Contents

CHAPTER 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. *Avena*

On August 8, 2019, a panel of the U.S. Court of Appeals for the Ninth Circuit reversed the district court's denial of habeas relief on a claim of ineffective assistance of counsel at the penalty phase in *Avena v. Chappell*, 932 F.3d 1237 (9th Cir. 2019). Avena was convicted and sentenced to death by a California jury on two counts of first-degree murder. The Ninth Circuit's decision vacates the death penalty in the case, though not on grounds of lack of consular assistance, which was the basis for the decision by the International Court of Justice in the *Avena* case. See *Digest 2004 at 37-43; Digest 2005 at 29-30; Digest 2007 at 73-77; Digest 2008 at 35, 153, 175-215; Digest 2011 at 11-23; Digest 2012 at 15-16; Digest 2013 at 26- 29; and Digest 2014 at 68-69.*

2. Memorandum of Understanding on Consular Notification and Access

On September 13, 2019, the American Institute in Taiwan ("AIT") and the Taipei Economic and Cultural Representative Office in the United States ("TECRO") signed a Memorandum of Understanding ("MOU") Regarding Certain Consular Functions. See AIT press release, available at https://www.ait.org.tw/ait-and-tecro-sign-mou-regarding-certain-consular-functions/. The MOU extends the principles in Articles 36 and 37 of the Vienna Convention on Consular Relations for consular notification and access, and provides that the competent authorities in the territories of the authorities represented by AIT and TECRO are expected to perform certain consular functions and provide consular assistance. For example, Section 1 of the MOU details the expectation that the competent authorities in the territory of the authorities represented by TECRO will advise detained U.S. nationals that they may have a representative from AIT notified of

their detention. Likewise, Section 2 states the expectation that competent authorities in the territory of the authorities represented by AIT will advise detained Taiwan passport holders that they may have a TECRO representative notified of their detention. The text of the MOU is available at https://www.ait.org.tw/wp-content/uploads/sites/269/AIT.TECRO_.Consular.Functions.MOU_.9.13.19-Merged.pdf.

B. CHILDREN

1. Adoption

In March 2019, the State Department released its Annual Report to Congress on Intercountry Adoptions. The Fiscal Year 2018 Annual Report, as well as past annual reports, can be found at https://travel.state.gov/content/adoptionsabroad/en/about-us/publications.html. The report includes several tables showing numbers of intercountry adoptions by country during fiscal year 2018, average times to complete adoptions, and median fees charged by adoption service providers.

2. Abduction

a. Annual Reports

As described in *Digest 2014* at 71, the International Child Abduction Prevention and Return Act ("ICAPRA"), signed into law on August 8, 2014, increased the State Department's annual Congressional reporting requirements pertaining to countries' efforts to resolve international parental child abduction cases. In accordance with ICAPRA, the Department submits an Annual Report on International Child Abduction to Congress each year and a report to Congress ninety days thereafter on the actions taken toward those countries cited in the Annual Report for demonstrating a pattern of noncompliance. See International Parental Child Abduction page of the State Department Bureau of Consular Affairs, https://travel.state.gov/content/childabduction/en/legal/compliance.html.

Annual reports on international child abduction are available at https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/for-providers/legal-reports-and-data/reported-cases.html.

b. Hague Abduction Convention Partners

On April 1, 2019, the 1980 Hague Convention on the Civil Aspects of International Child Abduction entered into force between the United States and Jamaica. See April 1, 2019 State Department media note, available at https://jm.usembassy.gov/united-states-and-jamaica-become-partners-under-the-hague-abduction-convention/. The United States had 79 partners under the Convention as of April 2019.

c. Hague Abduction Convention Cases

(1) Monasky v. Tagleri

On August 22, 2019, the United States filed a brief in the Supreme Court (in support of neither party) in *Monasky v. Tagleri*, No. 18-935. The case concerns an eight-week-old child's habitual residence under the Hague Abduction Convention. The petition was granted on two questions: 1) whether a district court's determination of habitual residence should be reviewed de novo, or under a more deferential standard of review and 2) where an infant is too young to acclimate to her surroundings, whether a subjective agreement between the infant's parents is necessary to establish her habitual residence under the Convention. Excerpts follow from the discussion in the U.S. brief of the second question.[*]

* * * *

As explained below, the Convention requires courts determining a child's habitual residence to eschew formal or rigid legal requirements, and instead to conduct an inherently flexible and factbound inquiry. Accordingly, a subjective agreement between the child's parents, while potentially relevant in some cases, is not categorically necessary to such a determination. … Although the court of appeals here applied the correct standard of review, neither court below applied the correct substantive standard under the Convention for determining habitual residence. Accordingly, this Court should vacate the judgment below and remand for further proceedings.

