ECLI:EU:C:2017:988

Provisional text

JUDGMENT OF THE COURT (First Chamber)

20 December 2017 (*)

(Reference for a preliminary ruling — Area of freedom, security and justice — Regulation (EU) No 1259/2010 — Enhanced cooperation in the area of the law applicable to divorce and legal separation — Recognition of a private divorce obtained before a religious court in a third country — Scope of that regulation)

In Case C-372/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht München (Higher Regional Court, Munich, Germany), made by decision of 29 June 2016, received at the Court on 6 July 2016, in the proceedings

Soha Sahyouni

v

Raja Mamisch,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, C.G. Fernlund, J.-C. Bonichot, A. Arabadjiev and E. Regan, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 31 May 2017,

after considering the observations submitted on behalf of:

– Mr Mamisch, by C. Wenz-Winghardt, Rechtsanwältin,

– the German Government, by T. Henze, M. Hellmann and J. Mentgen, acting as Agents,

– the Belgian Government, by L. Van den Broeck and C. Pochet, acting as Agents,

– the French Government, by D. Colas, D. Segoin and E. Armoët, acting as Agents,

– the Hungarian Government, by M.Z. Fehér, G. Koós and M.M. Tátrai, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and M. Carvalho, acting as Agents,

– the European Commission, by M. Wilderspin and M. Heller, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2017,

gives the following

Judgment

1 The present request for a preliminary ruling concerns the interpretation of Articles 1 and 10 of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ 2010 L 343, p. 10).

2 The request has been made in proceedings between Ms Soha Sahyouni and Mr Raja Mamisch concerning the recognition of a divorce decision delivered by a religious court in a third country.

Legal context

EU law

Regulation No 1259/2010

3 Recitals 9 and 10 of Regulation No 1259/2010 state:

‘(9) This Regulation should create a clear, comprehensive legal framework in the area of the law applicable to divorce and legal separation in the participating Member States, provide citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility, and prevent a situation from arising where one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he or she considers more favourable to his or her own interests.

(10) The substantive scope and enacting terms of this Regulation should be consistent with [Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1)]

…’

4 Article 1 of Regulation No 1259/2010 provides:

‘1. This Regulation shall apply, in situations involving a conflict of laws, to divorce and legal separation.

2. This Regulation shall not apply to the following matters, even if they arise merely as a preliminary question within the context of divorce or legal separation proceedings:

… ’

5 Pursuant to Article 4 of that regulation, entitled ‘Universal application’:

‘The law designated by this Regulation shall apply whether or not it is the law of a participating Member State.’

6 Article 5 of Regulation No 1259/2010 provides:

‘ …

2. Without prejudice to paragraph 3, an agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seised.

3. If the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such designation shall be recorded in court in accordance with the law of the forum.’

7 Article 8 of Regulation No 1259/2010 is worded as follows:

‘In the absence of a choice pursuant to Article 5, divorce and legal separation shall be subject to the law of the State:

(a) where the spouses are habitually resident at the time the court is seised; or, failing that

(b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seised, in so far as one of the spouses still resides in that State at the time the court is seised; or, failing that

(c) of which both spouses are nationals at the time the court is seised; or, failing that

(d) where the court is seised.’

8 Article 10 of Regulation No 1259/2010 provides:

‘Where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum shall apply.’

9 Article 12 of that regulation provides:

‘Application of a provision of the law designated by virtue of this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum.’

10 Under Article 13 of Regulation No 1259/2010, '[n]othing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation.'

11 Article 18 of that regulation provides:

'1. This Regulation shall apply only to legal proceedings instituted and to agreements of the kind referred to in Article 5 concluded as from 21 June 2012.

…

2. This Regulation shall be without prejudice to agreements on the choice of applicable law concluded in accordance with the law of a participating Member State whose court is seised before 21 June 2012.'

Regulation No 2201/2003

12 Pursuant to Article 1(1)(a) of Regulation No 2201/2003, that regulation is to apply, whatever the nature of the court or tribunal, to divorce, legal separation or marriage annulment.

