ECLI:EU:C:2022:562

Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

14 July 2022 (*)

(Reference for a preliminary ruling – Jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility – Parental responsibility – Regulation (EC) No 2201/2003 – Article 8(1) and Article 61(a) – General jurisdiction – Perpetuatio fori principle – Transfer, during the proceedings, of the habitual residence of a child from a Member State of the European Union to a third State that is party to the 1996 Hague Convention)

In Case C-572/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Högsta domstolen (Supreme Court, Sweden), made by decision of 14 September 2021, received at the Court on 16 September 2021, in the proceedings

CC

v

VO,

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, S. Rodin, J.-C. Bonichot, L.S. Rossi (Rapporteur) and O. Spineanu-Matei, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the German Government, by J. Möller, U. Bartl and M. Hellmann, acting as Agents,

– the French Government, by A. Daniel and A.-L. Desjonquères, acting as Agents,

– the European Commission, by P. Carlin and W. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 8(1) and Article 61 of 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).

2 The request has been made in proceedings between CC and VO concerning the latter's application to be granted custody of M, their son, in Sweden.

Legal context

International law

3 The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, signed at The Hague on 19 October 1996 ('the 1996 Hague Convention'), has been ratified or acceded to by all the Member States of the European Union. The Russian Federation also acceded to that convention in 2012, and its accession took effect on 1 June 2013.

4 The fourth recital of the 1996 Hague Convention reads as follows:

'Confirming that the best interests of the child are to be a primary consideration'.

5 In Chapter II of that convention, headed 'Jurisdiction', Article 5 provides:

'(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.'

6 Article 52 of the 1996 Hague Convention states, in paragraphs 2 to 4:

'(2) This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.

(3) Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.

(4) The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned.'

European Union law

7 Recitals 12 and 33 of Regulation No 2201/2003 are drafted as follows:

'(12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

…

(33) This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union,'

8 Article 1 of that regulation provides, in paragraphs 1 and 2:

'1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

(a) divorce, legal separation or marriage annulment;

(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

2. The matters referred to in paragraph 1(b) may, in particular, deal with:

(a) rights of custody and rights of access;

…'

9 Article 8 of that regulation, headed 'General jurisdiction', provides:

'1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.'

10 Article 60 of Regulation No 2201/2003, headed 'Relations with certain multilateral conventions', provides that, in relations between Member States, that regulation is to take precedence over a number of international conventions listed exhaustively in that provision, in so far as those conventions concern matters governed by that regulation.

11 Article 61 of that regulation, headed ‘Relations with the [1996 Hague Convention]’, provides:

‘As concerns the relation with [the 1996 Hague Convention], this Regulation shall apply:

(a) where the child concerned has his or her habitual residence on the territory of a Member State;

(b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the said Convention.’

The dispute in the main proceedings and the question referred for a preliminary ruling

12 CC gave birth to M in 2011, in Sweden. She was granted sole custody of her child from birth. Until October 2019, M always resided in Sweden.

13 From October 2019, M began to attend a boarding school on the territory of the Russian Federation.

14 In December 2019, VO, M’s father, brought an application before the competent Tingsrätt (District Court, Sweden) by which, primarily, he sought sole custody of M as well as a declaration that M’s habitual residence was at VO’s domicile, in Sweden. CC contended that that court had no territorial jurisdiction on the ground that, since October 2019, M has been habitually resident in Russia.

15 That court dismissed the plea of lack of jurisdiction raised by CC on the ground that, at the time the action was brought, M had not yet transferred his habitual residence to Russia. It granted sole custody of M to VO on a provisional basis.

16 The Hovrätten över Skåne och Blekinge (Court of Appeal, Scania and Blekinge, Sweden) upheld the decision of the Tingsrätt (District Court) that the Swedish courts have jurisdiction under Article 8(1) of Regulation No 2201/2003. However, it set aside the decision of the latter court to grant sole custody of M to VO on a provisional basis.

