

Case C-501/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

6 October 2020

Referring court:

Audiencia Provincial de Barcelona (Provincial Court of Barcelona, Spain)

Date of the decision to refer:

18 September 2020

Applicant:

M P A

Defendant:

LC D N M T

Subject matter of the main proceedings

An application for divorce and dissolution of the matrimonial property regime, in which applications concerning the custody and parental responsibility of minor children are also made, as well as applications for the grant of a maintenance allowance for the children and rules on the use of the family home in Togo.

Subject matter and legal basis of the request for a preliminary ruling

Reference for a preliminary ruling under Article 267 TFEU concerning the interpretation of Articles 3 and 8 and, where applicable, Articles 6, 7 and 14 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), and Articles 3 and, where appropriate, 7 of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction,

applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009 L 7, p. 1).

Questions referred

1. How is the term ‘habitual residence’ in Article 3 of Regulation No 2201/2003 and Article 3 of Regulation No 4/2009 to be interpreted in the case of the nationals of a Member State who are staying in a non-Member State by reason of the duties conferred on them as members of the contract staff of the European Union and who, in the non-Member State, are recognised as members of the diplomatic staff of the European Union, when their stay in that State is linked to the performance of their duties for the European Union?
2. If, for the purposes of Article 3 of Regulation No 2201/2003 and Article 3 of Regulation No 4/2009, the determination of the habitual residence of the spouses depended on their status as EU contract staff in a non-Member State, how would this affect the determination of the habitual residence of the minor children in accordance with Article 8 of Regulation No 2201/2003?
3. In the event that the children are not regarded as habitually resident in the non-Member State, can the connecting factor of the mother’s nationality, her residence in Spain prior to the marriage, the Spanish nationality of the minor children and their birth in Spain be taken into account for the purposes of determining habitual residence in accordance with Article 8 of Regulation No 2201/2003?
4. If it is established that the parents and children are not habitually resident in a Member State, given that, under Regulation No 2201/2003 there is no other Member State with jurisdiction to decide on the applications, does the fact that the defendant is a national of a Member State preclude the application of the residual clause contained in Articles 7 and 14 of Regulation No 2201/2003?
5. If it is established that the parents and children are not habitually resident in a Member State for the purpose of determining child maintenance, how is the *forum necessitatis* in Article 7 of Regulation No 4/2009 to be interpreted and, in particular, what are the requirements for considering that proceedings cannot reasonably be brought or enforced or prove impossible in a non-Member State with which the dispute is closely connected (in this case, Togo)? Must the party have initiated or attempted to initiate proceedings in that State with a negative result and does the nationality of one of the parties to the dispute constitute a sufficient connection with the Member State?
6. In a case like this, where the spouses have strong links with Member States (nationality, former residence), is it contrary to Article 47 of the Charter of

Fundamental Rights if no Member State is considered to have jurisdiction under the provisions of the Regulations?

Provisions of EU law cited

Regulation No 2201/2003, Articles 3, 6, 7, 8 and 14.

Regulation No 4/2009, Articles 3 and 7.

Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ 2016 L 183, p. 1).

Charter of Fundamental Rights of the European Union, Article 47.

Provisions of national law cited

Ley Orgánica 6/1985 del Poder Judicial (Organic Law on the judiciary) of 1 July 1985 (BOE No 157 of 02/07/1985); ('the LOPJ'); rule determining the jurisdiction of the Spanish courts

I) Under Article 22 quater thereof, in principle, the Spanish courts have jurisdiction:

– subparagraph c), in matters relating to personal relationships and property regimes between spouses, annulment of marriage, separation and divorce and changes thereto, provided that no other foreign Court has jurisdiction, when both spouses are habitually resident in Spain at the time of the application or were last habitually resident in Spain and one of them resides there, or when Spain is the habitual residence of the applicant, or, where an application is made by mutual agreement, when one of the spouses resides in Spain, or when the applicant has spent at least one year habitually resident in Spain since making the application, or when the applicant is Spanish and was habitually resident in Spain for at least six months prior to making the application, or when both spouses have Spanish nationality,

– subparagraph d), in matters concerning parentage and parent-child relationships, the protection of minors and parental responsibility, when the child or minor is habitually resident in Spain at the time of the application or the applicant is Spanish or habitually resident in Spain or, in any case, is habitually resident in Spain for at least 6 months before making the application.

