

2 FLR

**IKIMI v IKIMI**  
**[2001] EWCA Civ 873**

Court of Appeal

Thorpe and Clarke LJ and Holland J

13 June 2001

*Divorce - Jurisdiction - Habitual residence - 'Ordinary' residence - Two places of habitual residence - Length of time required to establish habitual residence*

The husband and wife, both Nigerian, married in 1977. Throughout the marriage they retained a residence in Nigeria, but from 1978 onwards they also had a home in England. At first they rented, then, in 1982, they purchased a substantial home in London which was at all times available for their exclusive occupation. The four children were all born in England, the three elder children held British as well as Nigerian citizenship, and all four were educated almost entirely in England. Between November 1995 and July 1998, EU sanctions imposed on Nigeria made it impossible for the husband and wife to travel to England, but the children remained in London. When restrictions on her entry were lifted in 1998, the wife immediately took steps to return to England, arriving on 5 August 1998. The husband issued divorce proceedings in Nigeria on 18 November 1998. In Spring 1999, the wife filed an answer and cross-petition in the Nigerian proceedings, pleading permanent residence and domicile in Nigeria. The wife issued divorce proceedings in England on 14 September 1999, on the basis that she had, by then, been habitually resident in England for one year. The preliminary issue arose whether the wife had in fact been habitually resident in England for one year, given that she had spent only 161 days of that year in England. The wife argued that her habitual residence was based on her very strong ties with England, which had endured for over 20 years, and her regular periods of residence in England, which had been interrupted only by the sanctions. The husband argued that the wife was habitually resident in Nigeria rather than England at all times, and alternatively, if the wife were to be held resident in England for any period, that in computing residence for jurisdictional purposes no account should be taken of any period spent by her in her Nigerian residence. The judge concluded that the court had jurisdiction to hear the wife's petition, based on the wife's habitual residence in England for the relevant year. He held that a person with two habitual residences occupied them concurrently, providing she spent some time in each, but otherwise regardless of the precise time she spent in each during the relevant period, rejecting the argument that in dual residence cases occupation of each residence should be considered consecutively.

**Held** - dismissing the appeal - a person could be 'habitually resident in England and Wales' for the whole one-year period required to found jurisdiction in matrimonial proceedings, under Domicile and Matrimonial Proceedings Act 1973, s 5(2), even though they were also habitually resident in another country. A person may be ordinarily resident in two countries at the same time. In the context of the court's divorce jurisdiction, 'ordinarily' and 'habitually' must be regarded as synonymous, and the same meaning should be given to 'habitually' wherever it appeared in a family law statute. The test proposed by the judge for habitual residence was too relaxed, and a petitioner would have to have spent an appreciable part of the relevant year within the jurisdiction to establish habitual residence. However, even on this stricter formulation, there was just sufficient foundation for jurisdiction on the facts of this case.

**Statutory provisions considered**

Law Reform (Miscellaneous Provisions) Act 1949, s 1

Matrimonial Causes Act 1965, s 40

Matrimonial Causes Act 1950, s 18

Education Act 1962

Domicile and Matrimonial Proceedings Act 1973, s 5(2)

Hague Convention on the Civil Aspects of International Child Abduction 1980

Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters

**Cases referred to in judgment**

*Akbarali v Brent London Borough Council; Abdullah v Shropshire County Council; Shabpar v Barnet London Borough Council; Jitendra Shah v Barnet London Borough Council; Barnet*

*London Borough Council v Nilish Shah* [1983] 2 AC 309, [1983] 2 WLR 16, [1983] 1 All ER 226, HL  
*I v I (Divorce: Habitual Residence)* [2001] 1 FLR 913, FD  
*Inland Revenue Commissioners v Lysaght* [1928] AC 234, HL  
*Levene v Commissioners of Inland Revenue* [1928] AC 217, HL  
*Norris, Re* [1888] 4 TLR 452  
*Nessa v Chief Adjudication Officer* [1999] 2 FLR 1116, [1999] 1 WLR 1937, [1999] 4 All ER 677, HL  
*Oundjian v Oundjian* (1980) 1 FLR 198, FD  
*Sinclair v Sinclair* [1968] P 189, CA  
*Stransky v Stransky* [1954] P 428, PDAD  
*V (A Minor) (Abduction: Habitual Residence), Re* [1995] 2 FLR 992, FD  
*Timothy Scott QC* and *Anne Hudd* for the appellant  
*Camden Pratt QC* and *Julie O'Malley* for the respondent

