Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 20 September 2018[1]

Case C-393/18 PPU

UD
v
XB

(Request for a preliminary ruling
from High Court of Justice (England and Wales), Family Division (United Kingdom))

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Jurisdiction in matters of parental responsibility — Regulation (EC) No 2201/2003 — Article 8(1) — Notion of 'habitual residence of the child' — Birth and continued stay of an infant in a third State against the mother's will — Infant never physically present in a Member State — Situation resulting from the coercion exercised by the father and a potential infringement of the fundamental rights of the mother and the infant — No rule under which a child cannot have its habitual residence in a Member State in which that child has never been physically present)

I. Introduction

1. By its request for a preliminary ruling, the High Court of Justice (England and Wales), Family Division (United Kingdom), asks the Court about the interpretation of Article 8(1) of Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ('the Brussels IIa Regulation').[2]

2. That request has been submitted in the context of a dispute between the mother, of Bangladeshi nationality, and the father, of British nationality, of a child aged around one year at the time when that court was seised. The child was conceived and born, and has continuously resided, in Bangladesh. The mother alleges that the father is detaining her against her will in that third State, to which she travelled, after residing for around six months in the United Kingdom with the father, with the sole intention of making a temporary visit. Owing to the coercion exercised by the father, the mother was forced to give birth in Bangladesh and to remain there with the child. The mother asks the referring court to order that the child be made a ward of that court and to order that she and the child return to England and Wales in order to participate in the judicial proceedings.

1 Original language: French.

2 Council Regulation of 27 November 2003 repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).

3. Under Article 8(1) of the Brussels IIa Regulation, the referring court has jurisdiction to adjudicate on that request only if the child was 'habitually resident' in the United Kingdom at the time when that court was seised. That court therefore seeks to ascertain whether the fact that the child has never been physically present in that Member State necessarily precludes her from being habitually resident there. It also asks the Court about the effect, in that context, of the fact that that absence from the territory of the United Kingdom is the result of the coercion exercised by the father over the mother, potentially in breach of the fundamental rights of the mother and the child.

4. At the end of my analysis, I will conclude that the fact that a child has never been in a Member State does not necessarily preclude it from being habitually resident there. I will also set out the factors, which include the reason why the mother and the child are absent from the territory of that Member State, to be taken into account for the purposes of determining the child's habitual residence in a case such as that obtaining in the main proceedings.

II. Legal framework

5. Recital 12 of the Brussels IIa Regulation is worded as follows:

'The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence …'

6. Article 8 of that regulation, entitled 'General jurisdiction', provides in paragraph 1 that 'the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised'.

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

7. The applicant in the main proceedings (UD), a Bangladeshi national, entered into an arranged marriage in 2013 in Bangladesh with the respondent in the main proceedings (XB), a British national. The applicant and the respondent are, respectively, the mother and father of a girl conceived in Bangladesh in May 2016.

8. In June or July 2016 UD travelled to the United Kingdom to live there with XB. She was granted a spousal visa issued by the United Kingdom Home Office, valid from 1 July 2016 until 1 April 2019.

9. UD makes allegations of domestic violence, both physical and emotional, against XB and his family. She also makes two allegations of rape by XB. The latter denies those allegations.

10. On 24 December 2016, when UD was heavily pregnant, she travelled with XB to Bangladesh, where the child was born on 2 February 2017. The child and UD have remained in Bangladesh since then. Early in 2018 XB returned to England and Wales.

11. The parties to the main proceedings put forward two divergent versions of the circumstances in which they travelled to Bangladesh and of the events that subsequently took place.

12. UD maintains that she is being unlawfully detained against her will in Bangladesh with the child by XB. She claims that she was forced to give birth there and to remain there in breach of her fundamental rights and those of the child, as guaranteed by Articles 3 and 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on

4 November 1950 ('the ECHR'). According to UD's allegations, XB left her in her father's village and stated that he would return for her one week later. However, he never returned and confiscated her passport and other documents so she cannot leave Bangladesh. UD asserts that she would never have travelled to Bangladesh if she had known XB's true intentions. She claims that in the village in question she has no gas, electricity or drinking water or the slightest income. The community of that village stigmatises her because she is separated from XB.

13. XB takes issue with all of those allegations. According to him, it was at UD's request that they travelled to Bangladesh, as she was unhappy in the United Kingdom. It was also, he claims, in accordance with UD's wishes that he returned on his own to that Member State.

14. On 20 March 2018, UD brought an action before the High Court of Justice (England and Wales), Family Division. She asks that court to order, first, that the child be made a ward of that court and, second, that the mother and the child return to England and Wales so that they can participate in the proceedings.

15. At a hearing on the same day, UD maintained that the referring court has jurisdiction to determine the action. She claims, primarily, that the child was habitually resident in England and Wales on the date on which the referring court was seised. In the alternative, the mother claims that, in national law, that court has a *parens patriae* jurisdiction (that is to say, jurisdiction on the basis of British nationality or citizenship) over and in respect of the child and that it should exercise that jurisdiction in the present case.

16. At a hearing held on 16 April 2018, XB contested the jurisdiction of the High Court of Justice (England and Wales), Family Division. According to XB, the child was habitually resident in Bangladesh on the date on which the main proceedings were commenced. Furthermore, that court does not, he submits, have *parens patriae* jurisdiction over the child, since she is not a British citizen. In any event, even if that court does have such jurisdiction, it should not exercise it in the present case.

17. In its order for reference, that court observes that it has made no findings of fact, since it considers it necessary to rule, as a preliminary issue, on the issue of its jurisdiction. The referring court considers that it must be determined whether the child was habitually resident in the United Kingdom when the proceedings were commenced before it, within the meaning of Article 8(1) of the Brussels IIa Regulation, before it examines any other head of jurisdiction.

18. In that regard, the referring court considered that a reference for a preliminary ruling was necessary in order to ascertain whether the habitual residence of a child may be established in a Member State in which that child has never been physically present. The referring court seeks, in particular, to ascertain whether that may be the case where the mother alleges that the child was born and is residing in a third State in which its parents, who have parental responsibility, have no intention in common to reside and in which the father is unlawfully detaining the mother and the child by coercion. That court observes that, if it were shown to be true, XB's conduct would in all likelihood constitute an infringement of the mother's and the child's fundamental rights under Articles 3 and 5 of the ECHR.

19. In those circumstances, the High Court of Justice (England and Wales), Family Division, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the physical presence of a child in a State an essential ingredient of habitual residence, within the meaning of Article 8 of [the Brussels IIa Regulation]?

(2) In circumstances where both parents are holders of parental responsibility, does the fact that a mother has been tricked to go to another State and then unlawfully detained by coercion or other unlawful act in that State by the father, leading to the mother being forced to give birth to a child

in that State, have any impact on the answer to [the first question] in circumstances where there may have been a violation of the mother and/or child's human rights, pursuant to Articles 3 and 5 of the [ECHR], or otherwise?'

20. The referring court has asked that the case be dealt with under the urgent procedure provided for in Article 107 of the Rules of Procedure of the Court. The First Chamber of the Court decided on 5 July 2018, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, to accede to that request.

21. UD, XB, the United Kingdom Government and the European Commission have lodged written observations. They, and the Czech Government, were represented at the hearing held on 7 September 2018.

IV. Analysis

A. Admissibility

22. The United Kingdom Government submits that the questions referred are inadmissible on the ground that Article 8(1) of the Brussels IIa Regulation governs only conflicts of jurisdiction between courts of the Member States. Under Article 61(c) EC, now Article 67 TFEU, the geographical scope of that regulation is confined to situations having cross-border implications for two or more Member States. Article 8(1) of that regulation thus does not apply in a dispute having links between a Member State and a third State.

23. In that regard, the wording of that provision indicates that the courts of a Member State have jurisdiction provided that the 'child … is habitually resident in that Member State at the time the court is seised' without limiting that jurisdiction to disputes which have links to another Member State.

24. Article 61(a) of the Brussels IIa Regulation confirms this reading. Under that provision, in relations with the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, signed at The Hague on 19 October 1996 ('the 1996 Hague Convention'),[3] that regulation applies where the child has his or her habitual residence in a Member State. The Brussels IIa Regulation thus takes precedence over that convention in all cases where that criterion is satisfied, without any relevance attaching to the issue of whether the dispute involves a potential conflict of jurisdiction between Member States or between a Member State and a third State which is a signatory to that convention.

3 The 1996 Hague Convention replaced the Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, concluded in The Hague on 5 October 1961 ('the 1961 Hague Convention'). While the European Union is not a party to the 1996 Hague Convention, all the Member States are signatories thereto.