13 Article 2 of that regulation provides:

'For the purposes of this Regulation:

…

(4) the term "judgment" shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision;

… '

German law

14 Paragraph 107 of the Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (Law on proceedings in family matters and in matters of non-contentious jurisdiction; 'the FamFG'), entitled 'Recognition of foreign decisions in matrimonial matters', provides as follows:

'(1) Decisions delivered abroad by which a marriage is annulled, invalidated [or] terminated ... shall be recognised only if the *Land* Justice Administration has found that the requirements for recognition are met. If a court or authority of a State of which both spouses were nationals at the time of the decision has given a ruling, recognition shall not depend on a finding by the *Land* Justice Administration.

(2) The Justice Administration of the *Land* in which one of the spouses habitually resides shall have jurisdiction. ...

(3) The Governments of the *Länder* may delegate, by regulation, the powers conferred by these provisions on the *Länder* Justice Administrations to one or more Presidents of the Oberlandesgericht (Higher Regional Courts) ...

(4) The decision shall be made on application. The application may be made by any person demonstrating a legal interest in the recognition.

(5) If the *Land* Justice Administration rejects the application, the applicant may ask the Oberlandesgericht (Higher Regional Court) to rule.

(6) If the *Land* Justice Administration finds that the requirements for recognition are met, the spouse who did not make the application may ask the Oberlandesgericht (Higher Regional Court) to give a ruling. The decision of the *Land* Justice Administration shall take effect upon notification to the applicant. However, the *Land* Justice Administration may determine in its decision that such a decision shall first become effective after a certain period of time has passed.

(7) The Civil Chamber of the Oberlandesgericht (Higher Regional Court) in the jurisdiction of which the *Land* Justice Administration has its seat shall be the competent court. An application for a judicial decision shall not have suspensive effect. Parts 4 and 5 and Paragraphs 14(1) and (2) and 48(2) shall apply *mutatis mutandis*.

(8) The above provisions shall apply *mutatis mutandis* when an application is made for a finding that the requirements for recognition are not met.

(9) The determination that the requirements for recognition are or are not met shall be binding upon courts and administrative authorities.

… ’

15 Under Paragraph 108 of the FamFG, entitled ‘Recognition of other foreign decisions’:

‘(1) With the exclusion of decisions in matrimonial matters, foreign decisions shall be recognised without the need to follow any particular procedure.

(2) Parties who have a legal interest therein may apply for a decision on the recognition or non-recognition of a foreign decision that does not involve property law. Paragraph 107(9) shall apply *mutatis mutandis*. …

(3) Local jurisdiction to take a decision on an application in accordance with the first sentence of subparagraph 2 shall lie with the court in the jurisdiction of which, at the time of the filing of the application:

1. the person opposing the application or the person to whom the decision on the application relates has his usual place of abode, or

2. if there is no local jurisdiction pursuant to point 1, interest in the establishment became known or the need for care arose.

This jurisdiction shall be exclusive.’

16 Paragraph 17(1) of the Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory Law to the Civil Code; 'the EGBGB'), in the version applicable prior to the entry into force, on 29 January 2013, of the Gesetz zur Anpassung der Vorschriften des Internationalen Privatrechts an die Verordnung (EU) Nr. 1259/2010 und zur Änderung anderer Vorschriften des Internationalen Privatrechts (Law on the adaptation of the rules of private international law to Regulation (EU) No 1259/2010 and on the amendment of other rules of private international law) of 23 January 2013 (BGBl. 2013 I, p. 101), provided:

'(1) A divorce shall be subject to the law applicable to the general effects of marriage at the time when the petition for divorce is filed. Where the dissolution of the marriage is not possible under that law, the divorce shall be governed by German law in the case where the petitioner is German at that time or was German at the time of the marriage.

(2) Only a court may dissolve a marriage in Germany.

… '

Facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

17 On 27 May 1999, Mr Mamisch and Ms Sahyouni married within the jurisdiction of the Islamic Court of Homs (Syria). Mr Mamisch has held Syrian nationality from birth. In 1977, he acquired German nationality by naturalisation. Since that year, he has held both nationalities. Ms Sahyouni has held Syrian nationality from birth. She acquired German nationality following her marriage.

18 The couple lived in Germany until 2003, when they moved to Homs. In summer 2011, on account of the civil war in Syria, they returned to Germany for a short time and subsequently, from February 2012, lived alternately in Kuwait and Lebanon. During that time they also stayed in Syria on a number of occasions. Both parties are currently living in Germany again, at different addresses.

