IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SOCIAL SECURITY COMMISSIONERS

SSTRF 96/1674/A

Royal Courts of Justice
Strand
London W2A 2LL

Tuesday 5th February 1998

B e f o r e

LORD JUSTICE MORRITT
LORD JUSTICE THORPE
SIR CHRISTOPHER STAUGHTON

NESSA — Applicant

v.

CHIEF ADJUDICATION OFFICER — Respondent

(Handed down transcript of
Smith Bernal Reporting Limited, 180 Fleet Street
London EC4A 2HD Tel: 0171 421 4040
Official Shorthand Writers to the Court)

MR RICHARD DRABBLE QC and MISS NATHALIE LIEVEN (instructed by Messrs T.V. Edwards, London E1 4TP) appeared on behalf of the Appellant (Plaintiff).

MR NICHOLAS PAINES QC (instructed by Solicitor of DSS, London WC2A 2LS) appeared on behalf of the Respondent (Defendant).

J U D G M E N T
(As approved by the court)

SIR CHRISTOPHER STAUGHTON: Mrs Nessa arrived in this Country on 22nd August l994. She was then fifty-five years old, and has lived all her life in Bangladesh. But she had been the wife of Mr Mobarik Ali. He had lived and worked in this country from l962 until his death in l975. It was presumably for that reason that she had the right of abode here when she arrived nineteen years later. She was not Mr Ali's only wife; nor were her three children the only children fathered by him.

Just over a fortnight later, on 6th September l994, Mrs Nessa made a claim for income support. An Adjudication Officer decided that the claim failed on the ground that she was not habitually resident in the United Kingdom during the period for which income support was claimed.

There was an appeal to a Social Security Appeal Tribunal. Its decision was as follows:

> "The Tribunal finds upon the evidence that the appellant is HABITUALLY resident as on the date of arrival in the United Kingdom and entitled to Income Support therefrom.
>
> The Tribunal accepts the evidence of the appellant in that she decided in Bangladesh to be habitually resident in the United Kingdom. She made of her own volition the necessary arrangements regarding her immigration status in the United Kingdom. That her centre of interest is in the United Kingdom and she is here for no other purpose than to be habitually resident here. The Tribunal had regard to the case law and Commissioners' decision."

A further appeal followed, and was heard by Mr Commissioner Mesher. He held that the Social Security Appeal Tribunal had erred in law, for these reasons:

> "It is evident that it considered only whether the claimant had adopted residence in the United Kingdom voluntarily and for settled purposes and did not ask whether there had been an appreciable period of residence. It also erred in finding that the claimant was actually entitled to income support without having dealt with all the conditions of entitlement. There is no alternative to referring the appeal to a differently constituted social security appeal tribunal for determination. Although there was some evidence before the appeal tribunal of 6 December l994 about what the claimant had done between the date of claim and 6 December l994, for instance the registration with a GP and the taking of DNA tests, I am not in a position to make the necessary findings of fact to give a decision."

There is now an appeal by Mrs Nessa to this court, after leave was granted by Simon Brown L.J.

Mrs Nessa's entitlement to income support on 6th September l994 (for that is the relevant date) depended amongst other things on Regulation 21(3) of the Income Support (General) Regulations l987, which had recently been amended. It provided:

> " 'person from abroad' also means a claimant who is not habitually resident in the United Kingdom, the Republic of Ireland, the Channel Islands or the Isle of Man, but for this purpose, no claimant shall be treated as not habitually resident in the United Kingdom who is ..
>
> > (a) a worker for the purposes of Council Regulations (EEC) No. 1612/68 or (EEC) No. 1251/70 or a person with a right to reside in the United Kingdom pursuant to Council Directive No.68/360/EEC or 73/148/EEC; or
> >
> > (b) a refugee within the definition in Article 1 of the Convention relating to the Status of Refugees done at Geneva on 28th July l951, as extended by Article 1(2) of the Protocol Relating to the Status of Refugees done at New York on 31st January l967; or
> >
> > (c) a person who has been granted exceptional leave to remain in the United Kingdom by the Secretary of State".

By virtue of paragraph 17 of Schedule 7 to the Regulations the applicable amount of a person from abroad who is a single claimant (as in this case) is nil. It follows that Mrs Nessa was not entitled to income support on 6th September l994 unless she was then habitually resident here.

The issue on this appeal is whether it is enough to show that the claimant was here voluntarily and for settled purposes. Or must it also be proved that she had fulfilled those two conditions for an appreciable period of time, before she could claim to be habitually resident here?

