English EU-equivalent divorce jurisdiction clearly out of step with EU law

Summary

When the UK left the EU, and new domestic legislation was needed to replace EU law, the UK government said in relation to divorce jurisdiction of England and Wales that it would follow, be the same as, the EU law. This was for very justifiable reasons of continuity and comity. They incorporated the relevant EU law into domestic legislation. But not word for word. Specifically, the English domestic statute followed one English High Court interpretation of EU law, when another, completely opposite, High Court interpretation was also favoured and was more probably the position in law and practice across EU member states. Government officials were warned by specialist practitioners that this would cause potential problems. It is now abundantly clear from a recent decision of the Court of Justice of the European Union (CJEU) that the EU understanding of the relevant law is very different to the expectation of English legislation. Will the English courts steadfastly follow the strict wording of the English domestic legislation, clearly putting us out of step with EU law, or interpret by reference to what is now stated as EU law? This has significance for all family lawyers undertaking international cases. It might have wider ramifications for other areas of domestic law following Brexit. Practitioners now need to be very cautious if relying on divorce jurisdiction of the applicant, petitioner, if there is not a continuous period of habitual residence. It might create problems with recognition, forum, and enforcement

Divorce jurisdiction from March 2001

Before March 2001, divorce jurisdiction in England and Wales was domicile or habitual residence for 12 months of either party. This suddenly changed when the UK joined the Brussels Regulation, Brussels II, then Brussels IIA[1]. The Regulation introduced[2] a menu of choice, with several

grounds overlapping with references to residence, habitual residence and common nationality[3]. Where hugely different financial outcomes still occurred across the EU[4] and the '*lis pendens*' rule secured jurisdiction for the party first to issue proceedings[5], two grounds in particular received distinctive attention in England as being the petitioners' choice of jurisdiction. Whatever might be the habitual residence, nationality or domicile of the respondent including the respondent having no connection with the country in which the proceedings were being issued, the petitioner could rely on these two grounds on their own claims for jurisdictional status with no reference to the respondent (and sometimes through taking tactical or other steps of which the respondent might be wholly unaware until served with the English petition and English financial claims[6]).

These were the similarly worded 5th and 6th indents of Art 3.1(a) BIIA with the 6th requiring a shorter time if nationality or domicile was present. Jurisdiction is with the courts of the Member State in whose territory:

- *the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or*
- *the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there.*

For the next 20 years, practitioners had to balance the different concepts of habitual residence and (simple) residing for either 6 or 12 months. Fundamentally, did the habitual residence have to be for the entire previous period of 6 or 12 months preceding the issue of the petition, or was it sufficient merely for there to be habitual residence on the day of issuing the petition, provided the petitioner had resided in the country for the 6 or 12 months as applicable? Certainly, the English version of the wording of the EU law was not clear either way. This was also crucially linked to the position held in English case law on Art 3, and now confirmed also by the CJEU, that a person can have only one habitual residence at any one time, although able to have more than one parallel (simple) residency.

There were conflicting High Court decisions at first instance and opportunities to go to the Court of Appeal[7] or the European Court were frustrated for various reasons. Then the UK left the EU.

But this issue is not just of historic relevance. Divorce jurisdiction law for all cases was only found in EU laws. It had to be replaced by national legislation. In drafting the new legislation for England and Wales[8] the Ministry of Justice indicated they intended and wanted to follow EU law for continuity and comity. However, they departed from the EU wording, to follow what they and some considered to be the prevailing interpretation of the conflicting High Court decisions. Whilst it was thought by some lawyers in England that most of the rest of the EU followed the other interpretation, the CJEU has now made clear that the interpretation set out in the English divorce jurisdiction legislation is very different to the interpretation favoured by the CJEU and therefore the law across the EU. This causes real uncertainty about how the English courts will interpret the new domestic legislation and impact on cross border Anglo EU cases.

This article explains what the High Court conflicting decisions were, then turning to the recent CJEU case law and looking at the outcome for English divorce jurisdiction

English High Court conflicting decisions

The problem with the EU divorce jurisdiction was that it tended to shoehorn the complicated lives of international families into narrow legal concepts. What happened when a family had 2 homes in different countries and one or both spouses were working out of each home or living in one home and spending significant time working from the other home[9]? How could this be one habitual residence?

