 2013, case C-648/11, *MA*, para. 56 *et seq.*

<sup>16</sup> J.-J. KUIPERS, *The (non-)Application of the Charter of Fundamental Rights to a Certificate for the Return of a Child*, in *European Human Rights Law Review*, 2012, p. 397 *et seq.*

<sup>17</sup> According to the Explanations relating to the Charter of Fundamental Rights, Art. 24 is based on several provisions of the 1989 UN Convention on the Rights of the Child, ratified by all Member States. Some discrepancies between the two instruments are highlighted in R. LAMONT, *Article 24*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds), *The EU Charter of Fundamental Rights. A Commentary*, Cambridge: Hart, 2014, p. 678.

<sup>18</sup> Court of Justice: judgment of 26 April 2012, case C-92/12 PPU, *Health Service Executive*, para. 127 *et seq.*; judgment of 9 November 2010, case C-296/10, *Purrucker*, para. 82 *et seq.*

<sup>19</sup> See M. ŽUPAN, *The Best Interests of the Child: A Guiding Principle in Administering Cross-Border Child-Related Matters?*, in T. LIEFAARD, J. SLOTH-NIELSEN (eds), *The United Nations Convention on the Rights of the Child*, Leiden: Brill, 2015, p. 213 *et seq.*

<sup>20</sup> See S. CORNELOUP, *Les règles de compétence relatives à la responsabilité parentale*, in H. FULCHIRON, C. NOURISSAT (eds), *Le nouveau droit communautaire du divorce et de la responsabilité parentale*, Paris: Dalloz, 2005, p. 69 *et seq.*

*forum (non) conveniens* rule in Art. 15.<sup>21</sup> In that context, domestic courts are called upon to make a case-by-case evaluation as to the best interests of the child, in order to decide whether to establish or to decline their jurisdiction.<sup>22</sup>

### III.1. HABITUAL RESIDENCE OF THE CHILD AS KEY CONCEPT IN THE REGULATION

In the framework of the Regulation and under its Art. 8 habitual residence of the child is the general tenet around which the system of jurisdictional competence in matters of parental responsibility revolves:<sup>23</sup> it does not come as much of a surprise, being habitual residence the most significant connection between a person and a given legal system in modern private international law.

As the Court of Justice repeatedly remarked, the general ground for jurisdiction contained in Art. 8 is focused on the central role of the habitual residence of the child, that is instrumental in ensuring the proximity between the case and the competent court and in achieving the best interests of the child.<sup>24</sup>

In addition, the relevance of the criterion of the habitual residence arises from a different point of view, as it is a decisive factor for the applicability *ratione personae* of the Regulation, especially in the relationship with the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.<sup>25</sup>

The 1996 Hague Convention, that contains rules on jurisdiction that mainly correspond to the rules included in the Regulation,<sup>26</sup> is in principle applicable before the

<sup>21</sup> On Art. 15 of the Regulation, concerning the transfer to a court better placed to hear the case, see, among others, E. PATAUT, *Article 15*, in U. MAGNUS, P. MANKOWSKI, *Brussels IIbis Regulation*, cit., p. 164 *et seq.*; K. TRIMMINGS, *Transfer of Jurisdiction and the Best Interests of the Child*, in *Cambridge Law Journal*, 2016, p. 471 *et seq.*

<sup>22</sup> In particular, the Court of Justice held that the assessment of the best interests of the child is an autonomous requirement to be satisfied before a transfer of proceedings to a better placed court under Art. 15 may take place: judgment of 27 October 2016, case C-428/15, *Child and Family Agency*, para. 58 *et seq.*

<sup>23</sup> For the relevance of the habitual residence of the child as a connecting factor in the practice of US courts, see J. ATKINSON, *The Meaning of "Habitual Residence" under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children*, in *Oklahoma Law Review*, 2011, p. 647 *et seq.*

<sup>24</sup> Court of Justice: judgment of 15 February 2017, case C-499/15, *W and V*, para. 51 *et seq.*; judgment of 16 July 2015, case C-184/14, *A v. B.*, para. 37 *et seq.*

<sup>25</sup> The Convention was ratified by all EU Member States on behalf of the European Union according to Council Decision 2008/431/EC of 5 June 2008. The Convention is thus part of the *acquis communautaire*: see P. BEAUMONT, *Interaction of the Brussels IIa and Maintenance Regulations with [possible] litigation in non-EU States: Including Brexit Implications*, in *Working Papers Series of the Centre of Private International Law of the University of Aberdeen*, 2018, no. 1, p. 9.