25. Moreover, Article 12(4) of the Brussels IIa Regulation, which provides in certain circumstances for the prorogation of the jurisdiction of the courts of a Member State which have jurisdiction on the parents' application for divorce even when the child does not have his habitual residence there, refers to the situation of a child who is habitually resident in a third State which is not a signatory to the 1996 Hague Convention. That provision therefore applies specifically to disputes having links between a Member State and a third State. [4]

26. A teleological reading of Article 8(1) of that regulation also leads me to consider that the child's habitual residence in a Member State is sufficient to form the basis of the international jurisdiction of the courts of a Member State if the child is habitually resident there, even in the absence of a connection with another Member State.

27. On that point, the Court stated in the judgment in *Owusu* [5] that the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the Brussels Convention'), [6] the instrument that preceded Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of decisions in civil and commercial matters ('the Brussels I Regulation'), [7] was intended to facilitate the working of the internal market through the adoption of rules of jurisdiction for disputes relating thereto and through the elimination of difficulties concerning the recognition and enforcement of judgments. The Court considered that the consolidation of the rules on jurisdiction relating to the disputes having a connecting factor with a third State helps to achieve that objective in that it makes it possible to eliminate the obstacles that may derive from disparities between national legislation on the subject. It inferred that the application of the general rule laid down in Article 2 of the Brussels Convention, which confers general jurisdiction on the courts of the Member State in which the defendant is domiciled, is not conditional on the existence of a legal relationship involving a number of Contracting States to that convention. [8]

28. To my mind, the reasoning followed in that judgment also applies in the context of Article 8(1) of the Brussels IIa Regulation. In fact, in accordance with Article 67(4) TFEU, the Union is to favour the mutual recognition of judgments delivered by the courts of the Member States in all civil matters. [9] The harmonisation of the rules on international jurisdiction aims, by strengthening legal certainty, at facilitating the emergence of mutual confidence allowing the introduction of a system of automatic recognition of judgments. [10] From that aspect, the approximation of the rules on jurisdiction to settle disputes having a connecting factor with a third State allows obstacles to the recognition and enforcement of judgments delivered in the other Member States in all civil matters, including in family matters, to be eliminated.

4 By contrast, certain provisions of the Brussels IIa Regulation dealing with jurisdiction refer specifically, as their wording indicates, to potential conflicts of jurisdiction between the courts of several Member States (see Articles 9, 10, 15, 19 and 20 of that regulation). Moreover, the provisions of the Brussels IIa Regulation on recognition and enforcement are applicable only to judgments delivered by the courts of the Member States (see the order of 12 May 2016, *Sahyouni* (C-281/15, EU:C:2016:343, paragraphs 19 to 22), and the judgment of 20 December 2017, *Sahyouni* (C-372/16, EU:C:2017:988, paragraph 27)). It is also common ground that the application of Article 11 of that regulation, dealing with the return of the child, assumes that the removal or retention of the child occurs from one Member State to another. In sum, it is germane to enquire, not about geographical scope of the Brussels IIa Regulation in its entirety, but about the applicability of each of its provisions.

5 Judgment of 1 March 2005 (C-281/02, EU:C:2005:120, paragraph 33).

6 OJ 1978 L 304, p. 1.

7 Council Regulation of 22 December 2000 (OJ 2001 L 12, p. 1).

8 Judgment of 1 March 2005, *Owusu* (C-281/02, EU:C:2005:120, paragraphs 34 and 35). See also Opinion 1/03 (*New Lugano Convention*) of 7 February 2006 (EU:C:2006:81, paragraphs 146 to 148).

9 Article 81(2) TFEU thus provides for the adoption of approximating measures in relation to judicial cooperation in civil matters '*particularly* when necessary for the proper functioning of the internal market' (emphasis added).

10 See point 13 of the Explanatory Report by A. Borrás (OJ 1998 C 221, p. 27), drawn up in the context of the procedure for the adoption of the Convention established on the basis of Article K.3 of the [TEU] Treaty, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters concluded in Brussels on 28 May 1998 (OJ 1998 C 221, p. 1; 'the Brussels II Convention').

29. That conclusion reflects, moreover, the manner in which both national courts [11] and academic writing [12] understand the scope of application of Article 8(1) of the Brussels IIa Regulation.

30. Consequently, the ground for inadmissibility of the questions referred which has been raised by the United Kingdom Government must be rejected.

31. With a view to being comprehensive, I would add that the admissibility of those questions also cannot be brought into question on the ground that they relate to a scenario which reflects certain matters which have not been established as facts by the referring court but are merely alleged by the mother. [13]

B. Substance

1. Preliminary considerations

32. The centrepiece of the Brussels IIa Regulation and the international conventions by which it is inspired, the concept of 'habitual residence' of the child plays a dual role in the context of those instruments.

33. In the first place, the criterion of habitual residence of the child at the time when the proceedings are brought forms, under Article 8(1) of that regulation, the basis of the general jurisdiction of the courts of a Member State to determine issues relating to parental responsibility. [14] That provision has the same content as that of Article 5(1) of the 1996 Hague Convention.

34. In the second place, the concept of 'habitual residence' of the child is at the heart of the return mechanism provided for in the Convention on the Civil Aspects of International Child Abduction, concluded at The Hague on 25 October 1980 ('the 1980 Hague Convention' and, together with the 1996 Hague Convention, 'the Hague Conventions'). [15] That mechanism, as supplemented by the provisions of the Brussels IIa Regulation, and in particular Article 11, is to continue to apply between Member States in the matters governed by that regulation. [16] In substance, the removal or the retention

11 See, inter alia, Cour de Cassation (Court of Cassation) (France), First Civil Chamber, 13 May 2015, No 15-10.872; United Kingdom Supreme Court, *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4, paragraph 29; and High Court of Ireland, *O'K* v *A*, 1 July 2008, [2008] IEHC 243, paragraph 5.8.

12 See, inter alia, Gallant E., 'Règlement Bruxelles IIa: compétence, reconnaissance et exécution en matières matrimoniale et de responsabilité parentale', *Répertoire du droit international*, Dalloz, 2013, paragraph 24 et seq., and Magnus, U., and Mankowski, P., *European Commentaries on Private International Law: Brussels IIbis Regulation*, Sellier European Law Publisher, 2012, p. 21.

13 The Court has already held that a national court may submit to it a request for interpretation 'even when it relies on the submissions of a party to the main proceedings of which it has not yet examined the merits, provided that it considers, having regard to the particular circumstances of the case, that a preliminary ruling is necessary to enable it to give judgment and that the questions … are relevant' (judgment of 9 December 2003, *Gasser* (C-116/02, EU:C:2003:657, paragraph 27)). In this instance, the referring court considers that the Court's answer to its questions is necessary in order for it to rule on its own jurisdiction, since the standard of proof of the relevant facts that must be satisfied for that purpose differs from the standard applicable to the establishment of the substantive facts. In that regard, the Court observed in the judgment of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraphs 59 to 63), that the extent of the verification obligations to which national courts are subject in the course of determining their jurisdiction under the Brussels I Regulation is an aspect of national procedural law subject to the preservation of the effectiveness of that regulation. According to the Court, the national court must be able readily to decide whether it has jurisdiction, without having to consider the substance of the case. An obligation to conduct, at the stage of determining jurisdiction, a comprehensive taking of evidence as regards the facts relevant to both jurisdiction and substance would risk prejudicing the assessment of the substance. To my mind, that reasoning can be transposed to the application of the rules on jurisdiction laid down in the Brussels IIa Regulation.

14 It is not disputed that the action in the main proceedings has as its subject matter questions relating to parental responsibility as defined in Article 2(7) of the Brussels IIa Regulation.

15 The 1980 Hague Convention was signed by all the Member States. However, the European Union did not accede to it. Furthermore, the Republic of Bangladesh is not a signatory to either that Convention or the 1996 Hague Convention.