Left to myself and guided only by the ordinary English meaning of words, I would say that a person is not habitually resident here on the day when she arrives, even if she takes up residence voluntarily and for settled purposes. "Habitually", to my mind, describes residence which has already achieved a degree of continuity. I can illustrate that by this imaginary conversation:

Q. Do you habitually go to church on Sunday?

A. Yes, I went for the first time yesterday.

That does not make sense to me.

The same view was taken by Lord Brandon of Oakbrook in Re J (a Minor) (Abduction: custody rights) [l990] 2 A.C. 562. Lord Donaldson of Lymington M.R in this court had described it as a very interesting question (p.571). But Lord Brandon said:

> "In considering this issue it seems to me to be helpful to deal first with a number of preliminary points. The first point is that the expression "habitually resident", as used in Article 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leave it with a settled intention not to return to it but to make up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a singe day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B. The fourth point is that, where a child of J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers."

Mr Drabble, for Mrs Nessa, argues that this passage is both ob iter and wrong. He relies on two other decisions of the House of Lords where the words in question were "ordinary residence" or "ordinarily resident" - Inland Revenue Commissioners v Lysaght [l928] A.C. 234 and R v Barnet BC ex parte Shah [l983] 2 A.C. 309. In the second, which was concerned with education and where there had already been a period of three years' residence, Lord Denning MR and Lord Scarman each equated "ordinarily" with "habitually", which (Lord Scarman said) "had two necessary features, namely residence adopted voluntarily for settled purposes" (p.342). But at p.344 he said:

> "If there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose."

I do not regard that case as plain authority that no appreciable period is required before residence

can be described as habitual.

There were a number of other cases cited by Mr Drabble, mainly in the family jurisdiction. Thus in Macrae v Macrae [l949] P. 397, which was concerned with the Summary Jurisdiction (Separation and Maintenance) Acts, Somervill L.J. said at p.403:

> "Ordinary residence can be changed in a day."

The decision in that case, as Mr Drabble accepts, was that it changed between 25th June and 15th July.

In Lewis v Lewis [l956] 1 All ER 375 Willmer J. was prepared to hold that the wife was ordinarily resident in this country from the time when she boarded a ship to come here from Australia. There were, however, two significant features in that case. First, the wife was returning to a place where she had been ordinarily resident in the past. That may well be a distinguishing feature from the case where, as here, an entirely new residence is adopted. Secondly, the statute there required that a period of ordinary resident should elapse before a certain event could take place, that is to say the invocation of the court's jurisdiction under the Matrimonial Causes Act l950. That, as it seems to me, may well allow different treatment; it may be right to look back and say that, with hindsight, there was habitual residence from day one. It is different from the present case, where the regulations require there to be habitual residence on the day when the claim for income support is made.

Kapur v Kapur [l984] FLR 920 was another case where a period of residence was required to establish jurisdiction, although it now had to be habitual residence. The conclusion of Bush J. (at p.926) was -

> "'habitually' means settled practice or usually, or, in other words, the same as for ordinary residence - a voluntary residence, with a degree of settled purpose."

In Hack v Hack [l976] FLJ 177 Arnold J repeated what Willmer J. had said in Lewis

> "Unless one led a nomadic life, one had to be habitually resident somewhere..."

In V v B (A Minor)(Abduction) [l991] 1 FLR 266 at p.272 Sir Stephen Brown, having referred to Kapur and Shah, said

> "A sufficient degree of continuity of residence has been established.... to justify the application of the phrase 'habitually resident immediately before removal' in this case."

There are then four cases decided after Re J. Of these the most important is Re S (A Minor)(Custody: habitual residence) [l997] 3 W.L.R. 596. There the deputy judge at first instance had said -

> "I bear in mind that it takes time in general to establish a new habitual residence."

The case of Re J was cited in the speech of Lord Slynn in the House of Lords, apparently without disapproval. Indeed I would say that it was accepted as law, although distinguished. Lord Slynn did however say (at p.603) that habitual residence may change very quickly.

In Re F (A Minor)(Child Abduction) [l992] 1 FLR 548 what Lord Brandon said in Re J was cited in this court and, as it seems to me, accepted as good law. Butler-Sloss L.J. said (at p.555) that with a settled intention -

> "A month can be ... an appreciable period of time."

She emphasised that there had if possible to be a habitual residence for the successful operation of the Child Abduction Convention. Some might say that the same is true for income support, others that it is not.

