SCC Court File No. 41108

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

MICHAEL PAUL DUNMORE

APPELLANT

– and –

RAHA MEHRALIAN

RESPONDENT

– and –

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. If it is in a child's best interests to be returned to their habitual residence, it stands to reason that a determination of a child's habitual residence must be aligned with their best interests. In order to ensure continuity in every part of the return analysis, best interests must inform a child's habitual residence under s. 22 of the *Children's Law Reform Act*[1]; it simply cannot be absent from the preliminary stage of deciding jurisdiction.

2. The habitual residence analysis must be consistent with a child's human rights under the *Convention on the Rights of the Child* ("*Child Convention*"),[2] including Articles 3 (best interests), 2 (non-discrimination), and 12 (right to participate and be heard), which are overarching fundamental rights,[3] as well as Articles 7, 8 (right to identity, nationality), and 9 (non-separation from family), all of which inform the meaning of a child's best interests and the recognition of children as full individual rights-bearers under the law.

3. This Court has developed a framework for determining habitual residence for countries that are signatory to the Hague Convention.[4] A child-focused inquiry is critical for children facing a return to a non-signatory state as they require more protection than those whose return is subject to a Hague inquiry.

4. The coalition of the Centre for Refugee Children ("CRC") and Defence for Children International – Canada ("DCI-C") argues that the determination of a child's habitual residence must consider the reality and situation of refugee, migrant, insecure and transient children in Canada. The migration journey for children coming to Canada may involve multiple stops and delays in several countries on route to Canada. Children in migration situations are at risk of being excluded from the current framework if they do not have a viable habitual residence or their interests are not aligned with their parents or parental intention.

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[1] *Children's Law Reform Act*, R.S.O. 1990, c. C.12. [CLRA].
[2] *Convention on the Rights of the Child*, 20 November 1989, Can. T.S. 1992 No. 3.
[3] UN Committee on the Rights of the Child, *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, at para. 12.
[4] *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35.

5. In child protection legislation the statutory references to parents and family "*are not stand-alone principles, but fall instead under the overarching umbrella of the best interests of the child. Those provisions are there to protect and further the interests of the child, not of the parents.*"[5] CRC/DCI-C submit that this principle similarly applies to the CLRA, particularly considering the purposes in s. 19 of the CLRA.

6. CRC/DCI-C encourages the Court to resist any interpretations that prioritize the rights of parents over the interests and perspectives of children. The narrow focus taken by both the Appellant and the Respondent has the potential to erroneously minimize a consideration of the best interests of the individual child before the court. Instead, the focus of the habitual residence inquiry should be properly shifted from the intentions of the parents to the actual situation of the child.

7. The habitual residence inquiry therefore ought to focus on the entirety of the child's lived reality and the degree of integration and acclimatization by the child in a social and family environment. The child's connections, relative attachments, sense of belonging, education, social engagements, participation in sports, lessons, and other programs are relevant. For an older child, her own perspective, wishes, and "state of mind" are crucial to the habitual residence determination.

8. CRC/DCI-C takes no position on the merits or facts of the return application.

PART II – QUESTION IN ISSUE

9. Does the parental intention approach risk undermining a child-centred analysis? To what extent should the interpretation of habitual residence in s. 22 of the CLRA include the best interests principles?

10. Should attornment be determinative of jurisdiction or eliminate the habitual residence analysis?

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[5] *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, at para. 45-46.

PART III – STATEMENT OF ARGUMENT

Statutory Interpretation of Section 22 of the CLRA

11. Determining a child's habitual residence based on parental intention alone dismisses a child's human rights, voice and agency in their own life. Both the Appellant's position and that of the Respondent are devoid of the interests of the children at the centre of habitual residence decisions.

12. CRC/DCI-C submits that continuity in the application of best interest principles in matters affecting children is required at ***all stages*** of cross-border family law proceedings. By adopting a holistic, child centred approach, informed by the best interests of the child, consistency with the overarching purposes of the CLRA, the *Canadian Charter of Rights and Freedoms ("Charter")* and *Child Convention* is achieved.

13. The guiding principles of best interests of children are to be measured from the child's perspective.[6] The best interests of the child includes recognition and enjoyment of all their rights under the *Child Convention* and the *Charter*; an adult's assessment of a child's best interests cannot override the obligation to respect all of a child's rights, nor can any right be compromised by a negative interpretation of the child's best interests.[7] This means that the child must be respected as an individual rights-holder, with agency, and a full panoply of rights.

14. Parental intention is not irrelevant; however, the starting point and focus should be the child. Evidence related to determinations regarding children should be assessed from the children's perspective, rather than that of the parents. A child-centred approach is preferable and may better serve the aim of timely resolution of cross-border disputes. As this case and many others demonstrate, the task of determining parental intention is challenging and does not necessarily achieve reliable results. Parents typically present different accounts of the nature, purpose and intended duration of the move to the new country. Parental intention can be manipulated and should be approached with caution. In contrast, the task of ascertaining a child's perspectives and objective connections to the new country is a narrower, more straightforward inquiry.

