Important Development in the Marinos/Munro Saga

https://caselaw.nationalarchives.gov.uk/ewfc/b/2024/163

A more detailed explanation of the background to this issue can be found in a blog Prof David Hodson OBE KC(Hons) MCIArb and I wrote for the FRJ earlier this year, but in considerable summary the position is as follows.

When the UK joined Brussels II (March 2001), two of the jurisdictional grounds for divorce were:

- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made; and
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and was (in the case of E&W) domiciled there.

There was some uncertainty regarding this wording, specifically whether the requirement to have spent six months (if domiciled here) or 12 months (if not domiciled here) in E&W prior to the date of issue needed to be habitual residence or just ordinary/simple residence.

In *Marinos v Marinos* [2007] EWHC 2047 (Fam) (September 2007) Munby J favoured the lower threshold, i.e. habitual residence only required on the date of issue with simple/ordinary residence sufficient for the relevant period prior to issue.

By contrast, in *Munro v Munro* [2007] EWHC 3315 (Fam) (December 2007) Bennett J adopted the higher threshold, i.e. habitual residence required both on the date of issue and throughout the relevant period beforehand.

Although the position was uncertain, the general perception seemed to favour Marinos until *Pierburg v Pierburg* [2019] EWFC 24 (April 2019) where Moor J – placing weight on, among other things, other language versions of Brussels II – favoured *Munro* and the higher threshold.

When the UK left the EU the MOJ said they intended to replicate the EU position but – despite most of the foreign language versions containing the higher threshold adopted in *Munro* – the wording chosen was the lower threshold favoured by *Marinos*.

Any uncertainty that may have existed regarding the EU interpretation was clarified in *BM v LO* (July 2023) when the ECJ confirmed that the relevant clauses must be interpreted as requiring the applicant to have been habitually resident for the entire period.

E&W is therefore currently in an unsatisfactory position with the wording which was chosen by the MOJ contradicting not only the EU position but also what the MOJ intended to achieve namely alignment with the EU.

This issue was recently considered by Recorder Allen KC in *TI v LI* [2024] EWFC 163 (B) (21 June 2024). Although the judgment is not binding (though it is citeable) and the comment is obiter, it contains a helpful analysis of the current state of the law.

After considering the background the judge adopted a purposive approach and took the view that habitual residence was required throughout the whole period rather than just on the day of issue.

The judge was influenced not only by the EU position – which the MOJ had intended to follow – but also the analysis in *Pierburg* (credit Stewart Leech KC for his submissions on behalf of the respondent husband in that case which are still having an impact now 5+ years on).

It remains to be seen how other judges will approach this issue but it is hoped this could be the start of a move towards aligning the position in E&W with the EU as was intended when the legislation associated with the UK's departure from the EU was being drafted.

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Michael Allum
Michael.allum@iflg.uk.com
The International Family Law Group LLP
www.iflg.uk.com