In Re M (Minors)(Residence Order: Jurisdiction) [l993] 1 FLR 495 at p.500 Balcombe L.J

expressly accepted what Lord Brandon had said in Re J, and expressed grave doubts (but did not actually decide) whether the children in that case had regained a habitual residence in England. Steyn L.J. agreed with Balcombe L.J., but Hoffman L.J. would have taken a different view - on the ground that the children were moving into a home which was already the habitual residence of the parent who lived there. That may well be a special case.

Finally there is the case of M v M (Abduction: England and Scotland [l997] 2 FLR 263. That, as it seems to me, was a case about settled intention, and not about the need for an appreciable period of time. It is true that Butler-Sloss L.J. (at p.267) regarded Shah as "the most relevant passage of all in the numerous authorities". She did however add:

> "This court has found periods of only a few months, even as short as one month, have been sufficient in the right circumstances to be treated as a habitual residence"

The period in that case was two years.

I can understand that a requirement of some appreciable period of time may cause difficulty in family cases. But in my judgment we ought to follow what was said by Lord Brandon in Re J, for six reasons:

1. It accords with the ordinary English meaning of the words in the Regulation.

2. It has since been accepted by this court in Re F, Re M, and M v M.

3. It was cited by the House of Lords without disapproval, and I would say accepted as law, in Re S.

4. The draftsman should be taken to have had in mind the established meaning of "habitually resident" at the time when those words were introduced by amendment in l994.

5. If an appreciable period is required in family cases, there is if anything a stronger argument for that result in the regulation of income support, since there was evidently an intention to impose some restriction on the immediate recourse of those who come from abroad.

6. Lord Brandon's observations, whether ob iter or not, were a considered view and should be departed from, if at all, only by the House of Lords.

I would dismiss this appeal.

LORD JUSTICE THORPE: Residence has had a prominent part in family law statutes. Jurisdiction to grant a divorce might depend on the residence of a party. Under the Matrimonial Causes Act 1950 the statutory requirement was three years ordinary residence. However the Domicile and Matrimonial Proceedings Act 1973 introduced the alternative of one year habitual residence (the case of Kapur v Kapur [1984] FLR 920 established that the change of adjective was not intended to change the nature or quality of what had to be established. Although a first instance decision it has frequently been cited with approval). These statutes, together with others such as the Summary Jurisdiction (Separation and Maintenance) Acts and the Family Law Act 1986, have spawned innumerable decisions in which the statutory words have been considered in a wide variety of factual circumstances. The density of the footnotes to sections 5.3 and 5.4 of the Sixteenth Edition of Rayden & Jackson on Divorce and Family Matters illustrate that. Many of the cases cited are not family law cases since revenue statutes and welfare statutes have used the same expressions. The cases establish:

1. The words have the same meaning in the different fields of law.
2. There is no material distinction between ordinary and habitual residence. R v Barnet London Borough Council Ex Parte Shah [1983] A.C. 309.

The ease and rapidity of travel has necessitated much development in the field of international family law. It now seems curious to read that the wife in Lewis v Lewis [1956] 1 All ER 375 took fifty four days onboard ship to travel from Australia to England. The English concept of domicile is not acceptable to Civil law systems and all international conventions are likely to adopt the test of habitual residence. The continuing stream of family law cases where habitual residence is argued are mainly drawn from the Child Abduction and Custody Act 1985 incorporating the Hague

Convention. So there has been some shift from an investigation of the date upon which the period of residence commenced (the jurisdiction cases) to whether habitual residence was established by a given date (the abduction cases). In order to uphold the efficacy of the Hague Convention there may be some tendency to find habitual residence established and consequently to lean against the vacuum in transition between the termination of one habitual residence and the acquisition of another.

Against that background I approach the principal point argued on this appeal, namely whether three sentences in the speech of Lord Brandon in Re J (A Minor)(Abduction: Custody Rights) [1990] 2 A.C. 562 are to be adopted or rejected. The sentences can be isolated by my added emphasis to the complete passage at 578G to 579A:

> "The third point is that there is a significant difference between a person ceasing to be habitually resident in country 'A', and his subsequently becoming habitually resident in country 'B'. A person may cease to be habitually resident in country 'A' in a single day if he or she leaves it with a settled intention not to return to it but to take up long term residence in country 'B' instead. *Such a person cannot, however, become habitually resident in country 'B' in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be appreciably resident in country 'A' but not yet have become habitually resident in country 'B'."*

The sentences emphasised are clearly obiter as is noted in Dicey and Morris 12th Edition at 162, footnote 36. Indeed Mr Paines concedes they are obiter. I accept Mr Drabble's submission that they do not rest on the foundation of earlier authority. Indeed they are contrary to the earlier authorities of Ex Parte Shah and specifically Macrae v Macrae [1949] P. 397 and Lewis v. Lewis. In Ex Parte Shah at 342 Lord Scarman said:

> "I agree with Lord Denning MR that in their natural and ordinary meaning the words mean 'that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration'. The significance of the adverb 'habitually' is that it recalls two necessary features mentioned by Viscount Sumner in Lysaght's case, namely residence adopted voluntarily and for settled purposes."