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[6] *Young v. Young*, [1993] 4 SCR 3; *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559, at para. 58; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, at para. 9.
[7] *General comment No. 14 (2013)*, CRC/C/GC/14.

15. A best interests approach ensures that the focus remains on the child and captures the needs and circumstances of ***all*** children. Under the statutory scheme of the *CLRA*, the best interests inquiry calls for a differing application in questions of jurisdiction than a determination of parenting on the merits. While the best interests of the child are to be comprehensively assessed applying the factors listed in s. 24 of the CLRA for a parenting determination, best interests are contextually applied in a jurisdiction determination. The best interests analysis when assessing a child's habitual residence, while differing in application from a custody assessment, will invariably depend upon the particular factual matrix of each individual case. Nevertheless, courts must be, as Lauwers J.A. points out in *N v F*, "alive to the issue".[8] Similarly, the serious harm and return analysis also have regard for a child's best interests.

16. When interpreting legislation, a court must heed the text, the context and the purpose of a provision.[9] The concept of "best interests of the child" plays a fundamental role in the interpretation and application of each section of the *CLRA*. It is interwoven into the judicial and legislative frameworks that impact children.

17. If a legal provision could have more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. Any decision-making process affecting a child must include an evaluation of the impact of that decision on the child and show that the right has been explicitly taken into account.[10]

18. The statutory interpretation principles reaffirmed in *Michel v Graydon*, 2020 SCC 24, at paras. 97 and 104, support a child-centred approach to s. 22 of the CLRA. It would be perverse to assume that Parliament's intention was to exclude certain children. An interpretation adverse to the pre-existing rights of children should be avoided. Children benefit from the well-established principles of statutory interpretation that the legislature is taken to know the social and historical context, and is presumed not to intend to limit an individual's right unless the statutory language is unequivocal.

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[8] *N v F*, 2021 ONCA 614, at para. 274.

[9] The Ontario Legislature sets out the four "purposes" for Part III of the CLRA, which governs jurisdiction and a determination of habitual residence.

[10] UN Committee, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14.

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Overarching Principles: Children as Rights Bearers and Paramountcy of their Best Interests

19. Pursuing and protecting the best interests of the child must take precedence over the wishes of a parent.[11] "This is no less true in matters of international abduction, whatever the child's country of origin, and whether or not the *Hague Convention* governs the dispute."[12]

20. The *Child Convention* is "the most universally accepted human rights instrument in history".[13] Ratified by Canada in 1991, it applies to all children without discrimination. The principles embodied in the *Child Convention* help inform the interpretation of the *Charter*, legislation, and common law in Canada with a focus on the best interests of the child.[14] This Court in *Kanthasamy v Canada (Citizenship and Immigration)* recognized that the best interests of the child must be of a "singularly significant focus".[15] Canada's obligations under the *Child Convention* are therefore heightened to protect uniquely vulnerable children who may be returned to non-signatory states.

21. Articles 3 and 12 of the *Child Convention* mandate best interests of children as "a primary consideration" and an opportunity to have their perspective considered and heard. This right is not limited by age and the Court, parents, and other adult duty-bearers have an obligation to consider the views and perspectives of even very young children, from the viewpoint of the child.[16]

22. Where the child's best interests conflict with other rights and interests, the "best interests" right is the "primary consideration" and must have "high priority". In fact, "a larger weight must be attached to what serves the child best", "in all circumstances, but especially when an action has an undeniable impact on the children concerned". The application of the concept of a child's best interests "requires the development of a rights-based approach, engaging all actors, to secure the

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[11] *King v. Low*, 1985 CanLII 59 (SCC); *Young v. Young*, 1993 CanLII 34 (SCC); *New Brunswick (Minister of Health and Community Services) v. L. (M.)*, 1998 CanLII 800 (SCC).
[12] *F v N*, 2022 SCC 51, at para. 61.
[13] *R v. Sharpe*, 2001 SCC 2, at paras. 177-178.
[14] *Michel v Graydon*, 2020 SCC 24, at para. 103; *F v N*, 2022 SCC 51; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.
[15] *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, at para 40.
[16] UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12.

holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity."[17]

23. The best interests principle is "highly contextual" because of the "multitude of factors that impinge on best interests" and "must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity".[18] It entails "[d]eciding what…appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention".[19]

24. The Alberta Court of Appeal in *Levesque v. Levesque*, found that, "there is no area of law more dependent on a matrix of facts than that relating to the best interests of the children."[20]

