Anonymised version

Case C-522/20

Request for a preliminary ruling

Date lodged:

19 October 2020

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

29 September 2020

Applicant:

OE

Defendant:

VY

REPUBLIC OF AUSTRIA […]

OBERSTER GERICHTSHOF (SUPREME COURT, AUSTRIA)

The Supreme Court, sitting as court of cassation […] in the action brought by the applicant OE, […], […] against the defendant VY, […], in the matter of divorce, further to the appeal on a point of law lodged by the applicant against the order of the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) of 29 June 2020 […] dismissing the applicant's appeal against the order of the Bezirksgericht Döbling (District Court, Döbling) of 20 April 2020 […], makes the

following

O r d e r:

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU):

1. Does the sixth indent of Article 3[(1)](a) of Council Regulation (EC) No 2201/2003 of 27 November 2003 infringe the **[Or. 2]** prohibition of discrimination in Article 18 TFEU on the ground that it provides, as a precondition to the jurisdiction of the courts of the State of residence, depending on the nationality of the applicant, for a shorter period of residence than the fifth indent of Article 3[(1)](a) of Council Regulation (EC) No 2201/2003 of 27 November 2003?

2. If the answer to Question 1 is in the affirmative:

Does that infringement of the prohibition of discrimination mean that, based on the fundamental rule laid down in the fifth indent of Article 3[(1)](a) of Council Regulation (EC) No 2201/2003 of 27 November 2003, a period of residence of 12 months is required for all applicants, irrespective of their nationality, in order to rely upon the jurisdiction of the courts in the place of residence or is it to be assumed that a period of 6 months' residence is the precondition for all applicants?

3. The proceedings are stayed pending delivery of the preliminary ruling of the Court of Justice of the European Union […].

G r o u n d s:

1. Form of order sought:

1.1. The applicant lodged an application with the Austrian District Court seeking divorce from the defendant, whom he married on 9 November 2011 in Dublin, Ireland.

1.2. The applicant submits, with regard to the court seised, that he is of Italian nationality and that the defendant is of German nationality; that they were last habitually resident together in Ireland; that he moved out of the marital home in Ireland in May 2018 and, as he has lived in Austria since August 2019, he had been resident in Austria **[Or. 3]** for over 6 months when the application was made (on 28 February 2020).

1.3. He contends that the jurisdiction of the court seised follows from the fifth and sixth indents of Article 3[(1)](a) 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 (Brussels IIa Regulation); that, under

those provisions, jurisdiction for divorce proceedings is established for nationals of the forum State after just 6 months' residence in that State, whereas nationals of other Member States must have been resident for at least 1 year; that this is unequal treatment solely on grounds of nationality and therefore infringes Article 18 TFEU; and that an interpretation consistent with EU law requires the more favourable rule to be applied in the event of doubt, so that the applicant can rely on the jurisdiction of the Austrian court in whose district he was last habitually resident after just 6 months' residence, even as a national of a Member State other than the forum State.

2. Previous proceedings:

2.1. The court of first instance seised by the applicant rejected the action at the outset on the grounds of lack of international jurisdiction.

It found that the differentiation by nationality in the fifth and sixth indents of Article 3[(1)](a) of the Brussels IIa Regulation prevents parties from forum shopping, and that, as jurisdiction depends on the period of residence at the time of the application, nor does it suffice **[Or. 4]** if the qualifying period expires while proceedings are pending.

2.2. The court of second instance dismissed the applicant's appeal against that order and concurred with the court of first instance that there had been no discrimination in this case on grounds of nationality.

2.3. The applicant lodged an appeal on a point of law against that judgment with the Supreme Court.

3. EU law:

3.1. It follows from Article 267(b) TFEU that the Court of Justice of the European Union has jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the EU institutions without exception (judgment of 13 June 2017, *Florescu and Others*, C-258/14, EU:C:2017:448, paragraph 30 and the case-law cited). The European Union is a union based on the rule of law in which all the acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, the general principles of law and fundamental rights (see, to that effect, judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 91, and of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 56).

3.2. Article 18 TFEU reads:

'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.'

3.3. Article 3 of the Brussels IIa Regulation reads:

'General jurisdiction **[Or. 5]**

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

- the spouses are habitually resident, or

- the spouses were last habitually resident, in so far as one of them still resides there, or

- the respondent is habitually resident, or

- in the event of a joint application, either of the spouses is habitually resident, or

- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his "domicile" there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

2. For the purpose of this Regulation, "domicile" shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.'

4. National law:

4.1. Paragraph 76 of the Jurisdiktionsnorm (Law on Jurisdiction, 'the JN') reads:

'Disputes arising from a marriage or registered partnership **[Or. 6]**

(1) The court in whose district the parties are or were last habitually resident together shall have exclusive jurisdiction in matters relating to the dissolution,

annulment or voidance of a marriage or for determining if a marriage does or does not exist between the parties and in matters relating to the annulment or voidance of a registered partnership or for determining if a registered partnership does or does not exist between the parties. If neither of the parties was habitually resident in that district when the application was filed or if they were never habitually resident together in Austria, the court in whose district the respondent is habitually resident or, if there is no such habitual residence in Austria, the applicant is habitually resident or, failing that, the District Court, Vienna Innere Stadt, shall have exclusive jurisdiction.

(2) The national court shall have jurisdiction for the matters referred to in paragraph (1) if:

1. one of the parties has Austrian nationality, or

2. the respondent or, in the case of an application for voidance against both spouses or both registered partners, at least one respondent is habitually resident in Austria, or

3. the applicant is habitually resident in Austria and either both spouses or both registered partners were last habitually resident together in Austria or the applicant is a stateless person or had Austrian nationality when the marriage or the registered partnership was contracted. **[Or. 7]**

(3) The national court shall always have jurisdiction in matters relating to the annulment or voidance of a registered partnership registered in Austria or for determining if a registered partnership registered in Austria does or does not exist.'