II) Under Article 22 octies thereof:

Spanish courts do not have jurisdiction if the grounds of jurisdiction provided for in Spanish law does not specify such jurisdiction; however, the Spanish courts

may not forgo or decline jurisdiction where the case in question has links with Spain and the courts of the various States connected with the case have declined jurisdiction.

Código Civil (Spanish Civil Code)

According to Article 40 thereof, for the exercise of rights and performance of civil obligations, the domicile of natural persons is, in principle, the place of their habitual residence, while the domicile of diplomats resident abroad due to their position abroad who enjoy the right of diplomatic immunity is the last one they had in Spanish territory.

Brief summary of the facts and the main proceedings

- 1 The parties to the dispute married at the Spanish Embassy in Guinea Bissau on 25 August 2010. The marriage is registered in the Consular Civil Register of Guinea Bissau. They have two children, born on 10 October 2007 and 30 July 2012 in Manresa (Barcelona, Spain). The wife (MPA) is a Spanish national. The husband (LCDNMT) is a Portuguese national. The children have Spanish and Portuguese nationality.
- 2 The spouses lived in Guinea Bissau from August 2010 to February 2015 and moved to the Republic of Togo from that date. The de facto separation took place in July 2018. Following the de facto separation, the mother (MPA) and the minor children continue to reside in the marital home in Togo and the spouse (LCDNMT) resides in a hotel in that country.
- 3 The spouses are both employees of the European Commission in its delegation in Togo. Their professional status is that of contract staff. According to the documents produced, contract staff do not acquire the full diplomatic status of a Member State through their contractual relationship with that institution. In the country of employment, contract staff have the status of diplomatic staff of the Union, but in the Member States of the European Union are only considered servants of the Union. They are entitled to diplomatic status, the validity of which is restricted to the country of residence and the period of the assignment.
- 4 On 6 March 2019, M P A brought an application before the Juzgado de Primera Instancia de Manresa (Court of First Instance, Manresa, Spain) seeking dissolution by divorce of the marriage entered into with L C DAS N M T. The application sought the divorce of the spouses and dissolution of the matrimonial property regime, and the determination of the regime and procedures for exercising custody and parental responsibility over the minor children, the grant of a maintenance allowance for the children and rules for the use of the family home in Togo.
- 5 By a decision dated 3 June 2019, the court of first instance declared the application to be admissible. The defendant claimed that the should decline to hear the case for lack of international jurisdiction, on the basis that the Spanish

courts do not have jurisdiction to hear the proceedings. By a decision dated 9 September 2019, the court upheld claim that it should decline to hear the case and declared that it lacked international jurisdiction to hear the case. The Juzgado de Primera Instancia (Court of First Instance) bases its decision on the lack of habitual residence in Spain. The wife brought an appeal against that decision before the referring court.

Main arguments of the parties to the main proceedings

- 6 **The wife** (MPA) asserts that both spouses enjoy diplomatic status as accredited servants of the EU in the country of employment and that this status is granted by the host country and extends to the minor children. As documentary evidence, she produces a *laissez passer* which she describes as a diplomatic passport; diplomatic cards issued by the African authority to her and her children; a letter from the EU Chargé d’Affaires in the Togolese Republic and the diplomatic list of the EU Delegation to Togo, on which the spouses appear. These documents support the assessment contained in paragraph 3 above.
- 7 She submits that, under EU Regulations, jurisdiction to hear divorce, parental responsibility and maintenance cases is determined by habitual residence and that, in accordance with Article 40 of the Spanish Civil Code, habitual residence coincides not with the place where she acts as an EU official but with the place of residence before acquiring that status, namely Spain.
- 8 She also claims that she is protected by the immunity recognised by Article 31 of the Vienna Convention and that her applications do not constitute exceptions to that article.
- 9 She cites the application of *forum necessitatis* recognised by the aforementioned Regulations, and sets out the situation of the Togolese courts. She produces reports drawn up by the United Nations General Assembly Human Rights Council (one dated 17 August 2016, finding that there was no adequate and continuous training of judges and a persistent climate of impunity for human rights violations; another, dated 22 August 2016, expressing the concern of the United Nations regarding the independence of the judiciary, access to justice and impunity for human rights violations and reproducing the observation of the United Nations High Commissioner for Human Rights that persons without legal accreditation act in the courts as intermediaries between certain judges and litigants, a fact considered to be conducive to corrupt practices), and states that the Committee on the Elimination of Discrimination Against Women called on Togo to guarantee the effective access of women to justice.
- 10 **The husband (LCDNMT)** asserts that neither of the two spouses performs a diplomatic function for their respective countries, Spain and Portugal, but are employees of the European Commission’s Delegation to Togo, employed as contract staff. He asserts that the *laissez-passer* is not a diplomatic passport but a