I. A SUBJECTIVE AGREEMENT BETWEEN THE PARENTS IS NOT REQUIRED TO ESTABLISH AN INFANT'S HABITUAL RESIDENCE

As the court of appeals recognized, determining a child's habitual residence under the Convention is "a question of pure fact." … That factual inquiry must remain flexible and take into account all relevant circumstances in each case in light of the "paramount importance" under the Convention of "the interests of children." Convention preamble; see 22 U.S.C. 9001(a)(1). Accordingly, no single piece of evidence can, in the abstract, be deemed either necessary or dispositive to determining habitual residence. It follows that a subjective agreement between the parents regarding where an infant should live—like any other potentially relevant evidence—is not categorically required to establish the infant's habitual residence.

A. Determining A Child's Habitual Residence Requires A Flexible And Factbound Inquiry

The ordinary meaning of the Convention's text, its negotiating and drafting history, and case law from other contracting states all demonstrate that habitual residence is a flexible and factbound concept.

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[*] Editor's note: On February 25, 2020, the Supreme Court issued its opinion. The Court ruled that the test to determine a child's habitual residence under the Convention is a totality of the circumstances test — essentially a fact-bound inquiry that should not be encumbered by rigid rules or presumptions. The Court also ruled that the standard of review for a habitual residence determination is clear error. The Court's opinion largely adopts the reasoning of the U.S. government in its amicus brief.

1. "The interpretation of a treaty, like the interpretation of a statute, begins with its text," *Abbott* v. *Abbott*, 560 U.S. 1, 10 (2010) (citation omitted), including "the context in which the written words are used," *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 699 (1988) (citations omitted). Here, the Convention, "[f]ollowing a long-established tradition of the Hague Conference," does not define habitual residence. *Explanatory Report* 53. But the term's ordinary meaning reflects its inherently factual nature. See *Abbott*, 560 U.S. at 11 (applying the ordinary meaning of "place of residence" in the Convention); cf. *Santovincenzo* v. *Egan*, 284 U.S. 30, 40 (1931).

The ordinary meaning of "habitual" is "[c]ustomary" or "usual." *Black's Law Dictionary* 640 (5th ed. 1979) (*Black's*); see 6 *Oxford English Dictionary* 996 (2d ed. 1989) ("existing as a settled practice or condition; constantly repeated or continued; customary"); *Webster's Third New International Dictionary* 1017 (1976) (*Webster's*) (similar). And the ordinary meaning of "residence" is "[p]ersonal presence at some place of abode," *Black's* 1176, or "one's usual dwelling-place or abode," 13 *Oxford English Dictionary* 707 (2d ed. 1989), or "the act or fact of abiding or dwelling in a place for some time," *Webster's* 1931; see *ibid.* ("a temporary or permanent dwelling place, abode, or habitation"). It follows that an individual is habitually resident in the place or abode where he or she customarily or usually lives or dwells.

That ordinary meaning is reflected in other areas of law. For instance, setting aside some provisos not applicable here, Congress has defined "Habitual Residence" in the Compact of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, 48 U.S.C. 1901 note, to mean "a place of general abode or a principal, actual dwelling place of a continuing or lasting nature." Compact tit. IV, art. VI, § 461(g). The Department of Homeland Security has adopted that definition for purposes of certain immigration laws. See 8 C.F.R. 214.7(a)(4)(i). And for purposes of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, S. Treaty Doc. No. 51, 105th Cong., 2d Sess. (1998), 1870 U.N.T.S. 167, the Department of Homeland Security has promulgated regulations allowing a child adoptee to be deemed habitually resident in the country of his or her "actual residence" instead of his or her country of citizenship as long as "the child's status in that country is sufficiently stable for that country properly to exercise jurisdiction over the child's adoption or custody." 8 C.F.R. 204.303(b).

Consistent with those illustrations of the term's ordinary meaning in other contexts, determining an individual's "habitual residence" under the Convention is, at bottom, a question of pure fact. The physical location of someone's actual abode or dwelling is obviously factual in nature. So too is whether that individual usually or customarily lives in that location in a continuing or lasting or sufficiently stable manner. However framed, that inquiry resists further doctrinal explication or subdivision into component parts; the answer ultimately will depend on the circumstances in a given case. …

2. That the inquiry into habitual residence is inherently flexible and factbound is reinforced by the Convention's negotiation and drafting history. "Because a treaty ratified by the United States is 'an agreement among sovereign powers,' " courts should interpret it in light of "the negotiation and drafting history of the treaty." *Medellin* v. *Texas*, 552 U.S. 491, 507 (2008) (citation omitted). For the same reason, courts must "read the treaty in a manner 'consistent with the *shared* expectations of the contracting parties.' " *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 12 (2014) (citations omitted); see 22 U.S.C. 9001(b)(3).