16 See Article 62(2) and recital 17 of the Brussels IIa Regulation. Pursuant to Article 60(e) of that regulation, the provisions of that regulation are to take precedence over those of the 1980 Hague Convention. See judgment of 5 October 2010, *McB.* (C-400/10 PPU, EU:C:2010:582, paragraph 36).

of a child is to be considered wrongful if it is in breach of rights of custody under the law of the State in which the child was habitually resident immediately before that event.[17] Where the removal or retention is unlawful, the child's return to that Member State must, in principle, be ordered without delay.[18]

35. According to the Court's case-law, the concept of the child's 'habitual residence' has the same meaning in both contexts.[19] That approach may be explained, in particular, by the fact that both Article 8(1) of the Brussels IIa Regulation and the return mechanism intend that disputes over parental responsibility be resolved by the courts of the Member State of the child's habitual residence, which are considered to be the most appropriate to protect the child's interests.[20]

36. More precisely, it is apparent from recital 12 of that regulation that the general rule on jurisdiction provided for in Article 8(1) of that regulation reflects the criterion of proximity, whereby the legislature intended to translate the objective of protecting the best interests of the child. The legislature considered that the courts of the Member State of the child's habitual residence are, owing to their proximity to the child's social and family environment, the best placed to assess its situation in the context of the substantive proceedings,[21] where necessary after the child has been returned to that Member State in application of the provisions of the 1980 Hague Convention as supplemented by the Brussels IIa Regulation. That jurisdictional rule, like the return mechanism, is thus based on a certain idea of the best interests of the child perceived in a general manner.[22] Those interests take a more specific form afterwards, at the stage of the proceedings on the substance of questions relating to parental responsibility.[23]

37. Neither the Hague Conventions nor the Brussels IIa Regulation define the concept of 'habitual residence of the child'. That being so, the Court, like the courts of the States Signatories to those conventions, has found it necessary to outline a test intended to determine the habitual residence of the child in each particular case. Such an exercise entails striking a balance between a number of requirements.

38. That test must be sufficiently flexible to allow the courts to adapt their decisions according to the specific circumstances of each case in order best to reflect the criterion of proximity. In that regard, the *travaux préparatoires* preceding the adoption of the Hague Conventions show that their authors deliberately omitted to define the concept of 'habitual residence'. The latter considered that that concept relates to findings of fact and should not be circumscribed by rigid legal rules such as those that determine the identification of domicile.[24]

17 See Article 3 of the 1980 Hague Convention and Article 2(11) of the Brussels IIa Regulation.

18 See Article 12 of the 1980 Hague Convention and Article 11 of the Brussels IIa Regulation.

19 Judgments of 9 October 2014, *C* (C 376/14 PPU, EU:C:2014:2268, paragraph 54), and of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436, paragraph 41).

20 See the E. Pérez-Vera Explanatory Report, Actes et documents de la XIV^{ième} session (1980), volume III, points 16, 19 and 66. In particular, point 16 of that document shows that the inability to fix by convention criteria for jurisdiction in custody matters led to the choice of the return mechanism approach, which, 'although an indirect one, will tend in most cases to allow a final decision on custody to be taken by the authorities of the child's habitual residence prior to its removal'.

21 See, to that effect, judgment of 9 November 2010, *Purrucker* (C-296/10, EU:C:2010:665, paragraph 84).

22 See points 24 and 25 of the Pérez-Vera Report and also judgment of 28 June 2018, *HR* (C-512/17, EU:C:2018:513, paragraph 59 and the case-law cited).

23 See, to that effect, judgment of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436, paragraph 66).

24 At the time of the adoption of the 1961 Hague Convention, the criterion of the habitual residence of the child was preferred to that of nationality, which traditionally served as the basis for jurisdiction in the matter of status of persons but was deemed obsolete, and to the criterion of domicile, which was a legal concept defined differently according to the national laws. Habitual residence was considered to be a 'question of fact' corresponding to the 'actual centre of interests of the child' (Explanatory Report submitted by Mr W. de Steiger, Acts and Documents of the Ninth Session (1960), Vol. IV, pp. 9, 13 and 14). The *travaux préparatoires* preceding the adoption of the 1980 Hague Convention reiterate that habitual residence, unlike the concept of 'domicile', is a 'question of pure fact' (the Pérez-Vera Report, point 66). During the *travaux préparatoires* preceding the adoption of the 1996 Hague Convention, a proposal to insert a definition of that concept was rejected on the ground that such a definition would have risked disturbing the interpretation of numerous other conventions using the same concept (Explanatory Report by P. Lagarde, Proceedings of the Eighteenth Session (1996), Vol. II, point 40). These reports are also available on the website https://www.hcch.net/en/instruments.

39. Furthermore, the test applied must ensure a certain degree of foreseeability and legal certainty by establishing adequate beacons to guide the courts' discretion. This latter requirement also corresponds to the objective of uniformity in the application of the Brussels IIa Regulation and the Hague Conventions: the more specific and the clearer the guidelines, the more foreseeable and thus the more uniform the results in the different courts concerned will be.

40. I believe it would be useful to emphasise here the importance of a consistent and uniform application of the criterion of habitual residence both within the European Union and in all the States Signatories to the Hague Conventions. The challenge is to avoid conflicts of jurisdiction between the courts of the Member States and those of other States Signatories to the 1996 Hague Convention and also to allow a harmonious application of the return mechanism established by the 1980 Hague Convention.[25] From that aspect, it seems to me to be appropriate to take into consideration, in my analysis, certain decisions delivered by courts of third States which are signatories to those conventions.[26]

2. The need for the child to be physically present in a Member State in order to establish his habitual residence there (first question)

(a) Introductory remarks

41. By its first question, the referring court seeks, essentially, to ascertain whether it is essential, in order for the child to be habitually resident in a Member State within the meaning of Article 8(1) of the Brussels IIa Regulation, that that child has, if only in the past and for a limited period, been physically present there.

42. As is apparent from the order for reference, the background to that question is a legal discussion before the United Kingdom Supreme Court in the context of a dispute the facts of which have certain points in common with the present case. In the judgment in *A v A (Children: Habitual Residence)*,[27] that court was asked to rule on the habitual residence of a child born in Pakistan who had never set foot in the United Kingdom. His mother, after living for several years in the United Kingdom, where she had already given birth to three children, had travelled to Pakistan before conceiving a fourth child, with the intention of paying a temporary visit there. She had subsequently been detained in Pakistan with her three children by the father, who, inter alia, had confiscated their passports, and had been obliged to give birth to a fourth child there.

43. The majority of the Supreme Court, led by Lady Hale, inclined, relying on the case-law of this Court, to take the view that the child's habitual residence in the United Kingdom is a question of fact,[28] considered that the physical presence of the child in the United Kingdom was a prerequisite in order to establish his habitual residence there. Acknowledging, however, that that question could not be resolved unless this Court shed light on the matter in a preliminary ruling, the judges in the majority left the question open and based the jurisdiction of the United Kingdom courts on a different head of jurisdiction, namely *parens patriae* jurisdiction.[29] In his dissenting judgment, Lord

25 See, in that regard, Opinion of Advocate General Kokott in *A* (C-523/07, EU:C:2009:39, points 26 and 30).

26 I am thus following the example of, in particular, the United Kingdom and Canadian courts, whose case-law contains numerous references to the courts of other States Signatories to the 1980 Hague Convention and of this Court. See, inter alia, Supreme Court of Canada, *Balev*, 2018 SCC 16, paragraphs 40 to 57, and also United Kingdom Supreme Court, *A v A (Children: Habitual Residence)*, [2013] UKSC 60, paragraph 46 et seq.

27 [2013] UKSC 60.

28 See point 47 et seq. of this Opinion.

29 [2013] UKSC 60, paragraphs 55 to 58.

Hughes expressed the view, also on the basis of the factual approach adopted by this Court, that the child was habitually resident in the United Kingdom because the members of the family unit of which he formed part had become sufficiently settled there to be habitually resident there and that the child was absent solely because of the coercion exercised by the father. [30]

44. The problem raised in the first question for a preliminary ruling has also been brought to the attention of the French courts. The Cour de cassation (Court of Cassation) (France) has dealt with a situation in which a mother, who lived in the United States of America with the father and their first child, had travelled, while pregnant, to France with that child for a temporary family visit. The mother had then remained on French territory, had given birth there to the second child, and had decided unilaterally not to return the children to the United States of America. In those circumstances, the Cour de cassation (Court of Cassation) (France) held that the two children were habitually resident in the United States of America even though the newly-born child had never been there. [31]

45. Although the Court of Justice has emphasised on several occasions that physical presence of the child in a given State is not *sufficient* to establish that child's habitual residence, it has not yet, to my mind, ruled on whether such presence is a *necessary* condition for that purpose. [32] I shall return, first of all, to that case-law and to the legal test that emerges from it (section (b)). I shall then develop, second, the reasons why I consider, in the light of the principles derived from existing case-law and also from the objectives and the context of the Brussels IIa Regulation, that a child's physical presence in a particular State is not a prerequisite for determining that it is habitually resident in that State (section (c)).

(b) The test established in the Court's case-law

46. In the course of its judgments, the Court has developed and clarified a test that allows the child's habitual residence to be determined on the basis of an essentially factual and casuistic approach focused on the child. It has thus sought to specify the criterion of proximity chosen by the legislature in the name of the protection of the best interests of the child.