At 343 he concluded:

> "Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration."

In Macrae v Macrae Somervell LJ said at 403:

> "Ordinary residence can be changed in a day. A man is ordinarily resident in one place up till a particular day: he then cuts the connection he has with that place - in this case he left his wife; in another case he might have disposed of his house or anyhow left it and made arrangements to make his home somewhere else. Where there are indications that the place to which he moves is the place which he intends to make his home for at any rate an indefinite period, then as from that date in my opinion he is ordinarily resident at the place to which he has gone."

These authorities were not cited to Lord Brandon for the obvious reason that the point as to the date at which the parent in transition acquired the new habitual residence in substitution for the old was not in issue. In these circumstances I conclude that the approach of Lord Donaldson MR in the Court of Appeal was preferable. He specifically left the point open for later decision when he said at page 571:

> "I think it is a very interesting question whether J and his mother could establish habitual residence in this country as at the moment when they arrived in this country in circumstances in which they had every intention of staying here indefinitely and of settling here.
>
> But I do not think, with respect to the argument, that that is the point. The question is: did J's habitual residence in Australia, which certainly existed up to 21st March, continue thereafter? It may take time, I do not say it does, to establish habitual residence, but I cannot see that it takes anytime to terminate it."

Nor do I think that subsequent authority advances the law. As my lord, Lord Justice Staughton, observed in argument. Butler-Sloss LJ in Re F [1992] 1 FLR 548, preferred to find her way round Re J rather than to confront it. Although Balcombe LJ adopted the critical sentences from Lord Brandon's speech in his third proposition in Re M (Minors)(Residence Order: Jurisdiction) [1993] 1 FLR 495 at 500, he had not heard a full blown attack on the speech as we have. Lord Justice

Hoffmann adopted a more questioning approach at 503B where he said:

> "I should say that if it were necessary for the decision of this case, I would have less difficulty than Balcombe LJ in holding that on 13th July 1992 the children were habitually resident in Oxford. Until the mother changed her mind, the children's presence in Oxford was for a temporary or transient purpose, namely for a holiday from Scotland. Once she decided that they should stay, they became resident and because they were in the mother's settled home and she intended they should remain there, I think they became at once habitually resident. In a case like Re J in which mother and child arrive in a new country together and have to find a settled home, it may be that although they have lost their old residence, it is necessary for sometime to keep an open mind on whether their new residence is habitual. But where a child comes into a home which is undoubtedly the habitual residence of the parent or other person to be responsible for his care and the intention of the parent or parents with parental responsibility is that the child's stay should not be merely transient or temporary, I do not see why the child's residence should not forthwith be treated as habitual."

Thus I conclude that the seeming authority in the House of Lords is not binding and the question of whether an appreciable period is an essential ingredient of habitual residence is open for consideration on this appeal.

I am firmly of the view that it is not. Particularly since this is an important coin in the international family law currency I consider that it should not be confined, defined or refined with judge made rules that may not run very far afield. In every case the judge or tribunal should be free to determine the essential question. That of course is a question of fact, as Lord Brandon said in Re J in the passage immediately preceding that already cited:

> "The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case."

The need to leave the tribunal unrestricted is underlined by the persistence of the Hague Conference resistance to the definition of the concept of habitual residence and by the following commentary also at page 162 of Dicey and Morris:

> "There is a regrettable tendency of the courts, despite their insistence that they are not dealing with a term of art, to develop rules as to when habitual residence may and may not be established."

In those cases where the court surveys the past retrospectively to establish when a period of residence commenced neither common sense nor authority requires an appreciable period to demonstrate the habitual nature of the residence. With the advantage of hindsight the court determines the quality and if satisfied declares that quality from the date of commencement and not from the date of completion of some notional appreciable period.

Where there is no opportunity for a retrospective survey it is of course attractive to suggest that any assessment of the requisite habitual quality must await the passage of an appreciable period. No doubt in many cases the tribunal or the judge would lack the confidence to declare the quality of the residence without that reassurance. But to say that an appreciable period is an absolute requirement in all cases in which the residence in issue is at its inception is to introduce an undesirable restriction.