Under the Convention, "the interests of children are of paramount importance." Convention preamble; see 22 U.S.C. 9001(a)(1). To that end, the Convention pursues the twin

goals of "protect[ing] children internationally from the harmful effects of their wrongful removal" and "ensur[ing] their prompt return to the State of their habitual residence." Convention preamble. Both goals "correspond to a specific idea of what constitutes the 'best interests of the child.' " *Explanatory Report* 25. Even the Convention's various exceptions to its rule of prompt return—such as when "the child is now settled in its new environment," Convention art. 12, or when "there is a grave risk that his or her return would expose the child to" harm, Convention art. 13—are in service of the child's interests. See *Explanatory Report* 25, 29-31.

Importantly, the Convention does not purport to resolve any underlying custody or access dispute; instead, its remedy is limited to returning the child to her country of habitual residence, where the courts can adjudicate and resolve such disputes. See Convention arts. 16, 19; *Explanatory Report* 36; 22 U.S.C. 9001(b)(4). Accordingly, such returns should be "prompt," Convention preamble; indeed, the Convention appears to contemplate decisions on whether to return a child to be rendered within six weeks of a petition's being filed, see Convention art. 11.

Both the negotiators' focus on the child's interests and the need for prompt resolution of petitions seeking a child's return are reflected in the choice of the flexible and fact-specific concept of habitual residence as the Convention's "connecting factor." In making that choice, the drafters rejected the two main alternatives: domicile and nationality. The Hague Conference had generally abandoned nationality as the connecting factor in its conventions in light of the rise of both stateless and multiple-nationality individuals. See Kurt H. Nadelmann, *Habitual Residence and Nationality as Tests at The Hague: The 1968 Convention on Recognition of Divorces*, 47 Tex. L. Rev. 766, 766-767 (1969).

Nationality had itself replaced domicile, see Nadelmann 767, which was regarded as too "technical" and a "term of art," Jeff Atkinson, *The Meaning of "Habitual Residence" Under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children*, 63 Okla. L. Rev. 647, 649 (2011) (citation omitted); see Nadelmann 768 (observing that domicile had a "different meaning * * * in different systems"); … Accordingly, the Hague Conference generally had settled on using habitual residence, which became "a well-established concept in the Hague Conference." *Explanatory Report*66.

The Convention here was no different. Because of their relative rigidity and inflexibility, both nationality and domicile were unsuited for the Convention and its goals. Professor Anton, the chairman of the commission that drafted the Convention, explained:

> The choice of the criterion of the habitual residence of the child was scarcely contested. It was clearly desirable to select a single criterion. That of the child's nationality seemed inappropriate because the State with the primary concern to protect a child against abduction is that of the place where he or she usually lives. In some systems the criterion of domicile would point to that place, but in others domicile has a technical character which was thought to make its choice inappropriate.

A. E. Anton, *The Hague Convention on International Child Abduction*, 30 Int'l & Comp. L.Q. 537, 544 (1981). The Convention's drafters thus chose habitual residence—"the place where [the child] usually lives," Anton 544—which they viewed "as a question of pure fact, differing in that respect from domicile." *Explanatory Report* ¶ 66. Using the factbound concept of habitual residence avoided dependence on "artificial jurisdictional links," *id.* ¶ 11, which would have

been contrary to the Convention's goal of protecting the interests of the child by promptly "restor[ing] a child to its own environment," *ibid.* As commentators have observed, "[t]he strength of habitual residence in the context of family law is derived from the flexibility it has to respond to the demands of a modern, mobile society; a characteristic which neither domicile nor nationality can provide." Paul R. Beaumont & Peter E. McEleavy, *The Hague Conference on International Child Abduction* 89 (Oxford Univ. Press 1999). Habitual residence was thus "chosen precisely for its flexibility to deal with modern society." Erin Gallagher, *A House Is Not (Necessarily) a Home: A Discussion of the Common Law Approach to Habitual Residence*, 47 N.Y.U. J. Int'l L. & Pol. 463, 468 (2015).

That negotiation and drafting history confirms that habitual residence is a flexible and factbound concept that resists further legal rules. As Professor Anton observed, because habitual residence is "a question of fact," further attempts to define it would be "otiose." Beaumont & McEleavy 89 (citation omitted). Indeed, "the Hague Conference has continually declined to" define the term precisely so the concept can "retain[] the maximum flexibility for which it [i]s so admired." *Id.* at 89-90.

3. The views of other contracting states confirm that habitual residence is a flexible and factbound concept. This Court has explained that " 'the postratification understanding' of signatory nations" is relevant to the interpretation of treaties. *Medellin*, 552 U.S. at 507 (citation omitted); see *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (explaining that "the opinions of our sister signatories [are] entitled to considerable weight") (citation omitted). That "principle applies with special force here, for Congress has directed that 'uniform international interpretation of the Convention' is part of the Convention's framework." *Abbott*, 560 U.S. at 16 (citation omitted); see 22 U.S.C. 9001(b)(3)(B). Consistent with the term's ordinary meaning as discussed above, courts of other contracting states have converged on the understanding that determining "habitual residence" requires a flexible and factbound inquiry.