safe conduct pass or travel document valid only within the territory of third countries that do not belong to the European Union.

- 11 He asserts that the Vienna Convention is not applicable and that Protocol No 7 on the Privileges and Immunities of the EU applies exclusively to acts performed in an official capacity.
- 12 He rejects the application of *forum necessitatis*.
- 13 For these reasons, he maintains that the habitual residence is Togo and the Spanish courts do not have jurisdiction under the applicable Regulations.

Brief summary of the reasons for the request for preliminary ruling

Overall approach to the issue

- 14 To determine the international jurisdiction of the Courts to hear the divorce proceedings, in which measures on parental responsibility, maintenance for the minor children and the dissolution of the matrimonial property regime are also being sought, three EU Regulations should be referred to: No 2201/2003, No 4/2009 and No 2016/1103. In the Regulations, jurisdiction relies on two fundamental concepts: habitual residence and nationality. The main connecting factor for determining the jurisdiction of the courts in this case is habitual residence, given that the spouses have different nationalities. However, those Regulations do not define what is meant by habitual residence.
- 15 The CJEU has not ruled on the concept of habitual residence of adults in divorce cases. Judgments delivered refer to the concept of habitual residence of the minor children: judgments of 17 October 2018, *UD* (C-393/18 PPU, EU:C:2018:835); of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436); of 9 October 2014, *C* (C-376/14 PPU, EU:C:2014:2268); of 22 December 2010, *Mercredi* (C-497/10 PPU), and of 2 April 2009, *A* (C-523/07, EU:C:2009:225). In those decisions, concerning the habitual residence of the minor children:
 - it is stated that Regulation No 2201/2003 does not contain any definition of the concept of ‘habitual residence’;
 - it is stated that it is an autonomous concept of EU law, and therefore must be determined in consideration of the context of the provisions of the Regulation and the latter’s objective, in particular as results from Recital 12 of the preamble thereto, according to which the rules of jurisdiction that it establishes are shaped having regard to the best interests of the child, in particular on the criterion of proximity;
 - various factors are taken into account in determining the habitual residence of the minor children, in particular the place where the child has some social and family integration, taking into account the duration, regularity, conditions and

reasons for the stay in the State, even if the duration of the child's presence in a given State is not, by itself, decisive with regard to their habitual residence in that State; it may be an indication, but must be assessed alongside other circumstances. Account may also be taken of the child's nationality, conditions of schooling and linguistic knowledge, as well as the child's family and social relationships. The physical presence of the child in the Member State at some point is always required.

- 16 There is no jurisprudence concerning the concept of habitual residence of the spouses to determine jurisdiction over the divorce. Nor is there any on the habitual residence of the children in the present case, in other words, on the effect that diplomatic status (or a similar status held by individuals performing duties as workers or servants of the European Union and posted to third States to perform those duties) may have on the determination of habitual residence.

On the non-application of domestic legal concepts.

- 17 The referring court considers that Article 40 of the Spanish Civil Code, on which the applicant bases the jurisdiction of the Spanish courts, is not applicable, given that the CJEU's case-law on the habitual residence of minor children is clear and indicates that the concept of habitual residence constitutes an autonomous concept of EU law and that the domestic law of the Member States is not applicable for the purpose of determining its meaning and scope.