*Cur adv vult*

**THORPE LJ:**

*The facts*

[1] The appellant husband, Chief Tom Ikimi, is a 56-year-old Nigerian. The respondent wife, Teresa Ikimi, is also Nigerian. She is 50. The husband is an architect and politician whilst the wife is a lawyer. They are Roman Catholics and married in November 1977. In July 1978 they set up a second home in London. Initially they rented in desirable residential areas until purchasing a four-bedroomed house in Hampstead Garden City in 1982. This is a substantial detached property with a value of about £850,000. It is fully furnished and cared for by a resident housekeeper. There are cars in the garage. All this is available for the use and enjoyment of the family or any of its members when in London. This facility is perhaps of even greater benefit to the children of the marriage. There are four children: Thomas born in 1979, Christopher born in December 1980, Judita born in October 1982 and Benjamin born in October 1986. All the children were born in London and certainly the three elder children have dual nationality. Although the parents decided on primary education in Nigeria the pattern for the boys has been Lambrook followed by the Oratory or Bradfield and St George's Ascot for Judita. Benjamin's years at Lambrook were preceded by 2 years in a Swiss boarding school. The three older children have all moved on to London University.

[2] The pattern of family life has been affected by the turbulence of Nigerian politics. In 1994 the husband was appointed to high political office but between November 1995 and July 1998 the imposition of EU sanctions prevented both the husband and wife from entering this jurisdiction. During that period the children continued their education in this jurisdiction having the use of the family home and the services of the resident housekeeper. It was during this period that the youngest child attended the Swiss school. Also during this period the wife suffered a nervous breakdown for which she received medical treatment in the US for sometime. Shortly after her return to Nigeria the parties separated and the wife ceased her legal practice.

[3] The fall of the military regime in June 1998 led directly to the relaxation of sanctions. The wife immediately obtained a visa from the British High Commission and returned to this jurisdiction on 5 August 1998. This summary of the facts I take from the judgment of Coleridge J which is the subject of the present appeal. In her evidence to the judge the wife described her arrival in August 1998 as settling here. To quote the words of the judge (*I v I (Divorce: Habitual Residence)* [2001] 1 FLR 913, 916):

'... she explained to me, she meant making England the more important of her two homes, explaining, as she did, that she has always regarded herself as having two matrimonial homes: one in this country, and one in Nigeria.'

[4] On 15 September 1998, after the start of the school term, the wife returned to Nigeria. However, she was in London for nearly 4 weeks covering the school half-term and for the

same period covering the Christmas holidays. Between these visits the husband filed a petition for divorce in Nigeria asserting his Nigerian domicile.

[5] In the first half of 1999 the wife made only two brief visits to London, neither coinciding with school holidays. Apparently the father stayed with the children at the London home throughout the Easter holiday. During this period an answer and cross petition was filed on the wife's behalf in the Nigerian proceedings. On her behalf it was pleaded:

'The respondent's permanent address and matrimonial home is 27 Festival Road, Victoria Island, Lagos and she is also a Lagos based legal practitioner. The respondent is domiciled in Nigeria.'

[6] However the mother returned to London for the summer school holidays and was here continuously from 2 June 1999 until after 14 September 1999. On that last date she filed a petition for dissolution in this jurisdiction pleading that she was 'habitually resident at 25 Vivien Way for 13½ months'. The husband subsequently challenged that jurisdictional basis and by consent an order was made for the trial of a preliminary issue as to jurisdiction. That was the issue tried by Coleridge J on 11/12 October 2000, his reserved judgment being delivered on 16 October 2000.

[7] The preliminary issue had been drafted thus ([2001] 1 FLR 913, 914):

'''The issue to be determined is whether the petitioner was habitually resident in England and Wales throughout the period of one year ending with the date when the proceedings were begun, namely 14 September 1999.'''