For example, the Supreme Court of Canada recently explained that courts making determinations of habitual residence "must look to all relevant considerations arising from the facts of the case at hand." *Office of the Children's Lawyer* v. *Balev*, [2018] 1 S.C.R. 398, 421. In adopting that flexible, factbound standard, the Canadian high court expressly rejected approaches that would focus on either "the intention of the parents with the right to determine where the child lives" (what it deemed a "forward-looking parental intention model"), or "the child's acclimatization in a given country" (what it deemed a "backward-focused" approach), to the exclusion of the other. *Id.* at 419-420. Instead, *Balev* determined that a "hybrid" approach—one that "considers all relevant links and circumstances" in all cases—is the most appropriate under the Convention. *Id.* at 421. "Imposing * * * legal construct[s] onto the determination of habitual residence," the Canadian high court observed, would "detract[] from the task of the finder of fact, namely to evaluate all of the relevant circumstances in determining where the child was habitually resident at the date of wrongful retention or removal." *Id.* at 422 (citation omitted).

Likewise, the Court of Justice of the European Union has held that determining a child's place of habitual residence under the European Council regulations implementing the Convention for intra-European cases "reflects essentially a question of fact," and courts making such determinations therefore must "tak[e] account of all the circumstances of fact specific to each individual case." Case C-111/17, *OL* v. *PQ*, ¶ 42, 51, ECLI: EU:C:2017:436 (June 8, 2017). Of particular salience here, in *OL* the Court of Justice explained that even "[w]here the child in question is an infant," courts must consider a variety of evidence, including "the duration, regularity, conditions and reasons for" the custodial parent's presence in the country at issue, as

well as "geographic and family origins and the family and social connections which [that parent] and child have with that" country. *Id.* ¶ 45. The Court of Justice emphasized that although the "intention of the parents to settle permanently with the child in a Member State * * * can also be taken into account, * * * the intention of the parents cannot as a general rule by itself be crucial to the determination of the habitual residence of a child." *Id.* ¶ 46-47. As the Court of Justice earlier had explained in Case C-497/10, *Mercredi* v. *Chaffe*, ECLI: EU:C:2010:829 (Dec. 22, 2010), "taking account of all the circumstances of fact specific to each individual case" is necessary to fulfill the Convention's purposes. *Id.* ¶ 47.

The Supreme Court of the United Kingdom likewise has rejected efforts to "overlay the factual concept of habitual residence with legal constructs." *In re A (Children)*, [2013] UKSC 60, ¶ 39. Instead, "habitual residence is a question of fact and not a legal concept such as domicile," and will "depend[] upon numerous factors, * * * with the purposes and intentions of the parents being merely one of the relevant factors." *Id.* ¶ 54. The high court reiterated that "[t]he essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce." *Ibid.*; see *AR* v. *RN*, [2015] UKSC 35, ¶ 17; *In re KL (A Child)*, [2013] UKSC 75, ¶ 20.

In *LCYP* v. *JEK*, [2015] 5 H.K.C. 293, the Hong Kong Court of Appeal of the High Court, citing *In re A* and other United Kingdom cases, agreed that "[h]abitual residence is a question of fact which should not be glossed with legal concepts." *Id.* ¶ 7.7 (citation omitted). The court explained that although "parental intent does play a part in establishing or changing the habitual residence of a child," it is not dispositive and instead "will have to be factored in, along with all the other relevant factors," in determining habitual residence. *Ibid.*

The Court of Appeal of New Zealand similarly rejected an exclusive shared-parental-intent approach in *Punter* v. *Secretary for Justice* [2007] 1 NZLR 40, emphasizing "the need to ensure that the concept of habitual residence remains a factual one not limited by presumptions or presuppositions" and reiterating that courts must consider "all of the relevant factual circumstances." *Id.* at 66 (¶ 106); see *id.* at 71 (¶ 130) (explaining that "the test is a factual one, dependent on the combination of circumstances in the particular case"); *id.* at 85 (¶ 189) ("Parental purpose should be treated as an important factor, but not decisive.").

Agreeing that the "approach described in [*Punter*] * * * should be followed," the High Court of Australia held that courts should undertake " 'a broad factual inquiry' into all factors relevant to determining the habitual residence of a child, of which the settled purpose or intention of the parents is an important but not necessarily decisive factor." *LK* v. *Director-General, Dep't of Cmty. Servs.* (2009) 237 CLR 582, 591, 600 (¶ 18, 45).

The point need not be belabored. As *Balev* observed, although there is not yet an "[a]bsolute consensus" among contracting states to the Convention, the "clear trend" from courts in those countries is to determine habitual residence using a flexible, factbound approach free from rigid legal or doctrinal requirements. [2018] 1 S.C.R at 423.