The English wife and the Greek husband in *Marinos*[10] lived with their children in Athens. However, she kept work based in England, flying out of Heathrow as cabin crew for British Airways. She had available accommodation in England and did a part-time English law course. But themarital life, marital home, the husband, the wife for the majority of her time and the lives of thechildren were in Athens. When the marriage came to an end, she returned to England with thechildren and, on arrival, issued an English divorce petition. She said that on issuing the divorce shehad English habitual residence and had been ordinarily resident during the previous 6 or 12 months[11]. In the High Court, Sir James Munby upheld this. A petitioner could have had two or moreparallel, simple residences (i.e. England and Greece) for the time leading up the petition as long ashabitual residence in England on issuing.

This opened the jurisdictional door for English divorces; it was suddenly much easier to secure the forum of choice of the applicant, the petitioner, seeking to bring divorce and ancillary financial proceedings in England with its perceived generosity to the applicant. Equally and understandably, it caused amazement and consternation to many respondents and their lawyers abroad who had (and had had) believed the family had their primary connection and habitual residence in another country[12].

In *Munro*[13], Bennett J took the opposite position to *Marinos.* He held habitual residence must be not only on the day of issue but over the continuous period of 6 or 12 months before the divorce. Naturally this reduced the jurisdiction opportunity for the petitioner, perhaps leaving the family home and other marital connections in another country, to issue immediately in England. Moor J in *Pierburg*[14] preferred the *Munro* interpretation. But they were only High Court authority[15]. In *Tan v Choy* Aitkens LJ put forward no less than three possible interpretations.

A major problem with the *Marinos* interpretation was being opposed to that in most other EU countries. David Hodson explained this in an article[16] . After research and consulting specialist family lawyers in some other Member States, he explained first that practitioners in many EU member states expected the habitual residence to be continuous throughout the 6 or 12 months, rather than just on the date of issue. Secondly, he demonstrated a difference in translation of keywords in Art 3 between English and some other EU languages. Whereas the English translation was "… habitually resident *if* he or she resided there for at least a year" etc, other translations had *insofar* or *as long as* instead of *if*. Indeed, some translations omitted the word *habitual* altogether. This was obviously unsatisfactory.

Leading English textbooks such as *Dicey, Morris and Collins* and *The International Family Law Practice*

preferred the *Munro* interpretation i.e. that habitual residence had to established throughout the 6 or 12 months. *Rayden and Jackson*[17] had preferred the *Marinos* approach but now, 2023, acknowledges there is a debate in case law between conflicting authorities. Practitioners awaited higher authority. But before it could go to the European Court, the UK left the European Union

English divorce legislation on leaving the EU

The Ministry of Justice rightly decided replacement legislation should have as much continuity as possible with the divorce jurisdiction since March 2001 in BIIA[18]. However, when they produced the intended draft law, specialist practitioners[19] immediately saw a problem. Instead of repeating Art 3 verbatim, the MOJ had added a gloss to the 5th and 6th indents. Instead of habitual residence *if* has resided for 6 months et cetera per Art 3, it said habitual residence *and* has resided for 6 months or 12 months as applicable, namely the *Marinos* interpretation.

The Ministry of Justice were challenged on this. They were adamant this was the proper and right interpretation of the law for continuity purposes. Despite being told that there was still controversy about the proper interpretation, and it was better to use the precise BIIA wording, there was no change.

So, the current English divorce jurisdiction legislation[20] requires the applicant to be habitually resident only on the day of issuing the proceedings, provided he/she has had ordinary, simple residence for the previous 6 or 12 months, possibly in parallel with an ordinary, simple residence in one or more other countries. Whilst good for the English family law profession as it allows a far greater number of potential cases, it ran the risk of putting England and Wales out of step with EU law. If England was to have laws based on EU laws, then it should be the exact laws. Anything else would create uncertainty, confusion and potential litigation. This was distinctly so if, as has now happened, the CJEU has understandably favoured the other, non-*Marinos* interpretation i.e. the habitual residence itself has to be throughout the 6- or 12-month period.