17 CC brought an application before the referring court, the Högsta domstolen (Supreme Court, Sweden), asking that court to grant leave to appeal against the decision of the Hovrätten över Skåne och Blekinge (Court of Appeal, Scania and Blekinge) and to refer a question to the Court of Justice for a preliminary ruling on the interpretation of Article 61 of Regulation No 2201/2003. Before the referring court, CC also stated that she had also made an application for custody of M before a Russian court which, by decision of 20 November 2020, had held that it had jurisdiction in any matter relating to parental responsibility with respect to M.

18 According to the referring court, the questions which arise are whether, on the one hand, the principle of *perpetuatio fori*, as it results from Article 8(1) of Regulation No 2201/2003, applies in the event of a change in the child’s habitual residence in a third State which is a party to the 1996 Hague Convention and, on the other hand, having regard to the rule of prevalence laid down in Article 61(a) of Regulation No 2201/2003, what is the time to be taken into consideration when assessing the place of habitual residence of the child and whether the scope of such an article is limited to relations between Member States or whether its field of application is broader. The referring court adds that, although some courts of other Member States have taken the view that, in

similar situations, Article 8(1) of Regulation No 2201/2003 does not apply, the question also divides opinion among those who write specialised legal literature.

19 In those circumstances, the Högsta domstolen (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does the court of a Member State retain jurisdiction under Article 8(1) of [Regulation No 2201/2003] if the child concerned by the case changes his or her habitual residence during the proceedings from a Member State to a third country which is a party to the 1996 Hague Convention (see Article 61 of the regulation)?’

Procedure before the Court

20 The referring court requested that the present case be dealt with under the expedited procedure provided for in Article 105 of the Rules of Procedure of the Court. In support of its request, that court stated that the main proceedings concern a question of jurisdiction which it is essential to settle within a short time.

21 Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his or her own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure.

22 On 7 October 2021, the President of the Court decided, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, that that request must not be granted, having regard, in particular, to the fact that the referring court had not provided any specific evidence relating to the circumstances of the case capable of establishing that the nature of the case meant that it had to be dealt with within a short time. As is apparent from the Court’s case-law, the fact that the referring court is required to do everything possible to ensure that the case in the main proceedings is resolved swiftly is not in itself sufficient to justify the use of the expedited procedure under Article 105(1) of the Rules of Procedure (judgment of 6 October 2021, *TOTO and Vianini Lavori*, C-581/20, EU:C:2021:808, paragraph 29 and the case-law cited).

23 However, the President of the Court decided that the present case had to be given priority, pursuant to Article 53(3) of the Rules of Procedure.

Consideration of the question referred

Preliminary observations

24 As a preliminary point, it should be noted, first, that the question referred is based on the finding that M, whose custody is, in particular, the subject matter of the proceedings before the Swedish courts, actually transferred, during the proceedings, his habitual residence to the territory of a third State, namely the Russian Federation, which is a party to the 1996 Hague Convention. In so far as, in accordance with the Court’s case-law, the child’s place of habitual residence, which is the place which is, in practice, the centre of that child’s life (see, to that effect, judgment of 28 June 2018, *HR*, C-512/17, EU:C:2018:513, paragraph 42), must be established on the basis of a global analysis of the particular circumstances of each individual case (see, to that effect, judgment of 28 June 2018, *HR*, C-512/17, EU:C:2018:513, paragraphs 42 and 54), it is not for the Court but for the national courts to satisfy themselves that that habitual residence has actually moved outside the

territory of the Member State concerned. In that regard, it should be recalled that, in addition to the physical presence of the child on the territory of a State, other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that it reflects some degree of integration of the child into a social and family environment (see, to that effect, judgment of 28 June 2018, *HR*, C-512/17, EU:C:2018:513, paragraph 41 and the case-law cited).

25 Second, it is not apparent from the file before the Court that M, who, since birth, was in the sole custody of CC, was wrongfully removed to the territory of the Russian Federation.