B. Under A Flexible And Factbound Inquiry, A Subjective Parental Agreement Is Not Categorically Necessary

Because the determination of habitual residence is inherently factbound and flexible, a subjective agreement between the parents is not necessary to that determination. Indeed, as explained above, even a shared parental intent is not necessary to that determination, so it follows *a fortiori* that an actual or subjective agreement between the parents … is not categorically required either. To the contrary, as with all questions of fact, courts may find a variety of evidence relevant to their consideration, as the district court here did. … A subjective

agreement between the parents about where their child should live might in some cases be relevant to determining the child's habitual residence. For example, when a child has lived in several countries, an agreement (or other indicia of parental intent) may shed light on whether the particular dwelling from which the child was wrongfully removed was sufficiently stable, lasting, or continuing in nature for that dwelling (as opposed to one of the other dwellings) to be regarded as the place of habitual residence. … But a subjective parental agreement—or lack thereof—should not be dispositive; as the court of appeals observed, cases under the Convention frequently arise in situations when the "parents d[o] not see eye to eye on much of anything." …

Imposing a rigid requirement of a subjective agreement would contravene not only the flexible and factbound nature of the inquiry, but also the Convention's purposes. As the court of appeals observed, such a requirement would in practice leave many young children, especially those who have resided in only one country, with *no* habitual residence at all, thereby "leaving the population most vulnerable to abduction the least protected" under the Convention. … That would undermine the Convention's goal to "deprive [the abducting parent's] actions of any practical or juridical consequences" by eliminating any benefit from unilaterally moving the child. *Explanatory Report* ¶ 16. To be sure, it might be possible to construe the Convention in such a way that in rare instances a very young child may lack a habitual residence under the Convention. … But courts should not *create* the need to confront whether (and if so when) the Convention contemplates that undesirable scenario by imposing rigid legal requirements or constructs on what should be a quintessentially flexible and factual inquiry under the Convention. That concern is particularly salient when, as here, a child has lived in only one country from birth to the wrongful removal.

Petitioner's suggestion … that an actual-agreement requirement would result in faster adjudications (when no such agreement exists) proves too much, for *any* rigid legal requirement would have the same effect. For instance, a requirement that a child have lived in a place for at least one year—as sometimes is required to establish domicile, see *Martinez* v. *Bynum*, 461 U.S. 321, 327 n.6 (1983)—or that the parents own or have a long-term lease for their dwelling also would result in rapid determinations in cases where those factors are absent. Yet applying such rigid requirements would be contrary to the flexible and factbound inquiry the Convention requires. …

Although the court of appeals here appeared to recognize the factual nature of a habitual-residence determination, … it nevertheless seemed to adhere to a binary view of considering *either* the child's acclimatization *or* the parent's shared intent—but not both, much less other considerations as well. … (Moore, J., dissenting) (agreeing with that binary standard). As explained above, that framework is incorrect; courts should consider all relevant evidence in all cases.

The Seventh Circuit's decision in *Redmond* v. *Redmond*, 724 F.3d 729 (2013), illustrates the correct approach to determining habitual residence under the Convention. There, the court refused to "overcomplicat[e] the issue of habitual residence with layers of rigid doctrine," and instead explained that, "in accordance with 'the ordinary and natural meaning of the two words it contains,' " determining a child's habitual residence "requires an assessment of the observable facts on the ground." *Id.* at 742-743 (citation omitted). *Redmond* rejected exclusive reliance on shared parental intent, explaining that although such intent can be "an important factor in the analysis," the "habitual-residence inquiry remains a flexible one, sensitive to the unique circumstances of the case and informed by common sense." *Id.* at 744. After reviewing various competing approaches in the courts of appeals—some of which focus on acclimatization, others

of which focus on parental intent, see *id.* at 744-746—*Redmond* reiterated that both parental intent and acclimatization can be relevant, but that ultimately any determination of a child's habitual residence must "remain[] essentially factbound, practical, and unencumbered with rigid rules, formulas, or presumptions." *Id.* at 746.

That approach is consistent with the ordinary meaning of habitual residence, the negotiation and drafting history of the Convention, and the emerging case law from other contracting states described above. Under that approach, courts determining a child's habitual residence should consider the full range of admissible evidence relevant to that determination. Such evidence potentially may include evidence of the parents' intent (such as an actual agreement, expressed intent to remain in the country, parental employment, the purchase of a home or the signing of a long-term lease, moving household belongings, establishing local bank accounts, or applying for driver's or professional licenses); the child's ties to the place (such as the length of residence, the child's language and assimilation, school or daycare enrollment, or participation in social activities); and any other relevant factors (such as immigration status, the reasons the child was in the country, or the existence of family and social networks), as they existed at the time of the wrongful removal or retention. See generally, *e.g.*, *Balev*, [2018] 1 S.C.R. at 414, 421, 423; *In re A*, *supra*, ¶ 48, 55; *Punter* [2007] 1 NZLR at 61-62 (¶ 88); Atkinson 654-657. Because the habitual-residence inquiry is factbound and flexible, the relative weight of any given evidence will vary from case to case and ultimately would be a matter of discretion for the trial court. Cf. *Anderson* v. *Bessemer City*, 470 U.S. 564, 574 (1985).