47. According to consistent case-law, the child's habitual residence corresponds to the place that reflects 'some degree of integration by the child in a social and family environment', [33] or, according to the expression used in the recent judgment in *HR*, to 'the place which, in practice, is the centre of that child's life'. [34] The application of that legal test by national courts involves a factual assessment designed to determine that place in the light of all the circumstances specific to each individual case. In that regard, 'in addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment' [35] — or, to use the words of the judgment in *Mercredi*, 'a certain permanence or regularity'. [36]

30 See, in particular, [2013] UKSC 60, paragraphs 82 to 93. In addition, the referring court considered in specific circumstances comparable to those of *A v A (Children: Habitual Residence)* that a child was habitually resident in the United Kingdom even though that child had never 'set foot' there. See High Court of Justice (England and Wales), Family Division, *B v H (Habitual Residence: Wardship)* [2002] 1 FLR 388.

31 Cour de cassation (Court of Cassation) (France), First Civil Chamber, 26 October 2011, No 10-19.905 (Bulletin 2011, I, No 178).

32 See points 47 and 54 to 63 of this Opinion.

33 See, inter alia, judgments of 2 April 2009, *A* (C-523/07, EU:C:2009:225, paragraph 38); of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829, paragraph 47); and of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436, paragraph 42).

34 Judgment of 28 June 2018 (C-512/17, EU:C:2018:513, paragraph 42). See also Opinion of Advocate General Kokott in *A* (C-523/07, EU:C:2009:39, point 38). This test corresponds to the '*centre effectif de la vie du mineur*' ('actual centre of interests of the chid') test described in the *travaux préparatoires* for the 1961 Hague Convention (see footnote 24 of this Opinion).

35 Judgments of 2 April 2009, *A* (C-523/07, EU:C:2009:225, paragraph 38), and of 9 October 2014, *C* (C-376/14 PPU, EU:C:2014:2268, paragraph 51). See also judgments of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829, paragraph 49); of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436, paragraph 43); and of 28 June 2018, *HR* (C-512/17, EU:C:2018:513, paragraph 41).

36 Judgment of 22 December 2010 (C-497/10 PPU, EU:C:2010:829, paragraph 44).

48. Those factors include, in particular, the duration, conditions and reasons for the stay in the Member State or States concerned, the child's nationality,[37] the place and conditions of its education, knowledge of languages and the child's family and social relations in the Member State or States in question.[38] The parental intention as regards the child's place of residence, provided that it is manifested by tangible steps (such as the purchase or rental of accommodation), is an additional indicium.[39] The relative weight of those factors depends on the circumstances of each specific case.[40]

49. When required to apply that test for the purpose of identifying the habitual residence of an infant,[41] the Court recognised for the first time in the judgment in *Mercredi*[42] that the evaluation of the child's integration in a social and family environment cannot ignore the circumstances of the stay of the persons on whom that child is dependent. The Court observed that the environment in which a young child develops is essentially a family environment defined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of[43] — as a general rule, its parents.[44] Consequently, where such a child lives with his parents on a daily basis, it is necessary, in order to determine the child's habitual residence, to determine the place where the parents are permanently present and are integrated into a social and family environment.[45]

50. That place must be identified in the light of a non-exhaustive list of indicia of the same type as those that demonstrate the child's integration in such an environment. Those indicia include the duration, regularity, conditions and reasons for the parents' stay in the Member State or States concerned, their knowledge of languages, their geographic and family origins and also the family and social connections which they have with the State or States in question.[46] The intention of the parents to establish themselves with the child in a particular place is taken into account in so far as it reflects the reality of the parents' integration (and therefore that of the child) in a social and family environment.[47] From that aspect, that parental intention is a factor which, while admittedly important, is not necessarily decisive.[48] The weight placed on the aspects relating to the parents' integration depends on the degree of the child's dependence, which varies according to his age, on his parents.

37 The statement of this criterion comes up against the objection that the child's nationality represents an autonomous link of connection, of a legal nature, that the authors of the Hague Conventions (by which the Brussels IIa Regulation was inspired) specifically intended to reject in favour of the factual criterion of the child's habitual residence (see footnote 24 of this Opinion). See Lamont, R., 'Case C-523/07, A, Judgment of the Court (Third Chamber) of 2 April 2009 (EU:C:2009:225)', *Common Market Law Review* 47, 2010, p. 241. From that aspect, the reference to the child's nationality is relevant only in so far as it constitutes an indicium that reflects the social reality of the child's environment. See, to that effect, judgment of 28 June 2018, *HR* (C-512/17, EU:C:2018:513, paragraphs 57 to 60).

38 See, to that effect, judgments of 2 April 2009, *A* (C-523/07, EU:C:2009:225, paragraph 39), and of 28 June 2018, *HR* (C-512/17, EU:C:2018:513, paragraph 43).

39 See judgments of 2 April 2009, *A* (C-523/07, EU:C:2009:225, paragraph 40); of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829, paragraph 50); of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436, paragraph 46); and of 28 June 2018, *HR* (C-512/17, EU:C:2018:513, paragraph 46).

40 See, to that effect, judgments of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436, paragraph 48), and of 28 June 2018, *HR* (C-512/17, EU:C:2018:513, paragraph 49).

41 According to the *Dictionnaire Larousse*, '*nourrisson*' ('infant') means a child from the end of the neonatal period until the age of two years, while '*nouveau-né*' ('newly-born child') refers to children aged not more than 28 days. I shall use the term 'infant' to cover these two categories of very young children. The girl involved in the main proceedings was an infant at the time when the referring court was seised.

42 Judgment of 22 December 2010 (C-497/10 PPU, EU:C:2010:829).

43 Judgment of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829, paragraphs 52 to 54). See also judgment of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436, paragraph 45).

44 Judgment of 28 June 2018, *HR* (C-512/17, EU:C:2018:513, paragraph 44).

45 See judgment of 28 June 2018, *HR* (C-512/17, EU:C:2018:513, paragraph 45).

46 Judgments of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436, paragraph 45), and of 28 June 2018, *HR* (C-512/17, EU:C:2018:513, paragraph 45). See also judgment of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829, paragraphs 55 and 56).

47 See, to that effect, United Kingdom Supreme Court, *Re L (A Child) (Custody: Habitual Residence)* [2013] UKSC 75, paragraph 23: 'it is clear that parental intent does play a part in establishing or changing the habitual residence of a child: not parental intent in relation to habitual residence as a legal concept, but parental intent in relation to the reasons for a child's leaving one country and going to stay in another'.

48 See judgments of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436, paragraphs 47 and 50), and of 28 June 2018, *HR* (C-512/17, EU:C:2018:513, paragraph 64).

51. The logic of that approach is most evident when the habitual residence of a newly-born child is involved. If all that mattered were the objective factors concerning integration generated during the child's stay in a particular place, any newly-born child, who by definition has not had time to become integrated in any place at all, would be deprived of an habitual residence. As a result, no newly-born child would be protected by the return mechanism provided for in the 1980 Hague Convention and supplemented by the Brussels IIa Regulation.

52. It is apparent from the foregoing exposition that the Court has applied what is called a 'hybrid' approach, whereby the child's habitual residence is determined on the basis, first, of objective factors that characterise the child's stay in a particular place and, second, of the circumstances of the parents' stay and also of their intentions with respect to the child's place of residence. If the notion of 'habitual residence' is focused on the child in that it designates the place where the child actually has his centre of interests, that place itself depends, to an extent that varies according to the child's age, on the place of the actual centre of interests of the parents and where they intend to raise their child.

53. Thus, as the Supreme Court of Canada has emphasised,[49] relying on the many judgments delivered in the States Signatories to the 1980 Hague Convention, the hybrid approach, which is to be preferred to the approach focused solely on the 'acclimatisation' of the child[50] and the approach that places predominant weight on the parental intention,[51] corresponds to a tendency which may be identified in the case-law relating to that convention at international level.

(c) The information that can be derived from the Court's case-law on whether or not physical presence is indispensable

(1) The proposition that the Court has already resolved the question

54. None of the interested parties disputes that, in practice, the overall assessment of the circumstances of each specific case leads generally to the conclusion that the effective centre of the child's life – and thus that child's habitual residence – is situated in a place where that child has already been physically present. However, UD, the United Kingdom Government and the Czech Government take the view, contrary to XB and the Commission, that, in certain exceptional circumstances that overall assessment may provide justification for the child being habitually resident in a State in which that child has never set foot.

55. In this regard, the Court's case-law described above reveals, as XB and the Commission have asserted, certain passages which at first sight support the conclusion that the child's physical presence in a Member State is a prerequisite to the establishment of its habitual residence in that Member State. The reading of those passages set in their context leads me, however, to exercise caution before drawing such a conclusion.