Substance

26 By its question, the referring court asks, in essence, whether Article 8(1) of Regulation No 2201/2003, read in conjunction with Article 61(a) of that regulation, must be interpreted as meaning that a court of a Member State that is hearing a dispute relating to parental responsibility retains jurisdiction to rule on that dispute under Article 8(1) of that regulation where the habitual residence of the child in question has been lawfully transferred, during the proceedings, to the territory of a third State that is a party to the 1996 Hague Convention.

27 Under Article 8(1) of Regulation No 2201/2003, jurisdiction in matters of parental responsibility is conferred on the courts of the Member State in which the child is habitually resident at the time the court is seised. Because of their geographical proximity, those courts are generally the best placed to assess the measures to be taken in the interests of the child (judgment of 23 December 2009, *Detiček*, C-403/09 PPU, EU:C:2009:810, paragraph 36).

28 By referring to the time when the court of the Member State is seised, Article 8(1) of Regulation No 2201/2003 is an expression of the principle of *perpetuatio fori*, according to which that court does not lose jurisdiction even if there is a change in the place of habitual residence of the child concerned during the proceedings.

29 Moreover, as the Court held in the judgment of 17 October 2018, *UD* (C-393/18 PPU, EU:C:2018:835, paragraphs 33 to 41), it does not follow either from the wording or the scheme of Article 8(1) of Regulation No 2201/2003 that the field of application of that provision should be considered to apply only to disputes involving relations between the courts of Member States. On the contrary, the general rule of jurisdiction laid down in Article 8(1) of that regulation may apply to disputes involving relations between the courts of a Member State and those of a third State.

30 It follows that, in so far as, at the time when the court of the Member State is seised, the child in question has his or her habitual residence on the territory of that Member State, that court, in principle, has jurisdiction in matters of parental responsibility, including where the dispute involves relations with a third State.

31 However, it is necessary to ascertain, as the referring court asks, whether the rule laid down in Article 8(1) of Regulation No 2201/2003 is applicable where the third State, to which the child's habitual residence is lawfully transferred during the proceedings in the light of the criteria set out in paragraph 24 of the present judgment, is a party to the 1996 Hague Convention.

32 In that regard, it should be noted that Article 61(a) of Regulation No 2201/2003 provides that, as concerns the relation with the 1996 Hague Convention, Regulation No 2201/2003 is to apply 'where the child concerned has his or her habitual residence on the territory of a Member State'.

33 It follows from the wording of that provision that it governs relations between the Member States, which have all ratified or acceded to the 1996 Hague Convention, and third States which are also parties to that convention, in the sense that the general rule of jurisdiction laid down in Article 8(1) of Regulation No 2201/2003 ceases to apply where the habitual residence of a child has been transferred, during the proceedings, from the territory of a Member State to that of a third State which is a party to that convention.

34 The context of Article 61(a) of Regulation No 2201/2003 supports that interpretation. First, unlike Article 60 of that regulation, Article 61 does not state that its scope is limited to relations between Member States.

35 Second, although Article 8(1) of that regulation states, in essence, that jurisdiction in matters of parental responsibility is to be conferred on the court of the Member State in which the child concerned habitually resides 'at the time the court is seised', Article 61(a) of that regulation does not contain the same stipulation.

36 It follows that, contrary to what the EU legislature provided for in the first provision, and as the German and French Governments pointed out in their written observations, the wording of Article 61(a) permits the view to be taken that the habitual residence, within the meaning of the latter provision, of the child is his or her habitual residence at the time when the court having jurisdiction gives its ruling, with the result that, if that residence, at that time, is no longer established on the territory of a Member State, but on the territory of the third State that is a party to the 1996 Hague Convention, Article 8(1) of Regulation No 2201/2003 must not apply and the provisions of that convention must apply instead.

37 That interpretation is supported by the wording of Article 61(b) of Regulation No 2201/2003, which provides that that regulation is to apply 'as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to [the 1996 Hague Convention]'.