19 On 19 May 2013, Mr Mamisch declared his intention to dissolve his marriage by having his representative pronounce the divorce formula before the religious sharia court in Latakia (Syria). On 20 May 2013, that court declared the couple divorced. On 12 September 2013, Ms Sahyouni signed a declaration that she was to receive from Mr Mamisch, under religious law, a total of USD 20 000 (approximately EUR 16 945), that declaration being worded as follows:

'... I have received all payments due to me under the marriage contract and on the basis of the unilateral divorce and hereby release him from all obligations towards me under the marriage contract and the divorce decree … issued by the Latakia sharia court on 20 May 2013 ... '

20 On 30 October 2013, Mr Mamisch applied for recognition of the divorce pronounced in Syria. By decision of 5 November 2013, the President of the Oberlandesgericht München (Higher Regional Court, Munich, Germany) granted that application, finding that the statutory requirements for recognition of that divorce were satisfied.

21 On 18 February 2014, Ms Sahyouni applied to have that decision set aside and a declaration made that the requirements for recognition of the divorce were not satisfied.

22 By a decision of 8 April 2014, the President of the Oberlandesgericht München (Higher Regional Court, Munich) rejected Ms Sahyouni's application. In that decision, it was pointed out

that recognition of the divorce decision was governed by Regulation No 1259/2010, which also applies to divorces pronounced without the constitutive intervention of a court or public authority ('private divorces'). In the absence of a valid choice of applicable law and a common habitual residence of the spouses in the year preceding the divorce, the applicable law was to be determined in accordance with the provisions of Article 8(c) of that regulation. Where both spouses have dual nationality, the decisive factor is their effective nationality within the meaning of national law. At the time of the divorce at issue, their effective nationality was Syrian. It was also noted that public policy within the meaning of Article 12 of Regulation No 1259/2010 did not prevent recognition of the divorce decision at issue.

23 By decision of 2 June 2015, the Oberlandesgericht München (Higher Regional Court, Munich), before which the dispute had been brought, stayed the proceedings and referred a number of questions on the interpretation of Regulation No 1259/2010 to the Court of Justice for a preliminary ruling. By order of 12 May 2016, *Sahyouni* (C-281/15, EU:C:2016:343), the Court declared that it manifestly lacked jurisdiction to answer those questions referred for a preliminary ruling on the ground, in particular, that Regulation No 1259/2010 did not apply to the recognition of a divorce decision delivered in a third country, and that the referring court had not provided any evidence capable of establishing that the provisions of that regulation had been rendered directly and unconditionally applicable by national law to situations such as that at issue in the main proceedings. The Court did, however, note that the referring court could still submit a new request for a preliminary ruling when it was in a position to supply the Court with all the elements which would enable it to give a ruling.

24 In support of its request for a preliminary ruling, the referring court points out that divorces pronounced in third countries are recognised in Germany under the procedure laid down in Paragraph 107 of the FamFG. Furthermore, as regards the recognition of private divorces, it is commonly accepted that the German courts carry out an assessment of the validity of the substantive requirements of such divorces in the light of Regulation No 1259/2010. That legal practice results from the removal by the German legislature, following the entry into force of that regulation, of the provision relating to the substantive law applicable to the divorce. Such a removal, it states, is based on the fact that the German legislature, considering that private divorces also come within the scope of that regulation, has taken the view that the previous provision had become obsolete, precisely as a result of that regulation.

25 In those circumstances, the Oberlandesgericht München (Higher Regional Court, Munich) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the scope of [Regulation No 1259/2010], as defined in Article 1 of that regulation, also include cases of private divorce, in this instance one pronounced by unilateral declaration of a spouse before a religious court in Syria on the basis of sharia?

(2) If the answer to Question 1 is in the affirmative: In applying Regulation [No 1259/2010] [when examining] Article 10 thereof in cases of private divorce,

(a) is account to be taken in the abstract of a comparison showing that, while the applicable law pursuant to Article 8 grants access to divorce to the other spouse too, that divorce is, on account of the other spouse's sex, subject to procedural and substantive conditions different from those applicable to access for the first spouse, or

(b) does the applicability of that rule depend on whether the application of the foreign law, which is discriminatory in the abstract, also discriminates in the particular case in question?

(3) If the answer to [Question 2(b)] is in the affirmative: Does the fact that the spouse discriminated against consents to the divorce — including by duly accepting compensation — itself constitute a ground for not applying that rule?'