25. Similarly, as stated by this Court in *Gordon v. Goertz*:

> Each child is unique, as is its relationship with parents, siblings, friends and community. Any rule of law which diminishes the capacity of the court to safeguard the best interests of each child is inconsistent with the requirement of the *Divorce Act* for a contextually sensitive inquiry into the needs, means, conditions and other circumstances of "the child" whose best interests the court is charged with determining…"No matter what test or axiom one adopts from the many and varied reported decisions on this subject, each case must, in the final analysis, fall to be determined on its particular facts and, on those facts, in which way are the best interests of the children met".[21]

Overarching Principles: Habitual Residence and Children in Migration Situations

26. The Appellant's position on the interpretation of s. 22 reinforces the antiquated notion that children are their parents' property.[22] Nowhere in his proposed habitual residence factors are children mentioned, let alone considered. A strict interpretation of the legislation, without considering a child's best interests, fails on every level. Habitual residence must be informed by the particular factual matrix and perspective of the child, this is of particular importance for children facing migration situations.

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[17] *General comment No. 14 (2013)*, CRC/C/GC/14, at paras. 5, 39 and 40.
[18] *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, at paras. 35-37.
[19] *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, at paras. 36 and 39.
[20] *Levesque v. Levesque*, 1994 CanLII 4486 (ABCA) at para. 51.
[21] *Gordon v. Goertz*, [1996] 2 SCR 27 at para. 44, in quotations citing *Appleby v. Appleby (De Martin)* (1989), 21 RFL (3d) 307 (Ont HC).
[22] Pérez-Vera, Elisa. "Explanatory Report", in *Acts and Documents of the Fourteenth Session (1980)*, t. III, *Child Abduction*. Madrid: Hague Conference on Private International Law, 1981.

27. In the circumstances of a child with no habitual residence, there is no abduction, and no longer a need for prompt return.[23] A child-focused approach may mandate Ontario assuming jurisdiction. Laskin J.A. writing for the majority in *Jackson v. Graczyk*, 2007 ONCA 388, found that the Hague Convention did not apply to a child with no habitual residence at the time of move.

28. Alternatively, requiring children in migration situations to fit in the s. 23 serious harm exception, or s. 22(1)(b) rigid six-part test, unduly shifts the burden to uniquely vulnerable children. Mandating a best interests approach to a determination of their habitual residence ensures that refugee and migrant children can be meaningfully included, and that decisions that align with their best interests can be guaranteed.

29. The term "habitual" implies a more enduring and permanent connection between a person and a place than simple residence. In considering the spectrum of connections between a person and a place, a child-centred approach is necessary when assessing the nature and quality of the connection to determine whether the child has achieved a sufficient degree of integration for her residence to be termed "habitual".

30. In *Adderson v. Adderson*, 1987 ABCA 52, Laycraft C.J.A. found that the term "habitual residence" seems to have come into Canadian law from the Hague Conventions adopted by the Hague Conference on Private International Law. Laycraft C.J.A. opined that the term was introduced, at least in part, "*to avoid the rigid and arbitrary rules which have come to surround the concept of 'domicile'. While 'domicile' is concerned with whether there is a future intention to live elsewhere, 'habitual residence' involves only a present intention of residence. There is a weaker animus.*" (para. 8). CRC/DCI-C submits that rigid and arbitrary rules must be avoided in determining the habitual residence of children. A child's habitual residence should be interpreted to recognize them as individual rights-bearers with interests that may be distinct from their parents, taking into consideration all relevant factors impacting the child's various movements and all the while having regard for their best interests.

[23] Schuz, Rhona, *Habitual Residence: Review of Developments and Proposed Guidelines*, 2023 CanLIIDocs 1497.

Overarching Principles: Hague vs. Non-Hague Cases

31. The legislation governing signatory and non-signatory states to the *Hague Convention* "operate independently of one another".[24] In Hague Convention cases the child's best interests *is* the paramount consideration. In *Geliedan v. Rawdah*, 2020 ONCA 254, the Court of Appeal affirmed that, by virtue of signing the Hague Convention, signatory states warrant that they are: "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody".

32. The hybrid approach in *OCL v. Balev*, 2018 SCC 16, is distinguished from cases involving non-signatory states because when countries *choose* not to sign the *Hague Convention*, there can be no assurance of the paramountcy of a child's best interests when parenting decisions are made; and, there is no commitment to the reciprocal international enforcement mechanisms behind the *Convention*. While some non-signatory countries may put the best interests of the child first, others may not.[25]

Non-Refoulement[26] and Citizenship

33. Burdening uniquely vulnerable children to satisfy a s. 23 exception risks refoulement which can be mitigated by adopting a child-centered approach in s. 22. The approach will support Canada's international non-refoulment obligations under s. 115 of the *Immigration and Refugee Protection Act* and art. 33 of the *United Nations Convention Relating to the Status of Refugees*, as well as children's rights to family, identity, and citizenship.