Importantly, the list above is intended to be illustrative, not mandatory or exhaustive; courts are free to consider any admissible evidence relevant to answering the ultimate factual inquiry: the location of the child's habitual residence. Conversely, the inquiry is not boundless. For instance, setting aside extraordinary circumstances (such as an infant born on an overseas vacation), a child's habitual residence likely cannot be in a country in which he or she has never been physically present. … That conclusion flows from the ordinary meaning of "habitual"; absent extraordinary circumstances, an individual cannot have *usually* resided somewhere if he or she has *never* resided there. In all cases, the touchstone is determining the location of the child's usual or customary dwelling or abode. …Courts should consider any and all admissible evidence relevant to making that purely factual determination.

Although the court of appeals recognized that the inquiry into habitual residence "is one of fact," … and although both the district court and the court of appeals correctly concluded that they could determine A.M.T.'s habitual residence without requiring proof of a subjective parental agreement, the district court made its determination without engaging in the flexible and factbound inquiry that the Convention requires. Instead, it appeared to focus on shared parental intent to the exclusion of other considerations. … This Court has repeatedly emphasized that it is a "court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *United States* v. *Stitt*, 139 S. Ct. 399, 407 (2018) (citation omitted). Accordingly, the Court should vacate the judgment below and remand the case so the lower courts have the opportunity to apply the correct legal standard to determine A.M.T.'s habitual residence in the first instance.

* * * *

(2) Abou-Haidar v. Vazquez

The United States submitted an amicus brief on December 18, 2019 in a Hague Abduction Convention case in the D.C. Circuit, *Abou-Haidar v. Sanin Vazquez*, 945 F.3d 1208 (D.C. Cir. 2019), in which habitual residence was one of the issues, as it was in *Monasky*, discussed *supra*. The D.C. Circuit also considered two additional issues:

> Whether a parent can retain a child within the meaning of Article 3 of the Convention prior to the expiration of a previously agreed-upon time to return the child to the country of the child's alleged habitual residence [so-called anticipatory retention]; and
>
> Whether a court may decide for itself the legal and factual questions related to a claim in a petition under the Convention, notwithstanding a Central Authority's decision to reject the same claim in a separate application [in this case, there was a decision by the French Central Authority].

The lower court decided that the child's habitual residence was France and ordered that the parent retaining the child in the United States (Vazquez) return her to France by December 31, 2019. The U.S. brief in *Abou-Haidar* (not excerpted herein) repeats the argument in the U.S. brief in *Monasky* in and addresses the two additional issues, stated *supra.*

On December 27, 2019, the D.C. Circuit issued its decision, affirming the lower court's judgment. The Court agreed with the U.S. brief on two of the issues, finding that the French Central Authority's decision carried little weight and that the case was one involving actual, and not anticipatory, retention. On the issue of habitual residence, the Court applied the standard on which the parties in this case had agreed (that used in the *Mozes* case). Excerpts follow from the opinion of the Court.

* * * *

Sanin Vazquez's primary contention is that the petition must be dismissed because the district court's retention date of May 7, 2019, precedes … the date through which the parties agreed the child would remain in the United States. Sanin Vazquez views this concern as jurisdictional… In her view, recognizing a retention date prior to December 31, 2019, would constitute an "anticipatory retention"—a type of claim that, she asserts, American courts have never previously recognized. …

We do not embrace Sanin Vazquez's effort to label her argument in jurisdictional terms; at bottom, her argument is simply about whether a retention occurred, and thus goes to the merits of Abou-Haidar's Hague Convention petition. In any event, we do not believe that the district court reached out to decide an unripe issue when it identified a retention of the child as of May 7, 2019—or, at the latest, May 23, 2019—because this case involves an actual, rather than anticipatory, retention. *See* U.S. Amicus Br. 25-29 (agreeing that this case involves an actual retention). No court has held that either of these retention dates would be premature. The circuits identify the date of retention as "the date consent was revoked" or when the "petitioning parent

learned the true nature of the situation." *Palencia v. Perez*, 921 F.3d 1333, 1342 (11th Cir. 2019). For example, the Second Circuit has held that the date of retention is the date when the retaining parent advised the other that "she would not be returning with the [c]hildren" as originally planned. *Marks ex rel. S.M. v. Hochhauser*, 876 F.3d 416, 422 (2d Cir. 2017). Similarly, the Third Circuit identifies the retention date as the "date beyond which the noncustodial parent no longer consents to the child's continued habitation with the custodial parent and instead seeks to reassert custody rights, as clearly and unequivocally communicated through words, actions, or some combination thereof." *Blackledge v. Blackledge*, 866 F.3d 169, 179 (3d Cir. 2017). These cases also find support in the official commentary of the Convention. …

The circuits also agree that the parental actions that serve to identify such date need not be particularly formal. The withdrawal of consent to existing custody arrangements may be communicated through an in-person conversation, *Darin v. Olivero-Huffman*, 746 F.3d 1, 10 (1st Cir. 2014), or an email, *Marks*, 876 F.3d at 417-18, or a phone call, *Palencia*, 921 F.3d at 1337. More formal actions would also certainly qualify, including unilaterally filing for custody, *Mozes*, 239 F.3d at 1070, or filing a petition under the Hague Convention for the child's return, *Blackledge*, 866 F.3d at 179.