56. First of all, the repeated use of the words 'in addition to the physical presence'[52] preceding the enunciation of other relevant factors, might give the impression that this parameter is a necessary ingredient for the purpose of establishing the child's habitual residence. However, owing to the factual context of the cases referred to, the Court has never specifically examined the question as to whether

49 See Supreme Court of Canada, 20 April 2018, *Balev*, 2018 SCC 16, paragraphs 50 to 57.

50 See United States Court of Appeals, 6th Circuit, *Friedrich* v *Friedrich*, 78 F.3d 1060 (1996), and *Robert* v *Tesson*, 507 F.3d 981 (2007), and also Court of Appeal of Montreal (Canada), 8 September 2000, No 500-09-010031-003.

51 See, in particular, United States Court of Appeals, 9th Circuit, *Mozes* v *Mozes*, 239 F 3d 1067 (2001), and also United States Court of Appeals, 11th Circuit, *Ruiz* v *Tenorio*, 392 F.3d 1247 (2004).

52 See point 47 of this Opinion.

physical presence is or is not indispensable. As UD and the United Kingdom Government have maintained, all that can be inferred from the use of those words is that physical presence *is not sufficient* to establish the child's habitual residence. It cannot be extrapolated from this that that factor is *necessary* for that purpose.

57. Nor, next, is the passage from the judgment in *W and V*,[53] namely that 'the determination of a child's habitual residence in a given Member State requires at least that the child has been physically present [there]', conclusive. That phrase must, in fact, be placed in the factual context of the case that gave rise to that judgment. One of the parents claimed that the child was habitually resident in Lithuania, although the child's nationality was the only connection with that Member State. The Court therefore pointed out that the nationality of a Member State cannot alone make up for the absence of tangible connections with that Member State, as the child had not even 'set foot' there.[54] The Court did not have to address the question whether, when such links exist, they may compensate for the lack of physical presence in the Member State in question.

58. Nor, last, does the judgment in *OL*[55] support the view put forward by XB and the Commission. The case giving rise to that judgment involved the child of a Greek mother and an Italian father who both lived in Italy before the child was born. According to the father, they had agreed that the child would be born in Greece, on the understanding that the child and the mother would subsequently return to Italy — a plan which the mother refused to implement. The father argued before a Greek court that the mother was illegally holding the child in a Member State (Greece) other than that in which the child had been habitually resident prior to its retention (Italy) within the meaning of Article 11(1) of the Brussels IIa Regulation. That court therefore had to examine whether the child was habitually resident in Italy at the relevant time, even though it had never been there.

59. In that context, that court had asked the Court whether the physical presence of the child in a Member State constituted, in all cases, a prerequisite for there establishing that child's habitual residence. If the Court had considered that the earlier case-law had already provided an affirmative answer to that question, it could have confined itself to indicating that to the national court – which would have allowed it to resolve in a straightforward manner the dispute pending before it. Advocate General Wahl had, moreover, proposed to the Court, on the basis, inter alia, of the judgment in *W and V*,[56] that it should adopt this path.[57]

60. The Court, however, reformulated the question in such a way as to avoid resolving it in a general and abstract manner, while providing useful assistance to the referring court for the purpose of resolving the dispute pending before it.[58] The Court addressed more specifically the situation, such as that in issue in the dispute, in which the child is born and continuously resided with its mother for several months, in accordance with the common wish of its parents, outside the Member State in which those parents habitually resided before its birth. It examined whether, in such a situation, the parents' initial intention regarding the mother's return, accompanied by the child, to that Member State constitutes a preponderant factor for taking the view that the child was habitually resident there, irrespective of the fact that the child had never been physically present there.

53 Judgment of 15 February 2017 (C-499/15, EU:C:2017:118, paragraph 61).

54 See, in this regard, footnote 37 of this Opinion.

55 Judgment of 8 June 2017 (C-111/17 PPU, EU:C:2017:436).

56 Judgment of 15 February 2017 (C-499/15, EU:C:2017:118).

57 Opinion of Advocate General Wahl in *OL* (C-111/17 PPU, EU:C:2017:375, points 57 and 61). In points 81 to 83, Advocate General Wahl alters his position somewhat when he considers that it is not inconceivable that the physical presence test may be disregarded in exceptional circumstances, provided that there is a tangible link with a Member State in which the child has never been present. Such a link would have to be based, in the interests of the child, on 'concrete and substantial evidence' that could take precedence over physical presence.

58 Judgment of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436, paragraph 35).

61. In response to the question thus reformulated, the Court merely refused to establish a general principle that the joint intention of those holding parental responsibility that the child would return to a Member State is predominant and automatically takes precedence over the child's physical presence in another Member State. Nor is there an absolute rule that the child's habitual residence necessarily follows that of its parents and cannot be changed unilaterally by one of the parents holding parental responsibility against the wishes of the other. [59]

62. Further, the Court assessed whether the circumstances brought to its attention by the national court allowed it to form the view that the child was habitually resident in the Member State in which its parents have initially intended to live with it (Italy) – a task which the Court might have considered to be redundant if it had been clear to it that the fact that the child was not physically present in Italy was sufficient to rule out the contention that it was habitually resident there. At the conclusion of that assessment, the Court concluded that the child could not be resident in that Member State since it had lived in Greece for several months and had been born there in accordance with the joint wishes of its parents. [60] The Court did not in any way preclude the possibility that in other circumstances, in particular where the place of birth does not reflect the joint wish of the parents, a national court might find that, in the light of all the relevant factors, the actual centre of interests of the child is in a Member State in which it has never been resident.

(2) The choice of approach which can best be reconciled with the case-law and the objectives of Article 8(1) of the Brussels IIa Regulation

63. As the Court has therefore not yet resolved the question of whether or not physical presence in a Member State is indispensable in order there to establish the child's habitual residence, it is appropriate to consider whether the factual approach, adopted in the case-law on the basis of the criterion of proximity set out by the legislature, better matches one or other of the solutions proposed by the interested parties.

64. According to UD, the United Kingdom Government and the Czech Government, the factual nature of the concept of 'habitual residence of the child' does not sit easily with the imposition of a rule that physical presence in a Member State is an essential precondition of the establishment of the child's habitual residence there, irrespective of the examination of other relevant circumstances. They emphasise, in particular, the importance of the factors relating to the integration of the parent having actual custody of a very young child. XB and the Commission contend, on the contrary, that since a child cannot by definition be integrated in a place which it has never visited, the establishment of its habitual residence in such a place would amount to a fiction incompatible with the factual nature of the concept in question.

65. The first of those positions is in my view more compatible with the factual approach taken by the Court. To raise the absence of physical presence into a nullifying criterion would result in the creation of a legal sub-test inasmuch as, in the absence of compliance with a precondition relating to the physical presence of the child, none of the other relevant factors could be examined. Such an abstract and general rule would result in the loss of the flexibility which allows the criterion of proximity to materialise in the best interests of the child. As is evident from the case-law set out above, this criterion relates to the proximity between the child and a social and familial environment established in a given place rather than to the mere geographical proximity between the child and a given place.

59 Judgment of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436, paragraph 50 et seq.).

60 Judgment of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436, paragraphs 49 and 50).

66. A flexible approach proves necessary, in particular, in order to deal with the specific cases of infants who are born and reside in a country other than the one in which their parents, because of their family and social connections, have their actual centre of interests. I recall, on this point, that the Court has acknowledged that, since infants have by definition been unable to develop effective links in any place independently of the parents, the actual centre of interests of infants depends, in practice, on that of their parents.[61] In my view, failure to have regard to that social and family reality would lead to more artificial results than would recognition of the fact that, in those exceptional situations, an infant may have its habitual residence in a place in which it has never been physically present.

67. In order to determine an infant's habitual residence, it is therefore necessary to take into consideration not only the objective parameters applicable to the infant's stay in the country in which he is present, but also indicia relating to the integration of the parent or parents on whom the infant is dependent in a social and family environment in another country. In that context, the circumstances giving rise to the presence of the infant and the parent or parents on whom the infant is dependent in the first country — and, at the same time, of their absence from the second country — at the time of the child's birth and during his brief existence are of particular importance.

68. In my view, when circumstances outwith the will of the parent or parents on whom the child is dependent, such as unforeseeable circumstances or *force majeure*, result in the infant's being born and staying outside the State in which the family unit of which the infant forms part, established by that parent or those parents and including, where relevant, other members, is established in a permanent and regular fashion, the infant has his habitual residence in that State. The infant's centre of interests is then situated de facto in the place where the infant is intended to be integrated in that family unit and where he would already have been in the absence of such external circumstances.