<sup>26</sup> Nonetheless, some discrepancies between the two instruments exist: for instance, Art. 9 of the Regulation does not correspond to any provision in the Convention; also the transfer to a court better placed to hear the case is governed by slightly different provisions under Art. 15 of the Regulation and under Art. 8 of the Convention.

courts of the Contracting States, without any geographical limitation.<sup>27</sup> However, the Regulation will have priority over the Convention when a child is habitually resident in a Member State (except Denmark)<sup>28</sup>, while the habitual residence of the child in a Contracting State (that is not an EU Member State) will lead to establish the jurisdiction of that State under the Convention. In addition, the 1996 Hague Convention can come into play even when the habitual residence of the child is located in a non-Member and non-Contracting State, but in that case a concurring application of the Regulation is possible, as the Court of Justice held in *UD*, when it suggested that the referring court could assume jurisdiction under the national rules referred to by Art. 14 of the Regulation.<sup>29</sup>

### III.2. THE NOTION OF HABITUAL RESIDENCE OF THE CHILD

As it is clearly perceptible, the notion of habitual residence of the child is of the utmost importance in the functioning of Regulation 2201/2003. Consequently, the interpretation of the notion itself is crucial to the correct application of the Regulation.

Even though habitual residence is used as a connecting factor in several other instruments, many scholars support the view that the meaning of the concept and the relevant factors to be taken into account depend on the characteristics of the person it refers to. In particular, the determination of habitual residence would be a different process depending on the age of the person concerned.<sup>30</sup> Such a view is also considered to be more consistent with the inherent need to protect fundamental rights, insofar as it would allow a certain degree of flexibility<sup>31</sup> and would comply with the re-

<sup>27</sup> See P. LAGARDE, *Explanatory Report on the 1996 Hague Child Protection Convention*, [www.hcch.net](http://www.hcch.net), para. 17, p. 545. In a different vein, see M. ŽUPAN, *Scope of Application, Definitions and Relations to Other Instruments*, in C. HONORATI (ed), *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction*, Torino-Frankfurt am Main: Giappichelli-Peter Lang, 2017, p. 3 *et seq.*, esp. p. 34.

<sup>28</sup> See Art. 61 of the Regulation, according to which it «shall apply: (a) where the child concerned has his or her habitual residence on the territory of a Member State». The provision is related to Art. 52 of the Convention: under Art. 52 the Contracting States may «conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention» (para. 2); the same applies to «uniform laws based on special ties of a regional or other nature between the States concerned» (para. 4). See, again, P. LAGARDE, *Explanatory Report*, cit., para. 172, p. 603.

<sup>29</sup> In *UD* the Court of Justice held that national rules could apply to the situation of a child having his habitual residence in a third State, but did not even mention the 1996 Hague Convention, probably in the light of the fact that Bangladesh is not a Contracting Party to it. See, however, opinion of AG Saugmandsgaard Øe delivered on 20 September 2018, case C-393/18 PPU, para. 24. See also the document of the Council stating the General approach to the Commission Proposal COM(2016) 411, 15401/18, p. 17, fn. 14, [data.consilium.europa.eu](http://data.consilium.europa.eu).

<sup>30</sup> See e.g. A. LIMANTE, *Establishing Habitual Residence of Adults under the Brussels Ila Regulation: Best Practices from National Case-Law*, in *Journal of Private International Law*, 2018, p. 160 *et seq.*, esp. p. 163. Cf. also Court of Justice, judgment of 2 April 2009, case C-523/07, *A*, para. 36.

<sup>31</sup> Cf. K. LENAERTS, *The Best Interests of the Child*, cit., p. 1306.

quirement, implied in Art. 24 of the Charter, that the special condition of children be taken into consideration.<sup>32</sup>

In the interpretation of Art. 8 of Regulation 2201/2003 the Court of Justice decided to preserve a degree of discretion and refused to frame a clear-cut definition, preferring to point to an all-encompassing evaluation.<sup>33</sup> Accordingly, while some general statements are recapitulated in every judgment, the Court, acting in its ordinary case-by-case perspective, showed diverging approaches, based on various combinations of criteria and placing emphasis on different circumstances of each case, especially with regard to the position of very young children.

In *A* the Court of Justice clarified that the factors to be taken into account concerned the physical presence of the child, the non-temporary nature of his or her stay and a certain degree of integration in a social and family environment; a list of possibly relevant indicators was also added.<sup>34</sup> Subsequently, in *C* the Court highlighted the necessity to strike an overall balance in presence of conflicting factors.<sup>35</sup>

A partially different approach was followed in *Mercredi*.<sup>36</sup> The Court had to deal with the case of a two months old child, whose habitual residence was to be assessed in the light of the fact that she was born in England and had been moved to the island of Réunion five days before the court was seised: having regard to the very young age of the child, it held that special importance had to be annexed to the situation of the mother, as the only person who exercised rights of custody, and to her reasons to move.