[8] At the trial the wife gave oral evidence and the husband did not. No doubt that reflected the happy and unusual fact that, as the judge said, 'there is very little dispute as to the precise facts'. Thus the judge's task, and it was by no means an easy one, was to apply the law to those facts. The statutory provision is clear enough. Section 5(2) of the Domicile and Matrimonial Proceedings Act 1973 provides:

'The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if) either of the parties to the marriage—

(a) is domiciled in England and Wales on the date when the proceedings are begun; or

(b) was habitually resident in England and Wales throughout the period of one year ending with that date.'

[9] Furthermore the judge had the assistance of skilful submissions from Mr Scott QC for the husband and Mr Camden Pratt QC for the wife. However the difficulty of the judicial task stems from the unusual facts of the case and a wealth of authority on similar or identical statutory language in other fields of litigation including bankruptcy, tax, immigration and state benefits. The judge reviewed the principal authorities in these fields with care and particularly considered whether an individual might be habitually resident in two jurisdictions at the same time. On that issue he concluded ([2001] 1 FLR 913, 921):

'... in relation to this particular statute, if an individual has two habitual residences, he occupies them concurrently providing he spends at least some time in each, but otherwise regardless of the precise time he spends in each during the relevant period.'

[10] Having recorded the rival submissions he answered the preliminary question in the affirmative explaining himself as follows (at 922):

'I have already dealt with the matter of law relating to dual residences: as I have indicated, in my judgment, habitual residence is a state of affairs which exists regardless of the precise time spent in the particular country. In my judgment, reviewing all the facts of this case and the history of this family, the quality of the wife's presence here amounts unquestionably to residence. Furthermore, the family's life, and in particular the wife's life, in relation to her visits to this country and her occupation of the property at London N2, is such that it can be properly described as "habitual". Taking all the matters together, therefore, I have no hesitation in saying that I find the wife was, as a matter of fact, habitually resident here throughout the relevant year. It is not necessary for me to find that she was also resident in

Nigeria at the same time. However, if it was necessary for me to do so, I would have made a finding that, according to the

English legal tests, the wife was, probably, resident in Nigeria as well.

Accordingly, I find the wife was habitually resident throughout the period of one year immediately preceding the presentation of this petition, and the court therefore has jurisdiction to hear it. Whether it is appropriate for this case ultimately to proceed in this jurisdiction is, of course, another matter. But that is for another day.'

[11] Coleridge J refused Mr Scott's application for permission to appeal which I subsequently granted on the papers. Mr Scott advanced three grounds in support of his appeal as follows:

- (a) The periods of time spent by the wife in England during the relevant year (agreed to amount to 161 days or 44%) cannot be characterised as residence, let alone habitual residence.
- (b) As a matter of construction of s 5(2) it is not possible for a person to be habitually resident in two places simultaneously, although in rare cases it is possible for a person to be habitually resident in two homes on an alternating basis.
- (c) Section 5(2) with its requirement of habitual residence throughout the relevant year demands a continuity of residence subject only to temporary absences. This demand will not be satisfied by someone who has also been habitually resident outside the jurisdiction during the relevant year whether on an alternating or (if this is possible) a simultaneous basis.

[12] Mr Camden Pratt argues forcefully that simultaneous habitual residence in more than one jurisdiction is possible on the authorities. He submits that the essential issue for the judge was one of objective fact. On that issue he reached a clear conclusion without any misdirection and it was accordingly not open to this court to interfere.

*The law*

[13] Before attempting any evaluation of Mr Scott's submissions I think it is necessary to briefly outline the development of this court's jurisdiction to entertain petitions for divorce. The traditional basis for the jurisdiction of the courts of England and Wales to dissolve marriages (at least from the end of the nineteenth century) was domicile, a concept of the common law.

[14] The Law Reform (Miscellaneous Provisions) Act 1949 extended that jurisdiction, s 1 conferring jurisdiction in proceedings by a wife for divorce, notwithstanding that the husband was not domiciled in England if:

- '(a) the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings; and
- (b) the husband is not domiciled in any other part of the United Kingdom.'