Consideration of the questions referred

Admissibility

26 It must be noted, first of all, that the referring court has before it, not an application for divorce, but an application for recognition of a divorce decision delivered by a religious authority in a third country.

27 The Court has already held that recognition of a divorce decision delivered in a third country does not come within the scope of EU law, since neither the provisions of Regulation No 1259/2010 nor those of Regulation No 2201/2003, or any other legal act of the European Union, apply to such recognition (see, to that effect, order of 12 May 2016, *Sahyouni*, C-281/15, EU:C:2016:343, paragraphs 22 and 23).

28 However, it is clear from settled case-law of the Court that the interpretation of a provision of EU law may be relevant in cases in which, although the facts of the main proceedings are outside the direct scope of EU law, the provisions of EU law have been made applicable by national legislation, which, in dealing with situations confined in all respects within a single Member State, follows the same approach as that provided for by EU law (see, to that effect, judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 53 and the case-law cited).

29 In that regard, the referring court points out that, under German law, Regulation No 1259/2010 applies to the recognition in Germany of private divorces pronounced in a third country, such as, inter alia, the divorce at issue in the main proceedings.

30 In particular, it is apparent from the information provided by that court and from the observations of the German Government that, under German law, the recognition of private divorces pronounced in third countries takes place within the context of the procedure laid down by Paragraph 107 of the FamFG. In accordance with that provision, the recognition of the decisions of a foreign court or State authority constitutively pronouncing a divorce is granted without an assessment as to their legality, whereas the recognition of private divorces is made subject to a review of their validity in regard to the substantive law of the State designated by the relevant rules governing the conflict of laws.

31 In that last regard, it should be noted that, before the entry into force of Regulation No 1259/2010, the substantive law applicable to divorce was determined by the rules governing the conflict of laws contained in Paragraph 17 of the EGBGB, in the version applicable until 28 January 2013. With the entry into force of that regulation, the German legislature, on the basis of the premiss that that regulation was also applicable to private divorces, took the view that the assessment of the validity of a private divorce pronounced in a third country, for the purposes of its recognition in Germany, had to be carried out from then on according to the law of the State designated by the rules governing the conflict of laws laid down by Regulation No 1259/2010.

32 In addition, by the Law adapting the rules of private international law to Regulation No 1259/2010 and amending other rules of private international law, the German legislature amended Paragraph 17(1) of the EGBGB and repealed the rule governing the conflict of laws therein, which had become outdated. Thus, pursuant to German legal practice, since the entry into force of Regulation No 1259/2010, for the purposes of the recognition in Germany of a private divorce pronounced in a third country, the substantive requirements which such a divorce must satisfy are assessed with regard to the law of the State determined on the basis of that regulation.

33 That being so, as the referring court points out, in the event that Regulation No 1259/2010 does not apply to private divorces, the case before it would have to be resolved on the basis of the German rules governing the conflict of laws.

34 Consequently, it is necessary to find that the conditions laid down by the case-law cited in paragraph 28 of the present judgment are satisfied and that, accordingly, the questions referred by the national court for a preliminary ruling are admissible.

The first question

35 By its first question, the referring court asks, in essence, whether Article 1 of Regulation No 1259/2010 must be interpreted as meaning that a divorce resulting from a unilateral declaration made by one of the spouses before a religious court, such as that at issue in the main proceedings, come within the substantive scope of that regulation.

36 In order to answer that question, it is necessary to interpret that provision, which defines the substantive scope of that regulation, by taking into consideration not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it forms part (see, to that effect, judgment of 11 July 2013, *Csonka and Others*, C-409/11, EU:C:2013:512, paragraph 23 and the case-law cited).

37 As regards, in the first place, the wording of Article 1 of Regulation No 1259/2010, that article merely states, in paragraph 1 thereof, that the regulation applies, in situations involving a conflict of laws, to divorce and legal separation. Article 1(2) lists the matters that are excluded from the scope of that regulation, ‘even if they arise merely as a preliminary question within the context of divorce or legal separation proceedings’. The wording of Article 1 of that regulation therefore does not provide any useful element for the purpose of defining the concept of ‘divorce’ within the meaning of that provision.