On the concept of habitual residence of the spouses for determining jurisdiction over divorce proceedings and maintenance

- 18 In assessing the habitual residence of the spouses seeking to divorce, it is necessary to determine the duration, regularity and stability of the spouses' residence in a country such as Togo. Account must be taken of the fact that their residence in that country is directly related to the performance of their duties as contract staff of the European Commission and that it may vary on account of those duties and the needs of the Commission. In that regard, the question arises as to whether their status as European Union workers is a decisive factor in considering that they are not habitually resident in Togo within the meaning of Article 3 of Regulation No 2201/2003 and Article 3 of Regulation No 4/2009. The question also arises as to whether the connecting factors of the mother's nationality (Spanish), her residence in Spain prior to the celebration of the marriage, one of the children's nationalities and their place of birth (Spain) may be taken into account in determining habitual residence.

On the concept of habitual residence of the minor children of EU contract staff

- 19 Although the parents' status as contract workers of the European Union affects the determination of their habitual residence in the sense that their being in Togo is not a decisive factor in establishing habitual residence, the court questions

whether the habitual residence resulting from that status affects the determination of the habitual residence of the minor children.

On the interpretation of Articles 6, 7 and 14 of Regulation No 2201/2003

- 20 Although the status of EU workers has no bearing on the determination of the habitual residence of the spouses in a Member State, the referring court is uncertain whether the residual clauses of Regulation No 2201/2003 (Article 7 for divorce and Article 14 for parental responsibility) should be applied, and of the effect of Article 6 of that Regulation on the application of the residual clauses.
- 21 As such, Article 6 could prevent the application of Articles 7 and 14 in this case and, consequently, the application of domestic laws relating to determination of jurisdiction in divorce matters and matters of parental responsibility. As the defendant is a Portuguese national (a national of a Member State), the referring court questions whether,
- a) under Article 6, he may be the subject of legal action in the courts of another Member State (in this case, Spain) only in accordance with Articles 3, 4 and 5 of the Regulation, to the exclusion of recourse to the domestic laws of Spain as authorised by Articles 7 and 14 of the Regulation, or,
 - b) on the contrary, the fact that he is a national of a Member State does not preclude him from being the subject of legal action in accordance with the domestic rules of another Member State, where no Member State has jurisdiction under that Regulation. This is a different situation from that which gave rise to the judgment of 29 November 2007, *Sundelind Lopez* (C-68/07, EU:C:2007:740), where the defendant was not a national of a Member State.

On the possible infringement of Article 47 of the Charter

- 22 The referring court questions whether, in a case like this where the spouses have strong links with Member States (nationality, previous residence), it is contrary to Article 47 of the Charter that Regulation No 2201/2003 does not permit the application of the rules of domestic law for determining the State's jurisdiction or whether, under those rules, no Member State has jurisdiction, where serious doubts exist as to the impartiality or independence of the courts of the non-Member State.

On the need to determine the conditions for forum necessitatis in Regulation No 4/2009

- 23 If the status of EU workers does not determine their habitual residence in a Member State and the residual clause applies, the Spanish courts would have jurisdiction, by virtue of the mother's Spanish nationality, to decide on parental responsibility measures under the provisions of Article 22 quater(d) of the LOPJ.

They would not have jurisdiction to decide on the divorce, under Article 22 quater(c) of the LOPJ. Nor would they have jurisdiction to determine the children's maintenance allowance under Regulation No 4/2009, which does not contain any residual clause. The rule contained in Article 3(d) is not applicable because the jurisdiction is based on nationality.

- 24 It is necessary that the CJEU clarify how the *forum necessitatis* mentioned in Article 7 of said Regulation is to be interpreted and specify:
- what conditions it deems necessary in order to find that proceedings cannot reasonably be brought or enforced or prove impossible in a non-Member State with which the dispute is closely connected (in this case Togo),
 - whether the party must prove that they have initiated or attempted to initiate proceedings in that State with a negative result, and,
 - whether the nationality of one of the parties constitutes a sufficient connection with the Member State.

WORKING DOCUMENT