[15] Section 18 of the Matrimonial Causes Act 1950 re-enacted this development. The ordinary residence provisions in s 18 were considered by Karminski J in *Stransky v Stransky* [1954] P 428. He had to decide whether the wife could establish jurisdiction on the basis of ordinary residence during

the period of 3 years preceding the presentation of her petition when she had spent approximately 15 of the 36 relevant months in Munich. Karminski J found for the wife, adopting a test suggested by Mr Colin Duncan for the Queen's Proctor: where between July 1950 and July 1953 was the wife's real home? The judge held that her London flat was her real home, he continued (at 437):

'Her long sojourns in Munich were accidental in the sense that they were dictated by the exigencies of the husband's work: I can find no intention on the wife's part to make Munich her home for an indefinite period.'

The statutory jurisdiction was later re-enacted in s 40 of the Matrimonial Causes Act 1965.

[16] In the case of *Sinclair v Sinclair* [1968] P 189 there were a number of jurisdictional issues at the trial before Ormrod J, one of which he defined thus (at 195):

'It is now, I think, common ground that the jurisdiction of this court to entertain the wife's alternative prayer for judicial separation rests solely upon proof by her that the husband was resident in England on August 1, 1966.'

[17] On that issue Ormrod J found against the wife. She appealed to this court who allowed her appeal. On the face of it the value of the precedent is slight since the court was required to determine only the husband's residence on a specific day and not throughout any extensive period. However there is a succinct passage in the judgment of Russell LJ at 222-223 which is frequently cited. He said:

'... residence is not a simple question of bodily presence. Bodily presence at the critical date may not involve residence. Equally, bodily absence is not inconsistent with residence. If a man is bodily absent at the critical date, having been at some previous time ... resident here, the inquiry must be directed to ascertaining whether he has at the critical date ceased to be relevantly resident here. In that inquiry it is, of course, of importance that, at the time when he bodily removed himself, there was a matrimonial home established here, but it cannot be conclusive. If the evidence were to show that he had determined never to return to that established matrimonial home, the fact that his wife and children remained there, even coupled with the fact that the tenancy was his and that he continued to meet his obligations as tenant, and that he contributed to the support of his wife and children, would not, it seems to me, make him relevantly resident here. Without such evidence, those matters are strong pointers to continuing residence, though there be bodily absence.'

[18] The third member of the court was Scarman J. At the conclusion of a learned judgment he stated (at 232):

'In my opinion, therefore, though the jurisdiction is correctly described in terms of residence at the commencement of the proceedings, the court must take account of the respondent's whole situation, matrimonial as well as personal, in determining whether he was resident within the jurisdiction at that time. The matrimonial home, the last place of cohabitation, the events leading up to the suit and events occurring after, his personal movements, location and way of life, the situation of wife and children - all are facts to which the court will have regard. Residence in this context is not merely a personal, or property, presence, with some degree of permanence, but a state of affairs which connects a man and his family sufficiently clearly with England to make it just that the court should intervene.'

[19] In the final paragraph of his judgment he applied those principles to the facts of the case. He said (at 232):

'... When he returned to the London house in September, he returned as master, not as a guest or visitor. It was his to enter; it was the home of his wife and children, and he stayed until ordered by the court to leave. There is nothing exclusive about residence. A man may reside in several places at one and the same time. Wherever else Mr Sinclair may have established a residence, to deny that he had in the summer of 1966 a "matrimonial residence" in the country where his wife and children were living would be to overlook the fact that at that time his family life had not, as he saw it, broken down ...'

[20] I have cited passages from a case which is not directly in point in part because 15 years later Lord Scarman delivered the speech in the leading case of *Akbarali v Brent London Borough Council; Abdullah v Shropshire County Council; Shabpar v Barnet London Borough Council; Jitendra Shah v Barnet London Borough Council; Barnet London Borough Council v Nilish Shah* [1983] 2 AC 309, a speech with which the other four members of the House expressed their agreement and to which I will come shortly.