Guided by these analyses, the district court correctly found that Sanin Vazquez retained the child at the earliest on May 7, 2019, when she informed Abou-Haidar of her Superior Court filing seeking "primary physical custody," … or at the latest by May 23, 2019, when Abou-Haidar filed his answer and counterclaim making clear that he opposed the proposed change to his custody rights…. If there were any doubt as to the precise date, other events further support the district court's conclusion that, by the end of May 2019, both parents understood they disputed the exercise of custody over the child: Sanin Vazquez informed Abou-Haidar on May 10 that she did not intend to return the child to France at the end of the year…; Sanin Vazquez's counsel wrote a letter to Abou-Haidar on May 31 reiterating that Abou-Haidar was not welcome in the Washington apartment where the child was living with her mother…; and, on June 10, Abou-Haidar filed his petition for the child's return to France…. Given the temporal concentration of these events and the lack of any material effect on the analysis of choosing one date over another, we need not isolate one definitive act of retention. Under any circuit's existing law on the point, one or more of these actions suffices to identify a retention. *See generally Redmond*, 724 F.3d at 739 n.5 (noting that an '"abduction' might have occurred on one of several dates; the question is always whether there was *any* date on which a wrongful removal or retention occurred").

* * * *

IV.

Having resolved the heart of Sanin Vazquez's claim, we now turn to her abbreviated challenge to the district court's conclusion of the second question. This question asks: "Immediately prior to the removal or retention, in which state was the child habitually resident?" *Mozes*, 239 F.3d at 1070. Here the district court concluded, based on detailed factfinding, that France is the child's habitual residence. Sanin Vazquez contends on appeal that the "factual findings made by the District Court, when applied to the law of and interpreting the Convention, could not possibly yield a ruling that habitual residence was still France." …

A preliminary question is what framework we should apply to determine the child's habitual residence. All the circuits to have addressed the question agree that two important considerations are: (1) the parents' shared intent for where the child should reside, and (2) the

child's acclimatization to a particular place. *See, e.g.*, *Redmond*, 724 F.3d at 746 ("In substance, all circuits—ours included—consider *both* parental intent *and* the child's acclimatization."). To the extent the circuits' approaches diverge, they "differ[] only in their emphasis." *Id.* Under the prevailing approach, again represented by *Mozes*, the primary focus is on the parent's shared intent. 239 F.3d at 1078-79. After ascertaining shared intent, the court also considers acclimatization, but a child's acclimatization to a new place of residence overcomes contrary parental intent only where the court "can say with confidence that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would now be tantamount to taking the child 'out of the family and social environment in which its life has developed.'" *Id.* at 1081 (quoting Pérez-Vera Report ¶ 11). The Sixth Circuit, and to some extent the Third Circuit, place primary emphasis on the child's acclimatization, treating shared parental intent as a "back-up inquiry for children too young or too disabled to become acclimatized." *Taglieri v. Monasky*, 907 F.3d 404, 407 (6th Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 2691 (June 10, 2019) (No. 18-935); *see also Ahmed v. Ahmed*, 867 F.3d 682, 688 (6th Cir. 2017); *Whiting v. Krassner*, 391 F.3d 540, 550 (3d Cir. 2004); *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995).

These differing emphases affect the framing of the standard of review on appeal. Under *Mozes*, the habitual-residence determination is a "mixed question of law and fact." 239 F.3d at 1073. The factual ingredients of the inquiry, *i.e.*, those "founded on the application of the fact-finding tribunal's experience with the mainsprings of human conduct," are reviewed for clear error, while legal aspects of the question, *i.e.*, those that require "judgment about the values that animate legal principles," are reviewed de novo. *Id.* (internal quotation marks and citations omitted). The Sixth Circuit does not identify any legal overlay subject to de novo review, so treats the habitual-residence determination as purely a "question of fact subject to clear-error review." *Monasky*, 907 F.3d at 409.

We have no occasion to decide as a legal matter which of these frameworks is correct because the parties agreed both here and in the district court to application of the *Mozes* framework. …

In line with the *Mozes* framework, we first examine the district court's findings regarding the parents' shared intent, and then its findings regarding the child's acclimatization.

A.