Even where the residence is at its inception there will be a history to survey. In the present appeal relevant features in the appellant's history include the following:

1. Her husband lived in the United Kingdom from 1962 until his death in 1975 and she has a consequential right of abode here.
2. She made the necessary immigration arrangements to enable her to leave Bangladesh and to come to the United Kingdom for good.
3. She travelled on a one-way ticket bringing all her worldly goods with her.
4. She joined her brother-in-law and his family in London and her only closer relatives are her three adult children in Bangladesh.
5. She has made the necessary application for them to join her here. DNA testing is in progress.

Of course that history suggests that there was an appreciable period prior to her physical departure during which she had committed herself to leaving Bangladesh for good. However the formation of the intention to sever all ties has not been suggested as terminating the previous habitual residence. Termination is only achieved by physical departure coupled with the necessary intent. If the physical move rather than the formation of intent signals termination, I do not see why physical arrival with the necessary intent should not signal acquisition.

Mr Paines submits that if the appeal were to succeed liability to pay benefit would extend to anyone declaring on arrival a subjective intention to stay. I agree with Mr Drabble that that submission caricatures his case. Where a domicile of choice is asserted the court is well used to testing an animus manendi, probing for the real intention in the light of all the surrounding circumstances. The avowed intention counts for little if it conflicts with other factors.

Of course it can be said that the effect of Mr Drabble's submissions is to erode the distinction between the acquisition of a domicile of choice and a habitual residence. The acquisition of a domicile of choice depends upon proof of the necessary intention coupled with residence. But the judicial focus is primarily on the intention. Residence means no more than presence and its duration is immaterial. In Bell and Kennedy [1868] LR 1Sc and Div 307 at 319, Lord Chelmsford said:

> "It may be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile."

Thus the transition from one domicile of choice to another requires no more than physical transition supported by the essential intention. But there are already parallels between the two concepts. For example the revival of a domicile of origin has its parallels in the case of the returning national who more readily establishes habitual residence in the United Kingdom than does a foreigner. Nor do I consider that some degree of erosion is premature. Certainly in the field of family law the

relevance of the concept of domicile diminishes. If the current negotiations to agree the Brussels II Convention proceed to fruition then domicile as a basis for jurisdiction in divorce will be much reduced within the European Union. Indeed I anticipate that one of the consequences of the need to harmonise family law systems throughout Europe and beyond will be the adoption of the concept of habitual residence as the generally accepted test of what connects an individual to a particular society. That process will be impeded unless the concept is given a common construction. If habitual residence is to be the dominant concept then it should not be so construed as to permit a vacuum for persons in transition. No such vacuum between domicile of origin and domicile of choice or between domiciles of choice is possible in law. It is particularly undesirable that there should be a vacuum between habitual residences for children who would be temporarily deprived of rights, protection, or benefits.

Since writing the above I have had the advantage of reading the judgments of my lords. Despite their powerful reasoning I maintain my dissent partly because there seems little likelihood of the concept of habitual residence being given different values in social security and family law and partly because what I regard as an aberration generated by Lord Brandon is in a family law case. For the family lawyer perhaps the adjective habitual does not in this context carry its literal sense so much as the sense of the quality of the connection of the individual to the relevant society for the purpose of the convention or legislation to be applied. The adjective ensures that that connection is not transitory or temporary but enduring and the necessary durability can be judged prospectively in exceptional cases.

For all these reasons I would allow this appeal and hold both that the commissioner was wrong in law to conclude that habitual residence could not be achieved before the expiration of an appreciable period after arrival.

LORD JUSTICE MORITT: By virtue of Income Support (General) Regulations 1987 Reg.21 income support is not payable to a "person from abroad", as defined in sub-paragraph (3) of that regulation. With effect from 1st August 1994, and subject to immaterial exceptions, such a person includes one "who is not habitually resident in the United Kingdom..." Mrs Nessa arrived in the United Kingdom from Bangladesh on 22nd August 1994. She had never been to the United Kingdom before but was entitled to a right of abode because her husband had lived and worked here until his death in 1975.

The Tribunal accepted the evidence of Mrs Nessa. They found that she had decided in Bangladesh to be habitually resident in the United Kingdom; that she had of her own volition made the necessary arrangements regarding her immigration status in the United Kingdom; that her centre of interest was then in the United Kingdom and that she was in the United Kingdom for no other purpose than to be habitually resident in the United Kingdom. On those facts they decided that Mrs Nessa was habitually resident in the United Kingdom as on and from the date of her arrival in the United Kingdom, 22nd August 1994, and so entitled to income support as from that date.