69. An example inspired by those given by the United Kingdom Supreme Court in *A v A (Children): Habitual Residence*)[62] and also in the written observations of the United Kingdom and Czech Governments illustrates my remarks. Let us suppose that a couple permanently and regularly established in Germany go on holiday to France, where the mother is obliged to give birth prematurely. Would the view have to be taken that, immediately after being born, the child is habitually resident in the place where its parents (and, if appropriate, its elder brothers and sisters) reside, where the child is intended to remain and where, perhaps, its cradle already awaits it (namely in Germany), or rather that until it has travelled to Germany the child has no habitual residence?[63]

70. There is scarcely any doubt in my view that the conclusion that the child has his habitual residence in Germany immediately after being born more faithfully reflects the reality of the child's integration within a social and family environment.[64]

71. Those considerations, of course, operate without prejudice to the possibility that the habitual residence of the child may change with the passage of time and on the basis of changes in objective circumstances. Thus, if the child born in emergency circumstances outside the State of establishment of the family unit of which it forms part has its habitual residence in that State, that conclusion holds good only so long as the duration of the residence of the child in the State of its birth and the resulting

61 See points 49 and 50 of this Opinion.

62 [2013] UKSC 60, paragraph 42.

63 A third approach, according to which the child would be habitually resident in France solely because it has been there since birth, appears to be precluded at the outset since that fortuitous presence cannot present the character of stability and regularity required in order to establish the child's habitual residence.

64 Contrary to what Advocate General Wahl suggested in his Opinion in *OL* (C-111/17 PPU, EU:C:2017:375, point 85), the approach which I propose does not in any way amount to accepting that the child may already have an habitual residence before it is born or, consequently, that an unborn child may come within the scope of the Brussels IIa Regulation. That approach merely reflects the social reality that an infant cannot be integrated in an autonomous family and social environment that has no connection with that of the persons who care for that child on a day-to-day basis.

cultural and social links do not shift matters in favour of the finding that the child has there, de facto, acquired the centre of its life. As time passes, the reality of the child's links with the State in which it might have been integrated in a social and familial environment fade until they become no more than merely notional.

72. Further, the reading which I recommend does not call into question the fact that, *in most cases*, the child's habitual residence corresponds to a place in which it has been physically present. It means only that the determination of the child's habitual residence must reflect the reality of its integration within a social and family environment, without being limited in that respect by inflexible legal rules. In specific situations concerning infants, the assessment of the body of circumstances specific to each case may lead to the view that the child has, in fact, its centre of interests in a country in which it has never been.

73. Certain judges of the United Kingdom Supreme Court have set out views in this regard which are extremely enlightening. They have on various occasions observed that, if the weighting of the factors that allow the child's habitual residence to be determined cannot be decreed by legal rules, such residence may, however, be usefully defined by certain 'generalisations of fact'. In other words, certain propositions are generally, although not invariably, consistent with the child's de facto situation. [65]

74. That is the case with regard to the proposition that the habitual residence of an infant is derived from that of the parent or parents on whom that infant is dependent, [66] just like, specifically, the proposition that the child's habitual residence presupposes a certain physical presence in the country concerned. [67] The fact that those two propositions may be in conflict (as the abovementioned example illustrates) shows that it is impossible to establish them as absolute legal rules.

75. That conclusion is not, in my view, brought into question by considerations relating to mandatory requirements of foreseeability, legal certainty and harmonisation of solutions within the European Union.

76. First, the indicative method adopted since the judgment in *A* [68] necessarily goes along with, as a corollary to the power of appraisal which it vests in national courts, a certain risk of diversity in the solutions adopted by different courts in comparable cases. [69] This 'price to pay' is generally accepted in the name of the flexibility necessary for the concretisation, in the overriding interest of the child, of the criterion of proximity with its social and family environment. I fail to see how the specific cases of infants who are born and reside in a country other than that in which the de facto centre of the life of its parents is situated – the only scenarios in which it is, in practice, conceivable that a child might be habitually resident in a Member State in which that child has never been – should, contrary to all of the other situations contemplated, be treated in an inflexible manner.

65 See *A* v *A (Children: Habitual Residence)*, [2013] UKSC 60, paragraphs 44 (majority judgment) and 73 to 75 and also 83 and 84 (dissenting judgment). See also *Re L (A Child) (Custody: Habitual Residence)* [2013] UKSC 75, paragraph 21.

66 See judgment of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436, paragraph 50), and *Re L (A Child) (Custody: Habitual Residence)* [2013] UKSC 75, paragraph 21: 'the proposition … that a young child in the sole lawful custody of his mother will necessarily have the same habitual residence as she does, is to be regarded as a helpful generalisation of fact, which will usually but not invariably be true, rather than a proposition of law'. See also Supreme Court of the United States, *Delvoye* v *Lee*, 2003 U.S. LEXIS 7737: 'There is general agreement on a theoretical level that because of the factual basis of the concept there is no place for habitual residence of dependence. However, in practice it is often not possible to make a distinction between the habitual residence of a child and that of its custodian.'

67 See, in that regard, the dissenting judgment of Lord Hughes in *A* v *A (Children: Habitual Residence)*, [2013] UKSC 60, paragraph 92.

68 Judgment of 2 April 2009 (C-523/07, EU:C:2009:225).

69 Article 19(2) of the Brussels IIa Regulation, however, provides a possibility of avoiding conflicts of jurisdiction. Under that provision 'where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established'.

77. Next, the Commission's argument that a flexible approach is not necessary in this type of situation, inasmuch as the child is in a Member State, fails to convince me. The Commission submits that, in the absence of habitual residence, Article 13 of the Brussels IIa Regulation provides for a subsidiary head of jurisdiction based on the child's presence. I note, however, that this head of jurisdiction, which incorporates only a geographical dimension of the criterion of proximity, offers no attribute of stability – hence its subsidiary character.[70] Thus, the application of Article 13 of that regulation is confined to exceptional situations in which it proves impossible to establish the habitual residence of the child.[71] What is more, as the United Kingdom Government has stressed, the problem assumes an even more fundamental importance in the context of the return procedure. In the potential situation in which, in the example cited above, one of the parents refuses to return to Germany with the newly-born child, that procedure could be activated only in so far as the view is taken that the child is habitually resident there.

78. Finally, I have doubts as to whether a rule under which the residence of the child necessarily involves an element of physical presence would, in any event, bring real benefits in terms of legal certainty. The parents, resident in Germany, of the child born in France by reason of *force majeure* might indeed legitimately expect that the German courts will rule on any dispute concerning parental authority. From the latters' point of view, a rule obliging those courts to declare that they lack jurisdiction solely because the child is not yet in Germany by reason of an unforeseeable and involuntary event would give rise to legal uncertainty.[72]

79. In the light of all of the foregoing, decisive weight cannot automatically, without consideration of the particular features of each case, be attributed to the criterion of physical presence. The physical presence of the child in a Member State does not therefore constitute a prerequisite for taking the view that the child is habitually resident there within the meaning of Article 8(1) of the Brussels IIa Regulation.

3. The impact of coercion for the purposes of determining the child's habitual residence (second question)

(a) Introductory remarks

80. In the words of the second question, the referring court asks the Court about the impact, for the purposes of determining whether a child is habitually resident in a Member State even though that child has never been physically present there, of the fact that, according to the mother's allegations, she was duped by the father into travelling to a third country and was subsequently unlawfully detained there by the father and thus forced to give birth there. The referring court adds that that situation may entail a breach of the fundamental rights of the mother and the child under Articles 3 and 5 of the ECHR, the content of which is replicated in Articles 4 and 6 of the Charter of Fundamental Rights of the European Union ('the Charter').

81. This question invites the Court to specify the importance of the fact that the presence of the mother and the child in Bangladesh at the time when the proceedings were brought — and, conversely, their absence from the territory of the United Kingdom — was attributable solely to the coercion exercised by the father. It is apparent from the order for reference that UD claims, in

70 See, to that effect, the Opinion of Advocate General Kokott in *A* (C-523/07, EU:C:2009:39, points 20 and 21).

71 Judgment of 2 April 2009 *A* (C-523/07, EU:C:2009:225, paragraph 43). Article 13 of the Brussels IIa Regulation concerns, in particular, certain removals in which, during a transitional period, the child has lost its habitual residence in the State of departure without yet having acquired any habitual residence in the host State. See the Opinion of Advocate General Kokott in *A* (C-523/07, EU:C:2009:39, point 45) and the Commission's Practice Guide for the application of the Brussels IIa Regulation (available on the internet site https://publications.europa.eu/en/publication-detail/-/publication/f7d39509-3f10-4ae2-b993-53ac6b9f93ed/language-en), p. 29.

72 Moreover, in situations of this kind, such a rule would deprive the court of the possibility of drawing a simple conclusion relating to the child's habitual residence in the light of all of the other relevant circumstances.

essence, that her initial intention, which she believed to be shared by XB (who with UD has joint parental responsibility) at the time of their departure for Bangladesh, was to give birth and live with the child in the United Kingdom.[73] The coercive behaviour of XB, however, allegedly prevented the realisation of that intention.