The CJEU decision

BM v LO[21] concerned a set of facts familiar to all specialist international family lawyers dealing with the EU divorce jurisdiction law over the previous 20 years. The parties were German and Polish, married and lived with their children in Poland from 2000 until June 2012. In October 2013 the German national brought proceedings for divorce in Germany saying he had been living at his parents' accommodation in Germany and was habitually resident in Germany. It was

acknowledged that on the day of issue of the divorce he was habitually resident and that he was a German national, but the German appeal court found he had not been habitually resident throughout the previous 6 months, when he had had only so-called simple residency. Nevertheless, he asserted this was sufficient i.e. the *Marinos* interpretation and what is now English statute law. He argued there was not settled EU law on the interpretation. The German court referred to the CJEU the question of whether the 6 months under the 6th indent needs to be continuous habitual residence or whether it was sufficient only for de facto, simple residence as long as there was habitual residence at the point of the divorce application.

It is a fairly short, 39 paragraph straightforward judgment and important to read by specialists in this field. The CJEU was very clear that the divorce jurisdiction in EU law, specifically 5th and 6th indents, require habitual residence throughout the relevant period and not just on the day of issue.

The CJEU states that the 5th and 6th indents which distinctively amongst the other grounds for divorce jurisdiction favour the applicant, petitioner, seeks to create a balance on the one hand with the mobility of individuals within the EU who may have left a member state where the couple had their shared habitual residence and on the other hand provide legal certainty, specifically by ensuring there is a real link between the applicant, petitioner, and the member state with jurisdiction. This latter causes controversy where the parties had spent their entire married life in one country only for one spouse to find that 6 months residency, perhaps post separation, spent by the other spouse in their home country then could give jurisdiction and priority of forum to that country notwithstanding the very limited connection: the very situation in *BM v LO*.

The CJEU went on to acknowledge that the relevant wording, specifically habitually resident as subject to having resided there for 6 or 12 months as applicable, did not necessarily mean that it must be habitual residence throughout the entire period. Nevertheless, they went on to say that in view of the objectives pursued by the Brussels Regulation, the interpretation of continuous habitual residence cannot take place independently of the criteria of habitual residence in Art 3 on divorce jurisdiction. They said that residence for example couldn't be interpreted differently in the 2nd indent and the 5th and 6th indent. They found there was no need to draw a distinction between the concept of residence and that of habitual residence; a distinction which would have the effect of weakening the criteria for determining jurisdiction

Furthermore, it was important for legal certainty that there was this continuous (6 or 12 month) period of habitual residence. It preserved the mobility of people to move around the EU without unduly favouring the applicant. Having the continuous period for the habitual residence indicates a

real link with the member state taking jurisdiction from the time that the 6 or 12 months started to run. They were satisfied this did not impose a disproportionate burden on the applicant from relying on this basis of jurisdiction.

In conclusion the CJEU ruled that the 6th indent *must be interpreted as meaning that the provision* [Art 3 BII] *makes the jurisdiction of the court of a member state to hear an application for dissolution of matrimonial ties subject to the condition that the applicant, who is a national of that member state, provides evidence that he or she has acquired habitual residence in that member state for at least 6 months immediately prior to the submission of his or her application*.

In general terms, with reference to both the 5th and the 6th indent, the habitual residence must not be just on the day of the issue of the divorce proceedings but for 12 months before that date, or 6 months if able to show also domicile or nationality as applicable.

What had been strongly implied by a previous CJEU decision of *IB v FA* was now absolutely clear.

What is the present position?

It is very uncertain. The new post Brexit divorce jurisdiction legislation, following *Marinos* as the MOJ perceived correct interpretation, is that *habitual* residence has only to be at the point of issuing the English divorce. Yet it purported to be the same, to follow, EU law. However, the EU position from the above case is now definitely not the English position. The *Marinos* case law is no longer good law as far as EU law is concerned, if ever it was.

Continuing to rely on the so-called English *Marinos* jurisdiction increases the likelihood that in a England/EU forum dispute, the EU member state would be less likely to acknowledge English jurisdiction if it was based on the habitual residence on the day of issue of the divorce alone. This may in turn, and perhaps more fundamentally, have a bearing when it comes to any recognition or enforcement of an English order in an EU member state. In those circumstances, is it not more likely that recognition or enforcement would be refused because the initial divorce jurisdiction was not acceptable under EU law despite purporting to be the same as EU law?