Even though habitual residence is seen by the Court as a connecting factor requiring the examination of a question of mere fact,<sup>37</sup> in several ensuing cases it had to examine the situation of a child being physically present in only one State since his or her birth and the suggestions of domestic courts that this factual link could be discarded as a consequence of other factors. In this regard, the position of domestic courts can be traced back to the findings of the Court in *Mercredi*, where it was held that even an extraordinarily short stay could lead to establish habitual residence of the child if accompanied by the intention of the parent looking after him or her to move. In addition, domestic courts seem to place a far greater emphasis on the choice of the parents as to the habitual residence of the child.<sup>38</sup>

<sup>32</sup> On the conflict between child welfare and paternalism and child autonomy through participation in Art. 24, cf. R. LAMONT, *Article 24*, cit., p. 678.

<sup>33</sup> As remarked by K. LENAERTS, *The Best Interests of the Child*, cit., p. 1306 *et seq.*

<sup>34</sup> *A*, cit., para. 38 *et seq.*

<sup>35</sup> Court of Justice, judgment of 9 October 2014, case C-376/14 PPU, *C*, para. 54 *et seq.*

<sup>36</sup> Court of Justice, judgment of 22 December 2010, case C-497/10 PPU, *Mercredi*, para. 52 *et seq.*

<sup>37</sup> The complexity of the notion is remarked by K. HILBIG-LUGANI, 'Habitual Residence' in *European Family Law: the Diversity, Coherence and Transparency of a Challenging Notion*, in K. BOELE-WOELKI, N. DETHLOFF, W. GEPHART (eds), *Family Law and Culture in Europe*, Cambridge: Intersentia, 2014, p. 249 *et seq.*

<sup>38</sup> See the national case-law cited in A. LIMANTÉ, I. KUNDA, *Jurisdiction in Parental Responsibility Matters*, in C. HONORATI (ed), *Jurisdiction in Matrimonial Matters*, cit., p. 78 *et seq.*

The Court of Justice has thus far opposed those attempts, assuming that an over-estimation of intention as an element of habitual residence can impair legal certainty.<sup>39</sup> In *OL* it clarified that the common intention of the parents as to the return of the child to the State of habitual residence of the parents themselves is not crucial, failing the physical presence of the child in that State;<sup>40</sup> in *HR* the Court concluded that the intention of the mother to move to her Member State of origin with the child could not prevail over the close factual connections to another Member State, notwithstanding her cultural ties with the first State and her short stays there with her child.<sup>41</sup>

The case examined in *UD* was exceptional in comparison to previous cases, as habitual residence of the child in Bangladesh was the alleged result of a decision by one of the parents, enforced by coercion. In that context, for the first time the referring court made an express mention of the protection of human rights as a factor capable to counterweigh the priority accorded to the principles of proximity and of legal certainty. Emphasising that habitual residence always requires physical presence of the child, the Court chose to follow the lead of its existing case-law.

It is now worth examining whether the conclusion reached by the Court is in accordance with the principles arising from the Charter and concerning the rights of the child.

#### IV. AT THE CROSSROADS BETWEEN LEGAL CERTAINTY AND FUNDAMENTAL RIGHTS

At the outset, it must be noted that the case dealt with in *UD* provided the example of a possible violation of fundamental rights that could influence the functioning of private international law in a different manner from those envisaged thus far by scholars.

On one hand, the referring court did not question the compatibility of the ground of jurisdiction in itself with the protection of the rights of the child (or of the mother), as it would happen, for instance, with a discriminatory ground of jurisdiction, like the habitual residence of the mother or of the father.<sup>42</sup> As earlier mentioned, the use of habitual residence of the child as a general ground of jurisdiction in matters of parental responsibility aims at ensuring the compliance with the best interests of the child. The notion of habitual residence is in itself flexible enough to allow domestic courts to take into account the circumstances of each case, provided that an actual connection between the child and the territory of the Member State exists. For that reason, it cannot be said to contradict in itself the principles underlying the protection of the child.

<sup>39</sup> On the principle of legal certainty in the EU judicial cooperation in civil matters, cf. C. OTERO GARCÍA-CASTRILLÓN, *Legal Certainty and Predictability in the EUPILLAR Project's Regulations: An Assessment*, in P. BEAUMONT, M. DANOV, K. TRIMMINGS, B. YÜKSEL (eds), *Cross-Border Litigation in Europe*, Cambridge: Hart Publishing, 2017, p. 213 *et seq.*

<sup>40</sup> Court of Justice, judgment of 8 June 2017, case C-111/17 PPU, *OL*, para. 47 *et seq.*

<sup>41</sup> Court of Justice, judgment of 28 June 2018, case C-512/17, *HR*, para. 47 *et seq.*

<sup>42</sup> For a criticism of the judgment in *Mercredi*, as disguising an application of the forum of habitual residence of the mother, see A. BORRÁS, *Article 8*, cit., p. 114 *et seq.*