5. Grounds for the reference:

5.1. According to the applicant's submission, he is of Italian nationality and the respondent is of German nationality and they were last habitually resident together in Ireland. Under national law, the courts of Austria do not have jurisdiction.

5.2. As of 1 August 2004, 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 (Brussels IIa Regulation), has applied in all the EU Member States with the exception of Denmark. The national courts therefore have jurisdiction if the requirements of that regulation are fulfilled.

5.3. The relevant provision in the matter of divorce is Article 3 of the Brussels IIa Regulation cited previously. However, in the only situations that might apply in this case, namely in the situations described in the fifth and sixth indents of Article 3[(1)](a) of the Brussels IIa Regulation, a certain period of residence is

required. The period of residence required, which depends on the applicant's nationality, is differentiated in the fifth and sixth indents of Article 3(1)(a).

5.4. As the applicant does not have Austrian nationality, that period is 1 year (fifth indent). The applicant did not fulfil that requirement when the application was lodged with the Austrian District Court **[Or. 8]**. Were the applicant an Austrian national, that period would have been just 6 months (sixth indent). The applicant contends that he fulfilled that requirement.

5.5. According to the wording of the fifth and sixth indents of Article 3(1)(a) of the Brussels IIa Regulation, the period of residence is measured from the time when the application was made.

5.6. Under national law, new arguments cannot be made in appeal proceedings. Although the exclusion of new arguments does not cover facts and evidence concerning circumstances to be considered by the court at any time of its own motion, which include jurisdiction, Article 42(1) of the Law on Jurisdiction states that the court is to take account of its own motion only of facts from which it follows that procedural requirements were not fulfilled which, in this case, means the inadmissibility of the legal action. However, as there is no provision governing (positive) fulfilment of these procedural requirements, it is settled case-law that facts argued in appeal proceedings against dismissal of the action are covered by the exclusion of new arguments […].

5.7. Therefore, the fact that even the 12-month period expired during the appeal proceedings is to be disregarded.

6. The first question referred:

6.1. Article 18 TFEU prohibits arbitrary unequal treatment, that is unequal treatment not justified by objective grounds which are not based on nationality as such. Unequal treatment must be justified by objective circumstances, meaning that benefits and interests must be weighed in light of the **[Or. 9]** objectives of the Treaty, taking account of the principle of proportionality (judgment of 23 January 1997, *Pastoors and Trans-Cap* v *Belgian State*, C-29/95, EU:C:1997:28, paragraph 19. See also judgment of 16 July 1998, *ICI* v *Kenneth Hall Colmer*, C-264/96, EU:C: 1998:370, paragraphs 28 and 29).

6.2. Some commentators argue that there is no objective justification for the unequal qualifying periods required under the fifth and sixth indents of Article 3(1)(a) of the Brussels IIa Regulation and that they therefore infringe Article 18 TFEU […] (evidence of that doctrine).

6.3. Other commentators contend, on the other hand, that the sixth indent of Article 3(1)(a) of the Brussels IIa Regulation is consistent with the principle of equal treatment […] (evidence of that doctrine). One of the reasons given is that it is unrealistic to assume that the applicant's qualified ties, to be proven primarily

by 1 year's residence, are established as quickly in any Member State **[Or. 10]** as in his home country. Nationality is used here as a criterion for ties, in that importance is admissibly attached to ancestry, cultural ties and the ability provided by language to communicate and integrate in the home country as the criterion by which habitual residence is established. Reference is made in that regard to the judgment of 2 April 2009, *A.*, C-523/07, EU:C:2009:225, paragraph 44), by which the Court found that nationality must be taken into consideration as an indication of the integration of a child substantiating its habitual residence (Article 8 of the Brussels IIa Regulation).

6.4. As the fifth and sixth indents of Article 3(1)(a) of the Brussels IIa Regulation are predicated exclusively on nationality and a sufficiently relevant difference for integration into and a close relationship with the respective Member State cannot be deduced from them in conjunction with the period of actual residence (as might apply, for example, to persons who were born and grew up in that Member State without holding its nationality), the Supreme Court has concerns as to whether the differentiation that can be deduced from those provisions is compatible with Article 18 TFEU.

7. The second question referred:

7.1. If one assumes that the different period of residence laid down in the Regulation as a precondition to jurisdiction based on the applicant's habitual residence infringes the prohibition of discrimination, the question arises as to the legal consequences.

7.2. In principle, the legislature has imposed the requirement in the fifth indent of Article 3(1)(a) of the Brussels IIa Regulation of a period of residence of 1 year to establish the jurisdiction of the courts in the applicant's place of residence and has only provided for **[Or. 11]** that period to be reduced to 6 months where the applicant is also a national of the State of residence. That would suggest that the 1-year period applies to all applicants, irrespective of nationality, who rely on jurisdiction in accordance with the fifth and sixth indents of Article 3(1)(a) of the Brussels IIa Regulation.

7.3. However, according to the case-law of the Court of Justice on discrimination, where, for example, national law, in breach of EU law, provides that a number of groups of persons are to be treated differently, the members of the group placed at a disadvantage must be treated in the same way and made subject to the same arrangements as the members of the privileged group (see judgment of 26 January 1999, *Terhoeve* v *Inspecteur*, C-18/95, EU:C:1999:22, paragraph 57 and the case-law cited). That would suggest that the shorter, 6-month, period applies to all applicants, irrespective of nationality.

8. As the court of last instance, the Supreme Court is required to make an order for reference pursuant to Article 267 TFEU, as it has doubts as to the correct application of EU law.

[…]

Supreme Court,
Vienna, 29 September 2020
[…]