38 Thus, it follows from a combined reading of Article 61(a) and (b) of that regulation that Article 8(1) thereof ceases to apply if the habitual residence of the child has been transferred to the territory of a third State which is a party to the 1996 Hague Convention before the competent court of a Member State, hearing a dispute relating to parental responsibility, has given its ruling. However, where the change in the child's habitual residence occurs after that court has given its ruling, that change does not preclude, under Article 61(b) of that regulation, the provisions of that regulation from applying to the recognition and enforcement of such a judgment on the territory of another Member State.

39 The limitation set out in Article 61(a) of Regulation No 2201/2003 on the application of Article 8(1) of that regulation from the moment when the child no longer has his or her habitual residence on the territory of a Member State but on that of a third State that is a party to the 1996 Hague Convention is also consistent with the EU legislature's intention not to undermine the provisions of that convention.

40 In that regard, it should be noted that, under Article 5(2) of the 1996 Hague Convention, in case of a change of the child's habitual residence to another contracting State, the authorities of the State of the new habitual residence have jurisdiction.

41 Furthermore, Article 52(3) of the 1996 Hague Convention expressly precludes, as regards matters within the scope of that convention, another convention concluded between two or more contracting States from affecting, in the relationship of such States with other contracting States, the application of the provisions of the 1996 Hague Convention. As confirmed by paragraphs 170 to 173 of the Explanatory Report on that convention, drawn up by P. Lagarde, Article 52(3) of that convention is the specific outcome of a compromise between the position of the Member States of the European Union, which are also all parties to that convention, which wanted to be able to enter into separate agreements in that field, such as the 'Brussels II' convention, which was succeeded by Regulation No 2201/2003, and that of the other States that are parties to the 1996 Hague Convention, which feared that such separate agreements may be used to support an argument for the States that concluded them to free themselves from their obligations towards other States that are parties to that convention, which would have the result of weakening that convention.

42 As the French Government and the Commission correctly pointed out in their written observations, if the court of a Member State had to retain its jurisdiction, in accordance with the *perpetuatio fori* rule provided for in Article 8(1) of Regulation No 2201/2003, despite the lawful transfer during the proceedings of the habitual residence of the child to the territory of a third State that is a party to the 1996 Hague Convention, such a prorogation of jurisdiction would run counter to both Article 5(2) and Article 52(3) of that convention. Accepting such an interpretation of Article 8(1) of Regulation No 2201/2003, which ignored the scope of Article 61(a) of that regulation, would lead Member States to act in a way that was incompatible with their international obligations (see, to that effect, judgment of 24 March 2021, *MCP*, C-603/20 PPU, EU:C:2021:231, paragraph 56).

43 Finally, it must be stated that not applying Article 8(1) of Regulation No 2201/2003 and applying the provisions of the 1996 Hague Convention instead does not, in itself, lead to the best interests of the child being compromised, since the courts of the States that are parties to that convention must ensure that those interests are a primary consideration, as provided in the fourth recital of that convention.

44 In the light of the findings above, Article 8(1) of Regulation No 2201/2003, read in conjunction with Article 61(a) of that regulation, must be interpreted as meaning that a court of a Member State that is hearing a dispute relating to parental responsibility does not retain jurisdiction to rule on that dispute under Article 8(1) of that regulation where the habitual residence of the child in question has been lawfully transferred, during the proceedings, to the territory of a third State that is a party to the 1996 Hague Convention.

Costs

45 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 (Fourth Chamber) hereby rules:

Article 8(1) of 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, read in conjunction with Article 61(a) of that regulation, must be interpreted as meaning that a court of a Member State that is hearing a dispute relating to parental responsibility does not retain jurisdiction to rule on that dispute under Article 8(1) of that regulation where the habitual

residence of the child in question has been lawfully transferred, during the proceedings, to the territory of a third State that is a party to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, signed at The Hague on 19 October 1996.

[Signatures]

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* Language of the case: Swedish.