[21] In the late 1960s the court's jurisdiction in divorce still depended largely upon the domicile of the husband. How to further extend it was the subject of (1973) Law Com No 48, *Family Law: Declarations in Family Matters*. In introducing the problem the report drew attention to the increase of cases with a foreign element resulting from greater international mobility. The report defined the task thus:

'The job of law reform is therefore to formulate bases of jurisdiction which meet the interests of the state and of those who genuinely "belong here", without allowing access to our courts to transients, "forum-shoppers", and others with no real connection with the country.'

[22] Having concluded that residence should be an additional foundation of jurisdiction the report considered what kind of residence should be sufficient to justify the assumption of divorce jurisdiction. The answer proposed was residence which establishes 'belonging' which might continue despite limited periods of absence and was more than occasional or casual.

The report then cited the decision in *Stransky v Stransky* [1954] P 428 as a good illustration of the kind of connection with this country which the authors thought important. However the report preferred to substitute the adverb 'habitually' for 'ordinarily' in order to achieve a uniform test throughout the field of family law and to conform with the language of international conventions. The change of language did not change the test.

[23] The Law Commission's proposals were subsequently adopted and enacted by the Domicile and Matrimonial Proceedings Act 1973 which, of course, continues to define the jurisdiction of our courts in divorce.

[24] What the Law Commission did not consider, and what has not hitherto been considered in any reported case, is the problem created by the family that can afford to establish matrimonial homes of matching status in different jurisdictions. Indeed the only reported case that considers s 5(2) cited to us is the case of *Oundjian v Oundjian* (1980) FLR 198. The case was not cited to the judge and only emerged with Mr Scott's supplemental skeleton argument received a few days before this hearing. The case was unusual in the sense that the wife contested jurisdiction by emphasising that of the 365 relevant days she had spent 149 out of the jurisdiction. This is how the judge resolved the issue (at 203-204):

'It is not disputed that the wife has spent 216 of the 365 days before the issue of proceedings in what I consider to be her sole place of residence. Nor is it disputed that she has spent 149 days in other places. Does the fact that she was not resident here for rather more than one-third of the year have the consequence that her residence here was not habitual or that it did not endure "throughout" the relevant period? It was urged by Mr. Scott Baker that the words "habitually resident throughout" require continual physical presence during the relevant period subject to de minimis absences. I consider that cannot be right. I must, I consider, look at the total number of days during which the wife was present at her residence in England. I must also look at the total number of days during which she was absent, look at the distribution of those absences during the year and the length of each individual period of absence. I must then ask myself "Can it fairly be said that in all the circumstances this wife was habitually resident in England throughout the relevant period? The word "habitual" is described rather than defined in the Oxford English Dictionary as "in the way of habit or settled practice constantly, usually, customarily". I bear that description in mind as giving the flavour of the word "habitually".

I remind myself that the underlying purpose of the statutory provision is to ensure a proper and sufficient connection between a *propositus* and this country to warrant the courts of this country assuming matrimonial jurisdiction.'

[25] In my opinion that is an admirably fair and succinct definition of the judicial task in any case in which the sole place of residence is apparent.

[26] How then should we be guided in applying s 5(2) in a case such as the present where the spouses have consistently maintained two marital homes? In my opinion we must look with some care to the decision in the case of *Akbarali v Brent London Borough Council; Abdullah v Shropshire County*

*Council; Shabpar v Barnet London Borough Council; Jitendra Shah v Barnet London Borough Council; Barnet London Borough Council v Nilish Shah* [1983] 2 AC 309. Before coming to the speech of Lord Scarman it is necessary to pick out some of the submissions. Counsel for *Shah* submitted that it was not possible for a student to have more than one

ordinary residence: he may have more than one residence, but he can only have one ordinary residence (318F). The same submission was repeated at 319C with a reference to *Stransky v Stransky* [1954] P 428. The submission recurs at 323H and at 324G the 'real home' test was advanced in reliance on *Stransky v Stransky*. Finally the submission was reiterated at 326B and 326E. Different submissions were advanced on behalf of Shropshire and contrary submissions on behalf of the students. The essential legal dispute was whether the construction of ordinary residence within the Education Act 1962 and subsidiary regulations was to be governed by the 'real home' test, as submitted by the local authority, or by prior decisions of the House in construing the Taxes Acts that recognised that it was possible to have simultaneous ordinary residence in two countries (see 333A).