82. Such a factual situation does not, alas, appear to be confined to an exceptional and isolated example. As the United Kingdom Government has stressed, it corresponds to a phenomenon already observed and, moreover, discussed before the courts of the United Kingdom in other cases.[74]

83. I shall first of all attempt to evaluate the extent to which the dimension of coercion described above must be taken into account in application of the principles derived from the existing case-law (section (b)). I shall then proceed to address the question whether the best interests of the child and the fundamental rights set out the Charter require the application of other principles in a situation such as that obtaining in the main proceedings (section (c)).

(b) The application of the principles derived from the existing case-law

84. In accordance with the factual approach established by the Court, the fact that the mother gave birth to her child in a third country and remained there with that child only because of the coercion exercised by the father is, to my mind, a relevant factor in evaluating the child's links both with the country in which it is actually staying and with the Member State in which it would have been born and would have lived had it not been for such coercion.[75]

85. One the one hand, that circumstance is one of the 'conditions and reasons for the stay' of the mother and child in that third country within the meaning of the case-law.[76] In the present case, it might indicate that the child is not habitually resident in Bangladesh although, by force of circumstances, all of her points of reference are situated in that country, where she has lived since she was born and to which her geographic and cultural origins are attached.

86. That child's environment is, owing to her extreme youth, essentially determined by that of the person or persons on whom she is dependent — namely, in all likelihood, and on the basis of the facts set out in the order for reference, her mother (as the father has returned to the United Kingdom). According to the allegations of UD, XB's coercive conduct prevents her from deciding where to live with her infant and forces her to remain in a village where she is stigmatised by the local community and deprived of essential commodities and of income. In those circumstances, I

73 It is, admittedly, permissible to question the assertion that the mother did not intend to give birth in Bangladesh since she travelled to that country when she was over seven months pregnant. However, since the referring court asserts that it must determine its jurisdiction on the basis of the mother's claim that she was forced by the father to give birth in Bangladesh, I shall base my analysis on that premiss.

74 See United Kingdom Supreme Court, *A* v *A (Children)*, [2013] UKSC 60, and also High Court of Justice (England and Wales), Family Division, *B* v *H (Habitual Residence: Wardship)* [2002] 1 FLR 388.

75 As is apparent from the order for reference, the national court is required to rule on its jurisdiction on the basis on certain matters that are alleged by the mother and have not yet been established as facts (see points 17 and 31 of this Opinion). In those circumstances, the considerations set out in what follows are intended to assist that court in determining the child's habitual residence within a factual context corresponding to that version of the facts, without prejudice to the substantive appraisal of the facts by that court.

76 See point 48 of this Opinion.

doubt whether the mother's and child's involuntary and precarious stay in a third State is sufficiently permanent and regular for the child to have her habitual residence there. Is it really possible to speak of integration in a social and family environment if the infant's connections with that third State came about solely because of a situation resulting from the coercion exercised by the infant's father?[77]

87. Those considerations remain relevant, notwithstanding the fact that UD is of Bangladeshi origin and is staying in Bangladesh in her family's village. In fact, the geographic and family origins of the parent with custody of the child — like the child's cultural and family connections that result from those origins — are only one of the factors that may be taken into account in the global analysis of the circumstances of each individual case.[78] That factor cannot conceal other objective circumstances, such as, in particular, the situation that the mother is allegedly being forcibly detained in Bangladesh with her daughter.

88. However that may be, on the other hand, the fact that, had it not been for the father's coercive behaviour, the child would have been born in the Member State in question and lived there after being born does not suffice to establish that the child is habitually resident in that Member State. According to the Court's case-law, even such a physical presence would not have sufficed for that purpose. It would still be necessary that the actual links between the child and the territory of that Member State would permit the view that the child's centre of interests is in fact there.

89. As I have explained above,[79] an infant who is part of a family unit the members of which have their actual centre of interests in a Member State is habitually resident there even though that infant was not born there and has not yet travelled there because of circumstances independent of the will of the parent or parents on whom that infant is dependent. It will be for the referring court to determine, in the light of all the relevant circumstances, whether the situation in issue in the main proceedings corresponds to such a scenario. The views expressed in what follows will help guide it when doing so.

90. In the first place, the *factors characterising the mother's residence in the United Kingdom* and the social and family connections which she has maintained there will merit particular attention. In fact, the child's centre of interests can be in the United Kingdom only in so far as her mother, on whom she is dependent, is herself permanently integrated there in a social and family environment. In this regard, it is necessary to take into account, inter alia, the duration of UD's stay in the United Kingdom, the period covered by her spousal visa, her linguistic knowledge and any social and cultural attachments which she might have to that Member State.

91. In that context, the question arises as to the extent to which UD's *intention*, which, she maintains, she thought was shared by XB at the time of their departure to Bangladesh, concerning the child's residence in the United Kingdom after she was born, should be taken into account. In that regard, I note that the parental intention as to where the child would be staying does not necessarily prevail over the actual links between the child and some different place.[80] The weight to be given to that factor depends on the circumstances of each individual case.

77 Along the same lines, some courts in the United States of America have taken account of the coercion applied to the mother of a child for the purposes of determining the child's residence. Thus, the District Court of Utah has held that, although a child lived in Germany, he was not habitually resident there since the mother and the child were prevented from leaving that country owing to verbal, emotional and physical abuse by the father (*Re Ponath*, 829 F. Supp. 363 (1993)). The District Court of Washington considered that the mother of the children in question was not habitually resident in Greece, where she lived with those children in a socially isolated manner and deprived of autonomy, with no knowledge of the cultural standards or the language and with limited access to financial resources, while being the victim of acts of violence committed by the father (*Tsarbopoulos* v *Tsarbopoulos*, 176 F. Supp. 2d 1045, (2001)). The District Court of Minnesota took account of the fact that the father had prevented the mother from leaving the territory of Israel, where they both had nationality and where the mother had spent 11 months with the father and their children, for the purpose of excluding the children from being habitually resident in that State (*Silverman* v *Silverman*, 2002 U.S. Dist. LEXIS 8313).

78 See judgment of 28 June 2018, *HR* (C-512/17, EU:C:2018:513, paragraphs 52 to 58).

79 See points 65 to 71 of this Opinion.

80 Judgment of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436, paragraph 48). See point 60 of the present Opinion.

92. In my view, where, in spite of the initial intention of the parents — or of the sole parent who intends to have custody of the child [81] — to become established with the child in a particular place, that child is born and remains against the wishes of the parent on whom it is dependent in a different place, intention is likely to be a particularly important factor. The same applies where, in such a situation, the objective factors relating to the stay of the child and that parent in the country in which they are situated are insufficient indicators of the place where they are actually integrated in a family and social environment. The intention as regards the child's place of residence in a specific State, provided that it is manifested by tangible measures, then constitutes a factor capable of prevailing over those objective factors and supporting the integration of the parent on whom the child is dependent in that State even though he or she has been absent from it since the birth of the child.

93. Any indications that the parents, or the mother alone, took steps before leaving for Bangladesh to give birth to the child in the United Kingdom, to settle the child in permanent accommodation in that Member State and to take care of the child on a day-to-day basis must therefore be taken into account with particular care for the purpose of determining the child's habitual residence.

94. In the second place, regarding the circumstances surrounding the *father's integration* in the Member State concerned, it is apparent from the case-law that the parent who does not in fact look after the child (even if that parent has parental responsibility) will form part of the child's family environment only in so far as the child continues to have regular contact with that parent. [82] In the hypothesis that the father returns to that Member State and prevents the mother from travelling there with their child, such contacts are no longer being maintained. The residence and integration of the father in that Member State at the time when the proceedings were commenced do not, in those circumstances, offer sufficient indications as to the place in which, given the facts, the centre of the child's life is situated.

95. Third, the *period of time* separating the birth of the child and the commencement of proceedings before the referring court will also be relevant. The duration of residence in a given State generally constitutes a factor capable of reflecting the child's integration in that State and, correspondingly, the absence of tangible links with another State. Its importance in the global assessment of the relevant circumstances nonetheless also varies according to each individual case. [83]

96. Thus, that factor does not automatically reflect the reality of the child's integration when the continued duration of its residence in a State and, symmetrically, its absence from another State is due solely to coercion. Admittedly, on pain of adding an artificial varnish to the concept of 'habitual residence', a child who grows up and forms links in the State in which it is forced to remain, without developing any connection with the State in which it ought to have remained in the absence of coercion, loses, to some extent, its habitual residence in that latter State. [84] That, however, is not necessarily the case with regard to a child who, as in this case, was still an infant at the time when the proceedings were commenced. Consequently, the duration of the child's stay in Bangladesh should not, as such, prevent that child's habitual residence from being established in the United Kingdom.