The Commissioner disagreed. He thought that the Tribunal had erred in law. He said

> "It is evident that it considered only whether the claimant had adopted residence in the United Kingdom voluntarily and for settled purposes and did not ask whether there had been an appreciable period of residence."

The reference to an appreciable period of residence is a reference to the speech of Lord Brandon of Oakbrook in Re J [1990] 2 A.C. 562. That case concerned the meaning of the words "habitually resident" in Article 3 of The Hague Convention on the Civil Aspects of Child Abduction enacted as part of the law of the United Kingdom by Child Abduction and Custody Act 1985. The relevant passage has been quoted in full and I need not repeat it. It is sufficient to refer to the three sentences at the foot of page 578 where Lord Brandon of Oakbrook said

> "A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to become so."

For Mrs Nessa counsel submit that that part of the speech of Lord Brandon of Oakbrook was obiter and wrong with the consequence that the error of law had been committed by the Commissioner not the Tribunal. They ask that the decision of the Tribunal be restored.

The essence of the argument for Mrs Nessa is that Lord Brandon of Oakbrook had not been referred to a number of relevant authorities which established that "habitual residence" is to be equated with "ordinary residence" and that ordinary residence may be acquired in the course of a single day and without the lapse of any appreciable period. Therefore, so it is said, habitual residence may be so acquired also. It is also contended that subsequent authorities have reached a different conclusion to that of Lord Brandon of Oakbrook. It is suggested that if it is necessary in all cases that there should have been an appreciable period of time before residence may become habitual residence then such requirement will be productive of injustice and inconsistent with Community Law. The injustice is said to arise in the cases of the permanent immigrant, the returning national and the resident who comes to the United Kingdom for a clearly defined period and purpose. The inconsistency with Community Law relied on arises from the use of the expression "habitual residence" in Commission Regulation 1408/71. This is used to define residence for the purpose, amongst others, of Article 3. That article equates the position of a resident to that of a national of the member state in which he resides for the purpose of imposing obligations and creating entitlements to benefits under the social security legislation of that state.

For my part I do not find any help in the cases relied on by Mrs Nessa which were decided before the decision of the House of Lords in Re: J. They do not invalidate the observations of Lord Brandon of Oakbrook as to the ordinary and natural meaning of the words "habitual residence".

Thus in Macrae v Macrae [1949] P.397 the Court of Appeal was concerned with the application of the words "ordinary residence" on 15th July to one who had left the matrimonial home in England on 25th June with the intention of making his home in Inverness. The Court of Appeal stated that a man can and generally does change his ordinary residence in the course of a day. But that was not the issue before the court. The question was whether the husband was ordinarily resident in Scotland at the time the summons was reissued and served on him on 15th July. On any view there had been an appreciable period of time between the two dates.

In Lewis v Lewis [1956] 1 All ER 375 the issue was whether the wife had been ordinarily resident in England for three years before she presented her divorce petition on 15th October 1954. Three years earlier she had left her husband in Australia to return to England where she had been born and brought up. She had embarked on 11th September 1951 and docked in England on 4th November 1951. Willmer J held that in those circumstances she had been ordinarily resident in England for the full period for the act of boarding the ship amounted to a resumption of her ordinary residence in England. This conclusion is hardly surprising given the concession that she was ordinarily resident in the United Kingdom when she landed on 4th November.

In Hack v Hack [1976] FLJ 177 Arnold J was concerned with the question whether the husband had been habitually resident in the United States at the time he obtained a divorce in the State of Missouri so that the validity of that decree should be recognised pursuant to s.3 Recognition of Divorces and Legal Separations Act 1971. In concluding that he was the judge stated that quality of residence was more important than its length, that intention though required was not determinative and that unless one was a nomad one had to be habitually resident somewhere. I do not think that this case is of any assistance in determining the issues on this appeal.

In R v Barnet LBC, Ex parte Shah [1983] 2 A.C. 309 the issue was whether the claimants for

education awards had been ordinarily resident in the United Kingdom for the requisite period of three years preceding the first year of the course in question. In the case of Nilish he had arrived in the United Kingdom on 7th August 1976 and his course began on 2nd October 1979. The dates in respect of the other four applicants appear to have been similar. In none of them was the issue when the period of ordinary residence had begun. Lord Scarman equated ordinary with habitual residence (page 340H) and considered (page 342D and 343G) that such residence had two necessary features, namely voluntary adoption and for settled purposes. He summarised the effect of all the necessary features at page 344E in these words

> "For if there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose."