The district court found, and Sanin Vazquez concedes, that France was the family's habitual residence before they came to Washington, D.C. … Under *Mozes*, a determination that shared parental intent has changed requires a finding that the parties had a "settled purpose" to establish a new habitual residence. 239 F.3d at 1074. Courts look at a variety of factors to determine whether the parents had a shared intent to change the child's habitual residence, including "parental employment in the new country of residence; the purchase of a home in the new country and the sale of a home in the former country; marital stability; the retention of close ties to the former country; the storage and shipment of family possessions; the citizenship status of the parents and children; and the stability of the home environment in the new country of residence." *Maxwell v. Maxwell*, 588 F.3d 245, 252 (4th Cir. 2009). Courts have held parents cannot establish a new habitual residence without forsaking their existing one. A "person cannot acquire a new habitual residence without 'forming a settled intention to abandon the one left behind.'" *Darin*, 746 F.3d at 11 (quoting *Mozes*, 239 F.3d at 1075).

Crucially, *Mozes* tells us that "[w]hether there is a settled intention to abandon a prior habitual residence is a question of fact as to which we defer to the district court." 239 F.3d at

1075-76. Here, the district court canvassed all of the record evidence and found that the parties intended to remain in Washington, D.C. for the eighteen months of Sanin Vazquez's initial contract, but that any plans to stay beyond that period were "aspirational and contingent." … The district court's detailed, record-based factual findings fully support that determination. …

On appeal, Sanin Vazquez has not articulated why any of these factual findings is clearly erroneous. … But the district court took those facts into account. … Sanin Vazquez also claims that the district court erred in crediting Abou-Haidar's testimony and the corroborating testimony of his friends, rather than the testimony of her friends and family, as to the parties' stated intentions upon departure from France. … But our review is at its most deferential when it comes to reexamining the district court's credibility determinations. *See, e.g.*, *Maxwell*, 588 F.3d at 253.

To the extent that Sanin Vazquez suggests that the district court made a mistake of law, her primary argument is that the district court "erroneously imposed a requirement that the parties supplant the former habitual residence of Paris with Washington, D.C., in order to effectively abandon Paris." … *Mozes* recognizes a conceptual difference between abandoning a habitual residence and establishing a new one: a person can abandon a habitual residence "in a single day if he or she leaves it with a settled intention not to return to it," but an "appreciable period of time and a settled intention will be necessary to enable him or her to become" habitually resident in a new country. *Mozes*, 239 F.3d at 1074-75 (internal quotation marks and citation omitted). The district court explicitly acknowledged this conceptual difference, and held only that the parents did *not* have a settled intention to abandon France, regardless of their intentions with respect to Washington, D.C. … The district court's factual finding of the absence of settled intention to abandon France suffices to support its habitual-residence holding. We see no legal error in its analysis of the point.

B.

The second inquiry, subsidiary under the parties' stipulated *Mozes* framework, is the child's acclimatization to the new country. "Evidence of acclimatization is not enough to establish a child's habitual residence in a new country when contrary parental intent exists." *Darin*, 746 F.3d at 12 (citing *Mozes*, 239 F.3d at 1078-79). *Mozes* further counsels that courts should "be slow to infer from [a child's contacts] that an earlier habitual residence has been abandoned" in the absence of shared parental intent to do so. 239 F.3d at 1079. Courts view a variety of factors as relevant to acclimatization, including "school enrollment, participation in social activities, the length of stay in the relative countries, and the child's age." *Maxwell*, 588 F.3d at 254.

Here, Sanin Vazquez has not identified any error in the district court's findings regarding the child's acclimatization. The district court recognized that the child had adjusted to a new school, made friends, and participated in extracurricular activities in the ten months she spent in the United States prior to the retention in May 2019. … But, until the sojourn in Washington, the child's life was based almost entirely in Paris: her parents married there, she was born there, and she attended nursery school there.

Sanin Vazquez has not argued that the district court committed any legal error in applying the *Mozes* framework to its findings relating to the parents' shared intentions and the child's acclimatization. She does not urge us to adopt any other court's approach (nor the approach the government describes). And she does not argue that any of the district court's factual findings, including its findings supporting its shared parental intent determination, were clearly erroneous. In these circumstances, the district court reasonably determined that "[e]vidence of acclimatization over such a short period of time for such a young child is not

enough to overcome the parties' lack of intent to abandon France," or any of the other factual indicia showing that France was their daughter's habitual residence. …

***

We conclude that Sanin Vazquez's arguments regarding the date of retention and the child's habitual residence lack merit. Because the parties chose the *Mozes* framework, and Sanin Vazquez has not challenged the district court's findings under the remaining questions or asserted any defenses, we affirm the district court's judgment granting Abou-Haidar's petition for return.

* * * *

Cross References

Children, **Chapter 6.C.**
IACHR petition of José Trinidad Loza Ventura (consular notification), **Ch. 7.D.3.b.**
Enhanced consular immunities, **Chapter 10.C.2.**