81 The Commission maintains that the unilateral intention of only one of the parents with joint parental responsibility cannot in any event compensate for the lack of physical presence of the child in the Member State concerned. This argument must be rejected in the light of the judgment of 28 June 2018, *HR* (C-512/17, EU:C:2018:513, paragraph 63), from which it is apparent that the intention of the parent who, while exercising parental responsibility, does not actually have custody of the child must be taken into account only in so far as that parent intends to exercise his right of custody. Consequently, the unilateral intention of the sole parent who actually intends to have custody of the child may be taken into account. That solution is, moreover, in keeping with the spirit of the return procedure laid down in the 1980 Hague Convention and supplemented by the Brussels IIa Regulation. In fact, Article 3(b) of that Convention, the substance of which is replicated in Article 2(11)(b) of that regulation, provides that the removal or retention of a child is to be considered wrongful only if there has been a breach of the right of custody under the law of the State in which the child is habitually resident and that right of custody *was actually exercised* at the time of removal or retention or would have been so exercised had those events not occurred.

82 See judgment of 28 June 2018, *HR* (C-512/17, EU:C:2018:513, paragraph 48).

83 In the words of the judgment of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829, point 51), while the child's residence 'must as a general rule have a certain duration which reflects an adequate degree of permanence', the Brussels IIa Regulation does not lay down any minimum duration and the duration of a stay can serve only as one of a number of indicators.

84 See point 71 of this Opinion.

97. All of those factors call for the following conclusion in a situation, such as that at issue in the main proceedings, where the child was born in a third State and was prevented from returning with her mother to a Member State owing to the coercion exercised by the father and where the child was still an infant at the time when the referring court was seised. In such a situation, the child is habitually resident in that Member State, within the meaning of Article 8(1) of the Brussels IIa Regulation, only in so far as, had it not been for the coercion, the child would have been permanently present there in a stable manner and integrated as a member of a family unit whose other member or members had his or their centre of interests in that Member State. Where that condition is satisfied, it means that the mother is integrated in a social and family environment in the Member State in question. It is for the national court to ascertain whether that is the case in the light of all the relevant circumstances, which include the objective factors applicable to the mother's earlier stay and integration in that Member State and also the tangible manifestations of her intention as regards where the child would be staying.

(c) The taking into account of the fundamental rights of the child and its mother

98. In the interests of comprehensiveness, it seems to me to be useful to make clear that, where the application of the 'actual centre of interests of the child' test does not in the particular case serve as a basis for the general jurisdiction of the courts of a Member State in a situation such as that in issue in the main proceedings, the protection of the best interests of the child guaranteed in Article 24 of the Charter and of the fundamental rights enshrined in Articles 4 and 6 of the Charter [85] would not justify any different conclusion.

99. That test, it will be recalled, reflects the criterion of proximity underpinning Article 8(1) of the Brussels IIa Regulation, whereby the legislature wished to protect the child's best interests envisaged in a general manner. [86] To my mind, the following considerations preclude the creation by the courts of an exceptional test that would disregard that criterion when the best interests of the child perceived in a specific case and its other fundamental rights are threatened in the third State in which that child is present.

100. In the first place, in accordance with Article 51(2) of the Charter, the latter 'does not extend the field of application of Union law beyond the powers of the Union'. Thus, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it. [87] In fact, the European Union and its Member States are not required, under EU law or under the ECHR, to exercise their jurisdiction over situations occurring in third States in the absence of a connection provided for by EU law or by the ECHR as interpreted in the Strasbourg case-law. [88]

101. In the second place, the Brussels IIa Regulation already establishes a mechanism that authorises Member States to protect the interests of a child even in the absence of a connection derived from EU law. Where no court of a Member State has jurisdiction under Articles 8 to 13 of the Brussels IIa Regulation, Article 14 of that regulation provides that Member States may, in the exercise of their

85 See recital 12 of the Brussels IIa Regulation and recital 33 of that regulation, in which it is stated that that regulation recognises and observes the fundamental rights guaranteed by the Charter.

86 See point 36 of this Opinion.

87 See, inter alia, judgment of 5 October 2010, *McB.* (C-400/10 PPU, EU:C:2010:582, paragraph 51).

88 According to the case-law of the European Court of Human Rights ('the ECtHR'), the jurisdiction of the Contracting States, within the meaning of Article 1 of the Convention, is in principle limited to their own territory. Exceptions to that principle exist only in very specific circumstances which bear no relation to the factual context of this case. See, inter alia, ECtHR, 7 July 2011, *Al-Skeini and Others v. United Kingdom* (CE:ECHR:2011:0707JUD005572107, §§ 130 to 142 and the case-law cited).

residual jurisdiction, confer jurisdiction on their courts under their national laws. Thus, it remains open to each Member State, where the provisions of that regulation based on the criterion of proximity do not permit the courts of any Member State to be designated, to declare that its own courts have jurisdiction under rules of domestic law that do not apply that criterion.

102. In the present case, such residual jurisdiction exists in the legal order of the United Kingdom in the form of the *parens patriae* jurisdiction of the courts of that Member State. As is apparent from the file submitted to the Court, the application of that rule of jurisdiction is, however, limited to British citizens and is a matter for the discretion of the national courts.

103. Furthermore, XB has claimed that, if necessary, UD could apply to the courts of Bangladesh, in particular where the law of that third State provides rules of jurisdiction based on the presence of the child. In that regard, although the referring court states that the detention of UD and child by XB might breach their fundamental rights, it does not expressly mention any allegations that the Republic of Bangladesh has failed to fulfil its positive obligation to protect those rights, in particular by judicial means.[89] In those circumstances, it seems to me to be inappropriate to base the present analysis on hypotheses to that effect.

104. In any event, to my mind Article 14 of the Brussels IIa Regulation conveys the notion that it is for each Member State to decide, in particular on the basis, where appropriate, of considerations of 'comity', whether the fear that the courts of a third State will not apply to the mother and child protective rules that conform to the rights and values which prevail in the Member State in question justifies, or not, the introduction of a specific head of jurisdiction in their national laws.[90]

105. Consequently, even when the best interests and the fundamental rights of the child are liable to be disregarded in a third State, Article 8(1) of the Brussels IIa Regulation cannot be interpreted in such a way as to establish the child's habitual residence on the basis of criteria which depart from the criterion of proximity in the form of the 'actual centre of interests of the child' test.

V. Conclusion

106. Having regard to all of the foregoing considerations, I propose that the Court reply to the questions for a preliminary ruling referred by the High Court of Justice (England and Wales), Family Division (United Kingdom), along the following lines:

(1) The habitual residence of a child, within the meaning of Article 8(1) of Council Regulation (EC) No 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, corresponds to the place where that child has its de facto centre of interests. That place must be determined in the light of all the circumstances of each individual case. In certain exceptional situations, the global assessment of all the circumstances may lead to the view that the child has, de facto, the centre of its interests in a place in which it has never been physically present. The physical presence of the child is therefore not a prerequisite for the purpose of establishing the child's habitual residence there.

89 Although the Republic of Bangladesh is not bound by either the ECHR or the Charter, Articles 7 and 9 of the International Covenant on Civil and Political Rights, which was adopted on 16 December 1966 by the General Assembly of the United Nations and entered into force on 23 March 1976 – an instrument to which the Republic of Bangladesh has acceded – guarantee rights analogous to those provided for in Articles 3 and 5 of the ECHR and Articles 4 and 6 of the Charter, respectively.

90 See, in this connection, the dissenting judgment of Lord Sumption in the case of *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4, paragraphs 66 and 76. He maintained that the mere disapproval of the rules that would be applied under the law of the country in which the child is present cannot suffice to establish the jurisdiction of the courts of the United Kingdom.

(2) The circumstance that the mother of an infant, who has actual custody of that infant, was compelled by the father to give birth in a third State and to remain there with the infant after its birth, placing them, where that is the case, in a situation contrary to the fundamental rights enshrined in Articles 4 and 6 of the Charter of Fundamental Rights of the European Union, constitutes a relevant factor for the purposes of determining the child's habitual residence within the meaning of Article 8(1) of Regulation No 2201/2003.

In such a situation, the infant can, however, be habitually resident in a Member State, notwithstanding the fact that it has never been physically present there, only in so far as its mother has her de facto centre of interests there, this being a matter which it is for the referring court to ascertain. In this regard, particular importance attaches to any indicia demonstrating that the mother has family, social and cultural connections in that Member State, as well as to any tangible manifestations of the mother's intention to live there with the child following its birth.