In Kapur v Kapur [1984] FLR 920 the issue was whether the husband had been habitually resident in England throughout the period of one year immediately preceding the presentation of the petition for divorce. He had come to England on 2nd August 1981 and presented his petition on 1st October 1982. Bush J considered that there was no real distinction to be drawn between ordinary and habitual residence and that the husband had been habitually resident in England for the necessary period. In reaching that conclusion it was unnecessary for him to decide when the husband became habitually resident.

The last case relied on before the decision of the House of Lords in Re J is V v B [1991] FLR 266. In that case the issue was whether a child who had been taken by his parents from England to Australia in November 1989 whence he was abducted by the father on 22nd January 1990 had become habitually resident in Australia by the latter date. The President decided that he had. He considered, among other cases, the decisions in Kapur v Kapur and R v LB of Barnet, ex p. Shah. It seemed to the President

> "to be quite apparent that a sufficient degree of continuity of residence has been established by the parties with the infant boy to justify the application of the phrase "habitually resident

immediately before removal" in this case."

I find nothing in the decision of any of these cases inconsistent with the statement of Lord Brandon of Oakbrook in Re: J. In each of them there was the lapse of an appreciable period of time which Lord Brandon of Oakbrook thought to be necessary before a person could become habitually resident in another place. I agree that the statement of Lord Brandon with regard to the acquisition of habitual residence was obiter and, therefore, not binding on this court but I do not, for reasons I will explain later, agree that it was wrong. Before doing so it is convenient to consider the subsequent cases relied on as indicating a different view.

The first was Re F [1992] FLR 548. In that case the parents had left their habitual residence in England with their 11 month old son for Australia (via the United States) on 10th April 1991. On 10th July 1991 the mother abducted the child and returned to England. The issue was whether the child had been habitually resident in Australia immediately before his abduction. The judge answered that question in the affirmative. The Court of Appeal concluded that the evidence had justified the judge's conclusion that the family intended to emigrate from England and settle in Australia. At page 555 Butler-Sloss LJ, having earlier referred to the material passage in Re: J, said

> "With that settled intention, a month can be, as I believe it to be this case, an appreciable period of time."

In my view that statement amounts to an acceptance and application of the dictum of Lord Brandon of Oakbrook.

In Re M [1993] 1 FLR 495 the children had gone to live with their paternal grandparents in Scotland on 11th September 1991 following the break up of their parents marriage. On 13th July 1992 the mother refused to return the children after a period of staying contact with her in England. On 23rd July 1992 the mother applied to the court in England for a residence order in respect of

each child. The only issue was that of the jurisdiction of the court in England to entertain the application of the mother. That depended on whether the children were habitually resident in England on 23rd July 1992 or present in England but not habitually resident in Scotland. The judge answered that question in the affirmative and the grandparents appealed. The Court of Appeal dismissed the appeal on the ground that the children were present in England and not habitually resident in Scotland. Balcombe LJ cited the passage from the speech of Lord Brandon of Oakbrook in Re: J which I have quoted and he described as the third proposition and observed

> "As stated in the passage from Lord Brandon's speech in Re J which is the third proposition above it is easy to lose an habitual residence: it is much more difficult to acquire one. It is sufficient to say that I entertain grave doubts that the children had by 23rd July 1992 regained an habitual residence in England."

Hoffmann LJ was not so doubtful as Balcombe LJ in the case of a child with his mother returning with her to her home with the settled intention to remain there. He said, at page 503

> "Until the mother changed her mind, the children's presence in Oxford was for a temporary or transient purpose, namely for a holiday from Scotland. Once she decided that they should stay, they became resident and because they were in the mother's settled home and she intended they should remain there, I think they became at once habitually resident. In a case like Re J (A Minor) (Abduction: Custody Rights [1990] 2 A.C. 562, sub nom C V S (A Minor) (Abduction: Illegitimate Child) [1990] 2 FLR 442 in which mother and child arrive in a new country together and have to find a settled home, it may be that although they have lost their old residence, it is necessary for some time to keep an open mind on whether their new residence is habitual. But where a child comes into a home which is undoubtedly the habitual residence of the parent or other person to be responsible for his care and the intention of the parent or parents with parental responsibility is that the child's stay should not be merely transient or temporary, I do not see why the child's residence should not forthwith be treated as habitual."