38 As regards, in the second place, the context in which Article 1 of Regulation No 1259/2010 occurs, it should be noted at the outset that no other provision of that regulation provides a definition of the concept of ‘divorce’ for the purposes of that regulation. In particular, Article 3 of that regulation merely defines the concepts of ‘participating Member State’ and ‘court’, the latter concept to be understood as covering ‘all the authorities in the participating Member States with jurisdiction’.

39 Next, although it is true that private divorces are not explicitly excluded from the scope of Regulation No 1259/2010, as the Advocate General has noted in point 60 of his Opinion, the references made to the involvement of a ‘court’ and to the existence of a ‘proceeding’ in a number of provisions of that regulation, such as Article 1(2), Article 5(2) and (3), Article 8, Article 13 and Article 18(2) thereof, show that the regulation covers exclusively divorces pronounced either by a national court or by, or under the supervision of, a public authority. Moreover, the fact that

Article 18(1) of Regulation No 1259/2010 makes reference to ‘legal proceedings’ supports that conclusion.

40 Lastly, according to recital 10 of Regulation No 1259/2010, the substantive scope and enacting terms of that regulation should be consistent with Regulation No 2201/2003.

41 In accordance with Article 1(1)(a) of Regulation No 2201/2003, that regulation ‘shall apply, whatever the nature of the court or tribunal … [to] divorce’. Article 2(4) of that regulation defines the concept of a ‘judgment’ within the meaning of that regulation as covering, inter alia, ‘a divorce … pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision’.

42 It would be inconsistent to define in different ways the same term ‘divorce’ used in those two regulations and thus to make the respective scopes of those regulations diverge.

43 In that latter regard, it should be borne in mind that both Regulation No 1259/2010 and Regulation No 2201/2003 were adopted in the context of the policy of judicial cooperation in civil matters. It is also clear from the observations submitted by the Commission that the latter had even considered, in the proposal for a Council regulation amending Regulation No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (COM(2006) 399), to insert into Regulation No 2201/2003 the conflict-of-laws rules relating to divorce matters, but that, as that proposal was unsuccessful, those rules were ultimately the subject of a separate regulation, namely Regulation No 1259/2010.

44 As regards, in the third place, the objective pursed by Regulation No 1259/2010, that regulation establishes, as is clear from its title, enhanced cooperation between the participating Member States in the area of the law applicable to divorce and legal separation.

45 As the Advocate General noted in point 65 of his Opinion, at the time of the adoption of that regulation, in the legal systems of the Member States participating in such enhanced cooperation, public bodies alone were able to adopt legally valid decisions in that sphere. It is therefore necessary to find that, by adopting that regulation, the EU legislature had in mind only situations in which divorce is pronounced by a national court or by, or under the supervision of, another public authority, and that, accordingly, it was not the intention of the EU legislature that that regulation should be applicable to other types of divorce, such as those which, as in the present case, are based on a ‘private unilateral declaration of intent’ pronounced before a religious court.

46 Such an interpretation is supported by the fact, as put forward by the Commission at the hearing, that no mention was made during the negotiations which led to the adoption of Regulation No 1259/2010 of an application of that regulation to private divorces.

47 In that regard, while it is true that a number of Member States have, since the adoption of Regulation No 1259/2010, introduced into their legal systems the possibility for divorces to be pronounced without the involvement of a State authority, it is nevertheless the case, as the Advocate General noted in point 66 of his Opinion, that the inclusion of private divorces within the scope of that regulation would require arrangements coming under the competence of the EU legislature alone.

48 Accordingly, in the light of the definition of the concept of ‘divorce’ in Regulation No 2201/2003, it is clear from the objectives pursued by Regulation No 1259/2010 that the latter

regulation covers solely divorces pronounced either by a national court or by, or under the supervision of, a public authority.

49 In light of the foregoing considerations, the answer to the first question is that Article 1 of Regulation No 1259/2010 must be interpreted as meaning that a divorce resulting from a unilateral declaration made by one of the spouses before a religious court, such as that at issue in the main proceedings, does not come within the substantive scope of that regulation.

The second and third questions

50 In the light of the answer to the first question, there is no need to answer the second and third questions.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 1 of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation must be interpreted as meaning that a divorce resulting from a unilateral declaration made by one of the spouses before a religious court, such as that at issue in the main proceedings, does not come within the substantive scope of that regulation.

[Signatures]

* Language of the case: German.