[27] The importance of Lord Scarman's speech in the context of the present appeal is that it conclusively determines this essential dispute and specifically considers the construction of ordinary residence in the context of s 18 of the Matrimonial Causes Act 1950. First he held that the construction of ordinary residence settled by the House of Lords in the tax cases of *Levene v Commissioners of Inland Revenue* [1928] AC 217 and *Inland Revenue Commissioners v Lysaght* [1928] AC 234, were of general application and binding across the wide statutory field in which the words appear: see 341H.

[28] Second, he rejected the submission that a person can have only one habitual residence at any time. He said at 342F:

'I note that in the 19th century bankruptcy case *Re Norris* (1888) 4 T.L.R. 452 it was accepted that one person could be ordinarily resident in two countries at the same time. This is, I have no doubt, a significant feature of the words' ordinary meaning for it is an important factor distinguishing ordinary residence from domicile.'

[29] Third, although approving the conclusion of Karminski J in *Stransky v Stransky*, he rejected the validity of the 'real home' test, saying at 345D:

'Counsel for the local education authorities recognised, and, indeed, submitted, that it is a necessary consequence of the "real home" test, or its variant, that a man can have only one ordinary residence at any one time. It was said on behalf of Brent and Barnet that this view was supported by the "recoupment" provisions to which I have already referred. For the reasons already given I derive no assistance from those provisions. What is important is to note that the test is wholly inconsistent with the natural and ordinary meaning of the words as construed by this House in the two tax cases. Indeed it is, I believe, an unhappy echo of "domicile" the rules for ascertaining which impose great difficulties of proof.'

[30] Fourth, Lord Scarman approved a definition coined by Lord Denning MR 'that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration'. He continued at 342E:

'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.'

To these two necessary features he returned at 344B:

'There are two, and no more than two, respects in which the mind of the "propositus" is important in determining ordinary residence. The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is.

And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that

is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.'

[31] In deciding this appeal those are the statements of the law that we must endeavour to apply. It seems to me that, having traced the origins of the shift in language from 'ordinarily' to 'habitually', precisely the same meaning must be given to each in determining the bounds of this court's divorce jurisdiction. In his speech in the case of *Nessa v Chief Adjudication Officer* [1999] 2 FLR 1116, [1999] 1 WLR 1937, at 1120A and 1941E respectively, Lord Slynn of Hadley left open the question as to whether the two adverbs are always synonymous. But it seems to me plain that they must be so in this field. I am further of the opinion that it is essential that the same meaning be given to 'habitually' wherever it appears in family law statutes. I would not however necessarily make the same extension to the Hague Convention on the Civil Aspects of International Child Abduction 1980 which is an international instrument, the construction of which is settled and developed within the wider field of international jurisprudence.

[32] Returning then to Mr Scott's submissions recorded at [11] above, in my opinion his second submission is contrary to the authorities which I have cited. Furthermore the adoption of the concept of alternating habitual residence adopted by Douglas Brown J in the case of *Re V (A Minor) (Abduction: Habitual Residence)* [1995] 2 FLR 992 seems to me to be reflective of the facts of the particular case. The family that spends 6 continuous months in one home and 6 continuous months in another will be rare. The concept breaks down in the instance of the family moving between two jurisdictions on a weekly basis.

[33] Nor would I uphold Mr Scott's first submission. During the year in question the periods that the wife spent in England were clearly substantial. Certainly they were irregular but that irregularity seems to reflect the pattern of the school year and the division of the children's holidays with her estranged husband.