In my view this case also is entirely consistent with the dictum of Lord Brandon of Oakbrook in relation to the arrival of an adult in a country where he or she had never previously been.

The third case relied on is Re S [1997] 3 W.L.R. 597. In that case it was contended that the child, born in January 1995 was habitually resident with his mother in Ireland from 4th September 1995 to 16th January 1996. On the latter date the mother brought the child to England. On 10th March

the mother died in England. It was admitted that on that date she and the child were habitually resident in England. On 11th March the maternal grandparents, who had come to England from Eire to look after the child, returned with him to Eire. On 13th March a High Court judge in England gave interim care of the child to the father and ordered the grandparents to return the child to England. The issue was whether the High Court judge had had jurisdiction to make that order. The resolution of that issue depended on whether the child was habitually resident in England on 13th March. The conclusion of Lord Slynn of Hadley, with whom the other members of the Appellate Committee agreed, was that

> "..... two days with the defendants in Ireland is not sufficient of itself to result in his existing habitual residence being lost and a new one gained. The position is quite different in the case of a mother, with parental rights and on whose habitual residence the child's habitual residence depends. If she leaves one country to go to another with the established intention of setting there permanently her habitual residence and that of the child may change very quickly."

Once again that case is consistent with the need for the lapse of an appreciable period of time for the acquisition of an habitual residence by an adult. In summary, therefore, I find nothing in the authorities relied on by Mrs Nessa to cast doubt on the statement of principle of Lord Brandon of Oakbrook.

The question for determination is not what the words mean in the context of family law but in the context of the amendment made in August 1994 to the Income Support (General) Regulations 1987. It would appear that the purpose of the amendment was to enlarge the definition of "a person from abroad" by the inclusion of all who are not habitually resident in the United Kingdom so as thereby to restrict those entitled to income support. In seeking to impose a restriction of that nature the draftsman had available the legislative precedents of "ordinary residence" usually used in the context of taxation and "habitual residence" by then usually used in the context of family law. Clearly there is a substantial measure of overlap between the two but I do not think that they are necessarily the same in relation to the time when residence of the appropriate quality starts.

Sir Christopher Staughton has given as an example the imaginary conversation with the churchgoer to illustrate the normal meaning of the word "habitual". I would also cite another example he gave in the course of argument. The youngster is not an habitual smoker when having his first cigarette. The ordinary meaning of the word habitual requires either an inherent disposition, such as in the phrase "habitual liar" or the product of repetition or continuation, such as in the phrase "habitual prisoner". In neither case can a person who has never been to the United Kingdom before be sensibly described as habitually resident here at the time when she disembarks from the aircraft.

In addition to the ordinary meaning of the word "habitual" the draftsman of the amending regulation must be taken to have been aware of the statement of Lord Brandon of Oakbrook in Re: J. If he had intended that the "residence" for which he sought to make provision should not be conditional on the lapse of an appreciable period of time as well as a settled intention he would not have have used the adjective "habitual" without qualification.

In addition to the ordinary meaning of the word "habitual" and the judicial and legislative background to its use it is permissible to take account of the purpose for which and the context in which it is used, namely to impose a restriction on entitlement to income support reasonably capable of being applied. It does not seem to me that physical presence in the United Kingdom together with a settled intention to remain but without the lapse of any appreciable period of time since arrival is best calculated to introduce the restriction intended. The additional requirement for the lapse of an appreciable period of time since arrival adds to the fact of physical presence a further fact more easily ascertainable than and confirmatory of a settled intention to remain.

I see no necessary injustice in the three cases relied on by Mrs Nessa, namely the permanent immigrant, the returning national and the resident for a defined purpose and period. What is an

appreciable period will depend on the facts of each individual case for all that is required is what is necessary to give to the fact of residence the quality of being habitual in accordance with the normal meaning of that word. There is no reason why in the three cases relied on "the appreciable period" should be so long as to cause hardship or injustice. Further the use of the same phrase in the Council Regulation to which Counsel referred us is in no sense determinative as there has been no determination by the European Court of Justice of the meaning of the word in that context.

I appreciate the problems to which Thorpe LJ has referred. Nevertheless I do not think that they justify giving to the word "habitual" in this regulation a meaning at variance with the normal meaning of that word, as expounded by Lord Brandon and apparently applied by this court in the other cases to which I have referred. I agree with Sir Christopher Staughton that this appeal should be dismissed.

Order: Appeal dismissed with costs; order nisi against legal aid fund; legal aid taxation; application for leave to appeal to the House of Lords allowed.