34. The Court of Appeal in *AMRI v. KER*, 2011 ONCA 417, relied on the *Child Convention* to inform the right of a refugee child to be protected against *refoulement.* The weight given to the child's best interests in the *Child Convention* strongly supported the conclusion that the child's status as a refugee gave rise to a rebuttable presumption of risk of persecution or other serious harm to be faced by the child if a return order was issued (paras. 82-83).

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[24] *Thomson v. Thomson*, [1994] 3 SCR 551, p. 603; *Ireland v. Ireland*, 2011 ONCA 623, para. 46.
[25] *Ojeikere v. Ojeikere*, 2018 ONCA 372 at paras. 60 and 61; *Geliedan v. Rawdah*, 2020 ONCA 254, paras. 35-38; *MAA v DEME*, 2020 ONCA 486, para. 43. Also see *Re J*, [2005] UKHL 40.
[26] Non-refoulement protects a refugee from being removed from Canada to a country where they will face persecution, torture or cruel and unusual punishment.

35. In *MAA v DEME*, 2020 ONCA 486, when considering the return of a child to Kuwait under the CLRA, the Court of Appeal directly referenced the *Child Convention* in determining that a section 40(3) return order cannot be made in the face of a pending refugee claim (paras. 62-72).

36. An inquiry into the child's habitual residence encompasses considering the child's nationality as an element of the child's identity under Article 8 of the *Child Convention*. This Court regarded nationality as relevant to a child's "links and circumstances" in assessing habitual residence under the Hague Convention (*Balev*, para. 44). The Court of Appeal linked citizenship to the children's views and rights under s. 6(1) of the *Charter* (*Ojeikere*, para. 85).

37. CRC/DCI-C submits that citizenship/nationality (or lack thereof in the country of return), is relevant to the habitual residence analysis. While not determinative of the issue, in recognizing a child's sense of belonging, family, rights, opportunities, and resources that promote their overall wellbeing, the benefits of citizenship deserve consideration.

Attornment

38. Attornment should not be determinative of jurisdiction or eliminate the habitual residence analysis, particularly in the case of children in migration situations. The Appellant seeks to eliminate children's participation and quash any assessment of a child's connectedness to a jurisdiction by requiring jurisdiction to be a forgone conclusion based on attornment. The Appellant conflates the role of attornment in recognizing foreign judgments to the role of attornment in determining jurisdiction for parenting purposes.

39. There is no reference to attornment in the CLRA. While arguing for principles of statutory interpretation to be applied under s. 22, the Appellant's subsequent reliance on the common law test for attornment is contradictory.

40. CRC/DCI-C adopts the Respondent's argument on attornment, and that of the Court of Appeal in *H.E. v. M.M.*, 2015 ONCA 813, which stated "The *CLRA* mandates a child-centered approach based on the best interests of the child in discouraging child abduction. Children have no control over where their parents litigate" (para. 82).

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Conclusion

41. The focal point of the child's life/circumstances, including of those too young to express views must be prioritized. A habitual residence assessment can have profound and often searing impacts on children. The approach must consider the particular child's perspectives and integration into the new social and family environment rather than completely subordinating their interests to the intentions of the parents.

42. This Court in *Young v. Young* endorsed a child-centered approach, with the best possible arrangements for the particular child, and held:

> 227 […] To deprive a child of what a court has found to be in his or her best interests is to "injure", in the sense of not doing what is best for the child. The vulnerable situation of the child heightens the need for protection; if one is to err, it should not be in favour of the exercise of the alleged parental right, but in favour of the interests of the child.[27]

43. Children are people with a part to play in their own lives, rather than passive recipients of their parents' decisions. As this Court recently reiterated in *Michel v. Graydon*: "courts are not to be discouraged from defending the rights of children when they have the opportunity to do so" (para. 31).

PART IV – SUBMISSIONS ON COSTS

44. CRC/DCI-C does not seek costs and requests that no costs be ordered against them.

PART V – ORDER SOUGHT

45. CRC/DCI-C takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of November, 2024.

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[27] *Young v. Young*, [1993] 4 SCR 3, paras. 162 and 227; see also CRC/C/GC/14, at para. 71.

PART VI – TABLE OF AUTHORITIES

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20.	*Ojeikere v. Ojeikere*, 2018 ONCA 372	60, 61, 85
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7.	UN Committee, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14.	2, 5, 11-17, 28, 39, 40, 71
8.	*United Nations Convention Relating to the Status of Refugees*	Art. 33

STATUTES	
1.	*Children's Law Reform Act*, R.S.O. 1990, c. C.12. [CLRA], s. 22
2.	*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 115