On the other hand, it was not even submitted that the application of the rules contained in Regulation 2201/2003 could result in a complete lack of jurisdiction by the Member State concerned. The Court of Justice clearly remarked that under Art. 14 of the Regulation and availing itself of the so-called “residual jurisdiction” the referring court could be able to assume jurisdiction. In fact, Regulation 2201/2003, while not providing, unlike more recent EU Regulations in family matters, for a forum of necessity,<sup>43</sup> allows domestic courts to make use of national rules on jurisdictional competence when no court of a Member State would be otherwise competent. The application of those rules, ensuring the access of the claimant to English courts, could in itself have prevented a situation of denial of justice in the European judicial area and the related violation of the right of the claimant to a fair trial.

Instead, the preliminary question in *UD* clearly called for a broad interpretation of the notion itself of “habitual residence”, stressing the exceptional circumstances that led to the establishment of that connection in the instant case. The Court refused to take those facts into account, also mentioning that they had not yet been proven in domestic proceedings; in any event, it held that the above described circumstances could not allow it to stretch the notion of habitual residence so far as to include a place where the child had never been physically present, since such a broad interpretation was not required by the principle of the best interests of the child.

Such a reasoning shows the attitude of the Court of Justice towards the use of principles relating to fundamental rights in the interpretation of rules on jurisdictional competence (even though it is possible to draw more general conclusions concerning the entire domain of judicial cooperation in civil matters). On the one hand, when the existing rules contain an express reference to the protection of fundamental rights as a condition for the exercise of jurisdiction, the Court is certainly ready to give adequate weight to such an evaluation.<sup>44</sup> On the other hand, failing that condition, the Court of Justice, though accepting that some provisions may embody human rights considerations, is quite reluctant to depart from the literal interpretation in order to pursue an enhanced protection of fundamental rights, at least when the same objective can be fulfilled through other means.

That approach can easily be explained as a sign of deference towards the legislator’s choices as to the instruments for the implementation of that protection. It also implies a certain deference towards the techniques of private international law, as capable of contributing to the achievement of the same objective: in this regard, the interpretation of EU instruments concerning judicial cooperation in civil matters in conformity

<sup>43</sup> On the usefulness of such a provision in Regulation 2201/2003 see E. PATAUT, *The External Dimension of Private International Family Law*, in M. CREMONA, H.-W. MICKLITZ (eds), *Private Law in the External Relations of the EU*, Oxford: OUP, 2016, p. 108 *et seq.*

<sup>44</sup> See C. HONORATI, A. LIMANTÉ, *Transfer of Proceedings*, in C. HONORATI (ed.), *Jurisdiction in Matrimonial Matters*, cit., p. 199 *et seq.*

with the Charter is facilitated by the fact that from the beginning the EU legislator was strongly committed to ensuring protection of fundamental rights, as demonstrated by the general structure and the single provisions of Regulation 2201/2003.

However, it must be borne in mind that private international law and international civil procedure also have objectives of their own, among which legal certainty has a prominent position. The Court of Justice has been stressing for many years the importance of that value in the system of jurisdictional competence under the 1968 Brussels Convention and under the subsequent Brussels I Regulations;<sup>45</sup> but, as it is shown by the emphasis placed by the Court of Justice on habitual residence of the child under Regulation 2201/2003, it can prove to be a major concern also in family matters. The application of that principle in those matters can seem to be sometimes at odds with the special relevance there annexed to the protection of fundamental rights, demanding for a higher degree of flexibility in the determination of jurisdiction.<sup>46</sup>

In *UD* the Court of Justice was exactly confronted with a conflict between the inherent need of legal certainty and the suggestion that a more open approach to the notion of habitual residence was necessary in order to ensure the protection of the fundamental rights of the child. The Court held that there was no room for a wider interpretation of the notion and for the consideration of the factors put forward by the referring court. But it did so only after having recalled the different methods through which flexibility in the determination of jurisdiction can be ensured under Regulation 2201/2003 and after having satisfied itself that a possible denial of justice could be in any event prevented as the referring court was able to assume jurisdiction in the instant case. This cautious approach seems a knowledgeable solution in order to avoid that, ultimately, an excessive emphasis on the protection of fundamental rights can turn out to be a disgregating factor for the smooth functioning of judicial cooperation in civil matters.

<sup>45</sup> See A. BRIGGS, *Civil Jurisdiction and Judgments*, 6th ed., Abingdon: Routledge, 2015, p. 31 *et seq.*

<sup>46</sup> The idea that legal certainty and flexibility are opposed values in private international law was recently called into question: see K. ROOSEVELT, *Certainty vs. Flexibility in the Conflict of Laws*, in University of Penn Law School, Public Law Research Paper No. 18-40.