There are 2 key elements for practitioners; how will the English courts approach the legislative position and what advice to give to clients who might otherwise be relying on jurisdiction based on habitual residence only on the day of issue.

The way in which the English family court handles this issue may depend in part on what method of

statutory interpretation is adopted. On a literal approach the English legislation is clearly the *Marinos* interpretation namely habitual residence only being required on the day of issue with (simple/ordinary) residence sufficient for the remainder of the 6- or 12-month period as applicable. But on a purposive approach we know that the UK government intended to replicate EU law which probably was at the time, and certainly is now, the Munro approach namely habitual residence throughout the whole period.

What is clear is that, pending clarification from the higher courts, practitioners need to warn clients not only about potential issues of recognition and enforcement abroad if the English divorce is based on the Marinos interpretation but also that there may a challenge to English jurisdiction if based on one of these grounds and the applicant is not habitually resident throughout the whole of the relevant period.

Caution must be exercised by practitioners, with suitable warnings to clients, if proceeding on the basis of divorce jurisdiction on the so-called *Marinos* approach of habitual residence only on the day of issue of the divorce proceedings. The UK has left the EU but, for potentially very sensible reasons of continuity and comity, by introducing a domestic law which purported to follow or be similar to EU law, it is still looking at developments in EU case law.

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Notes

[1] Council Regulation (EC) No 1347/2000 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealed and replaced by Council Regulation (EC) No 2201/2003; divorce jurisdiction was largely unchanged, save lis pendens provisions in Art 19.1

[2] Art 3. Art 7 provides for a residual jurisdiction at national law level if there were no Aer 3

jurisdiction. In the UK (and the Republic of Ireland) this was sole domicile of either party

[3] Domicile in the case of the UK and the Republic of Ireland: Art 3. 2

[4] Particularly with England and Wales perceived as being far more generous than other EU member states in its discretionary rearrangement of the entire assets of both parties to provide a fair, especially needs-based, outcome.

[5] Art 19

[6] The situation might be when the parties had lived in one country but the spouse seeking the end of the relationship would return to their home country, of domicile or nationality, and perhaps secretly from the other spouse create a 6-or 12-month residency in order to seize divorce jurisdiction, and also financial claims. Sometimes this might be through giving thoroughly dishonest explanations to the other spouse e.g., going home to look after parents, to pursue possible work or other activities or merely asking for time apart for reflection and specifically without making it clear the intended real purpose was to build up the residency in order to secure divorce jurisdiction and a far better financial outcome as a consequence

[7] See *De Gafroij (Appeal: Hadkinson Order),* [2018] EWCA Civ 2070 and below

[8] Scotland chose to go it alone and introduce divorce jurisdiction based on the position before March 2001 i.e., reverting to domicile and 12 months habitual residence

[9] For example, as found in *Choy v Tan* (2014) EWCA 251, which came close to a CJEU referral on this issue

[10] i.e. at that point she no longer had Greek habitual residence and only English habitual residence and she had had parallel simple residency in both England and Greece

[11] For

[12] Moreover, Moor J also made his findings also on the alternative *Marinos* interpretation.

[13] David Hodson ‘What is jurisdiction for divorce in the EU? The contradictory law and practice around Europe’

https://iflg.uk.com/practice-areas/jurisdiction-forum-choicewhere-to-have-family-court-proceedings

[14] See 1.293–1.310.

[15] Adding sole domicile as a primary basis, not merely the now redundant concept of residual jurisdiction.

[16] Specifically, the small group working closely with the Ministry of Justice on family law on leaving the EU

[17] Section 5(2) of the Domicile and Matrimonial Proceedings Act 1973, as amended by paras 7 and 8 of the Schedule to the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/519).

[18] Case C-462/22 and https://curia.europa.eu/juris/document/document.jsf?text=&docid=275249&pageIndex=0&doclang=EN and see helpful case summary by Rebecca Bailey Harris at [2023] Family Law 1412

[19] The spouses were last habitually resident in so far as one of them still resides there

[20] This comment might necessitate a review generally of what the various Art 3 jurisdictional grounds mean in practice

[21] Case C-289/20, 25 November 2021 and see article by David Hodson and Rebecca [redacted], (2022) Fam Law 853, with acknowledgement in this article