[34] For me the difficulty of the case lies in determining his third submission, namely that the statutory requirement of habitual residence throughout the relevant year demands a degree of continuity which is not demonstrated in this case. There can be no doubt that the definition adopted by the House in *Akbarali v Brent London Borough Council; Abdullah v Shropshire County Council; Shabpar v Barnet London Borough Council; Jitendra Shah v Barnet London Borough Council; Barnet London Borough Council v Nilish Shah* [1983] 2 AC 309 requires normal residence here apart from temporary or occasional absences. On the other hand those absences may be of long or short duration. It is in that area that the difficulty of the case lies. For in my opinion the wife has no difficulty in satisfying the questions, important in determining ordinary residence, that go to her mental state. Clearly she voluntarily adopted residence in Hampstead as soon as the EU sanctions were lifted. Nor can there be any doubt of her settled purpose. The support of her children in education, the breakdown of the marriage, the need for health and dental care all contributed to her purpose. Therefore in the end for me the crucial question is whether in the case of a couple with two long established matrimonial homes a total of 161 days of bodily presence is sufficient to satisfy the statutory test? Before answering the question I return to the conclusions of Coleridge J. His essential reasoning is to be found at paras 14 and 16 of his judgment which I have set out at [9] and [10] above.

[35] Now in my opinion the test proposed by Coleridge J in those passages of his judgment is too relaxed. It would result in a finding for the wife in the present case, presumably, had she spent no more than five of the 365 relevant days within the jurisdiction. That approach seems to me to move the concept of habitual residence altogether too far towards the concept of domicile, which requires no bodily presence but may be satisfied by the sort of considerations set out by the judge in para 16 of his judgment. In the field of family law jurisdiction sometimes may be assumed on the basis of domicile, sometimes on the basis of habitual residence or sometimes on the basis of bodily presence. Where the statutory requirement is that the state of habitual residence must be proved over a stated duration the important ingredient of bodily presence, in my opinion, must be elevated well above the token level that Coleridge J

was seemingly prepared to accept. The difficulty lies in the reformulation of his proposition. If the requirement is set too high the consequence may be that the spouse having divided the relevant period equally between the two jurisdictions will not be able to invoke a habitual residence jurisdiction in either. Setting the standard too low enables the spouse to invoke the jurisdiction in both. As a matter of policy I, like Coleridge J, would favour a liberal rather than a restrictive outcome. Of course the consequence of liberality may be forum-shopping. But that feature, particularly undesirable in matrimonial proceedings, can be controlled by the power to stay or, in the case of our European partners, by the introduction of an absolute rule: see Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters

('Brussels II'), EU reg no 1347/2000. However I would be loathe to formulate any general test for the application of this statutory provision in cases such as the present where spouses have created two matrimonial homes of equivalent status. The danger of stated tests is that they are soon exposed by the arrival of a challenge in the form of a set of facts unforeseen by the architect of the test. No field is more vulnerable to such challenges than the field of family law. But I would find it hard to envisage that any petitioner could rely on this statutory provision unless he or she had spent an appreciable part of the relevant year within this jurisdiction.

[36] Since I accept Mr Scott's criticism of the judge's direction in the two passages which I have cited and since the relevant facts are not in any material dispute, it is open to this court to reappraise the essential question, namely whether Mrs Ikimi's five departures and sojourns elsewhere during the relevant 12 months can or cannot be characterised as 'temporary or occasional absences of long or short duration'. I have not found it easy to answer this question. My mind has fluctuated from my first reading of the papers for the purposes of granting leave to the close of argument and the writing of this judgment. But having regard to all the circumstances of the case in the end I conclude that there is just sufficient foundation for jurisdiction in this case. I reach that conclusion with some regret since it will inevitably lead to costly stay proceedings. I do not wish to comment on their apparent merits. It only seems to me regrettable that the present challenge to jurisdiction was not coupled with an alternative application for a stay. Had that been done it is now plain that there would have been a saving of costs to the family.

**CLARKE LJ:**

[37] I entirely agree with Thorpe LJ's analysis of the approach to and meaning of 'habitual residence'. Like him, I too have found this case difficult to decide on the facts but, on balance, I agree that there is just sufficient justification for holding that the English court has jurisdiction to entertain the petition. Whether it should exercise that jurisdiction will depend upon the outcome of the husband's application to stay the proceedings in England. I agree that the appeal should be dismissed.

**HOLLAND J:**

[38] I also agree.

*Appeal dismissed.*

Solicitors: *Le Brasseur J. Tickle* for the appellant

*Lee & Pembertons* for the respondent

PHILIPPA JOHNSON  
*Barrister*