Anonymised version

Case C-540/19

Request for a preliminary ruling

Date lodged:

16 July 2019

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

5 June 2019

Defendant and appellant:

WV

Applicant and respondent:

Landkreis Harburg

BUNDESGERICHTSHOF

(FEDERAL COURT OF JUSTICE)

ORDER

…

in the family matter of

WV, … (Austria),

defendant and appellant,

…

v

Landkreis Harburg (the administrative district of Harburg), … Winsen (Luhe),

applicant and respondent,

…

[Or. 2] The Twelfth Civil Chamber of the Bundesgerichtshof …

made the following order:

I. The proceedings are stayed.

II. The following question concerning the interpretation of Article 3(b) 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 (European Maintenance Regulation) is referred to the Court of Justice of the European Union for a preliminary ruling:

Can a public body which has provided a maintenance creditor with social assistance benefits in accordance with provisions of public law invoke the place of jurisdiction at the place of habitual residence of the maintenance creditor under Article 3(b) of the European Maintenance Regulation in the case where it asserts the maintenance creditor's maintenance claim under civil law, transferred to it on the basis of the granting of social assistance by way of statutory subrogation, against the maintenance debtor by way of recourse? **[Or. 3]**

Grounds:

1 I. Facts of the case

2 The applicant, as a local social assistance institution, is a public body. It is asserting claims for parental maintenance for the period from April 2017 against the defendant on the basis of transferred rights.

3 The defendant's mother, born in 1948, ('the assistance recipient') has been living in a retirement and care home in Cologne since 2009. She receives regular social assistance from the applicant in accordance with the Twelfth Book of the Social Code (SGB XII), because her own income (social security benefit, nursing housing allowance, statutory nursing insurance benefits) and her personal assets are not sufficient to cover in full her residential costs. The defendant lives in Vienna (Austria).

4 In these proceedings, the applicant is bringing an action against the defendant for payment of maintenance arrears of EUR 8 510 for the period from April 2017 to April 2018 and for payment of regular maintenance of EUR 853 *per mensem* from May 2018. The applicant claims that the assistance recipient's parental

maintenance claim, directed against the defendant, has, pursuant to Paragraph 94(1) of the SGB XII, been transferred to the applicant, because it regularly granted the assistance recipient social assistance benefits in the maintenance period of interest here which significantly exceed the maintenance amount requested. The defendant submits that the German courts lack international jurisdiction. **[Or. 4]**

5 The Amtsgericht (District Court) took the view that the German courts have no international jurisdiction and dismissed the application as inadmissible. It stated that jurisdiction under Article 3(b) of the European Maintenance Regulation is in particular excluded, because the creditor within the meaning of that provision is only the maintenance creditor itself, and not a state body asserting maintenance claims legally transferred to it by way of recovery. In response to the applicant's appeal, the Oberlandesgericht (Higher Regional Court) set aside the contested decision and remitted the case to the Amtsgericht for a fresh hearing. In the opinion of the Oberlandesgericht, the German courts do have international jurisdiction, because the maintenance-entitled assistance recipient's right of option, under Article 3(a) and (b) of the European Maintenance Regulation, to claim the maintenance from her son both at the court with jurisdiction for her place of domicile in Germany and at the court with jurisdiction for the defendant's place of domicile in Austria, could also be exercised by the applicant in its capacity as the assignee of the maintenance claim.

6 That decision is opposed by the appeal, which has been authorised, lodged by the defendant, who is seeking restoration of the Amtsgericht's decision.

7 II. The claim asserted

8 Under Paragraph 1601 of the Bürgerliches Gesetzbuch (German Civil Code; BGB), direct relatives are obliged to provide one another with maintenance. Pursuant to Paragraph 1610 of the BGB, the quantum of the maintenance to be provided is determined according to the position in life of the person in need. According to established case-law of the Bundsgerichtshof, the position in life of a parent living in a care home is determined by that person's institutional care. **[Or. 5]** That person's maintenance requirement within the meaning of Paragraph 1610 of the BGB therefore usually corresponds to the costs incurred for the institutional care plus a smaller cash amount for financing the needs not covered by the services of the care facility …. If a parent in need of care is unable fully to meet the costs of inpatient care out of his or her own income and assets, that person has a supplementary right to social assistance in the form of help for care according to the Seventh Chapter of the Twelfth Book of the Social Code (Paragraph 61 *et seq.* of the SGB XII). With regard to the relevant transfer of civil-law maintenance claims against children, the first sentence of Paragraph 94(1) of the SGB XII specifies the following:

> 'If the person entitled to benefits has a maintenance claim under civil law for the period for which benefits are provided, this shall pass to the social

assistance institution up to the amount of the expenses incurred, together with the right to information under maintenance law.'

9 In respect of the enforcement of the claims, the third sentence of Paragraph 94(5) of the SGB XII contains the following provision:

'The claims under subparagraphs 1 to 4 shall be determined pursuant to civil law.'

10 III. The referral to the Court of Justice of the European Union

11 The question of whether the applicant can invoke Article 3(b) of the European Maintenance Regulation is relevant for the resolution of the case. Because other grounds **[Or. 6]** for international jurisdiction of German courts are apparently excluded, the appeal would be well founded if Article 3(b) of the European Maintenance Regulation should not apply in favour of the applicant. In the opposite case, the defendant's appeal would have to be dismissed.

12 1. The European Maintenance Regulation is applicable to the present proceedings.

13 (a) Existence of a civil matter

14 (aa) Under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), recovery proceedings regarding transferred maintenance claims could come within the substantive scope thereof only if those proceedings were to be classified as a civil matter (Article 1(1) of the Brussels I Regulation). Although a comparable limitation cannot directly be inferred from the wording of the individual provisions of the European Maintenance Regulation, the restriction of the substantive scope of the European Maintenance Regulation to civil matters is apparent from the competence standards mentioned in the introductory passages of the Regulation (Articles 61(c) and 65(b) of the EC Treaty, now Article 81(1) and 81(2)(c) TFEU), which allow the EU legislature to adopt measures in the area of judicial cooperation in civil matters.

15 (bb) So long as the Brussels I Regulation was in force, on the basis of the case-law of the Court of Justice of the European Union in recovery cases, the existence of a civil matter was always to be assumed if the basis **[Or. 7]** and the detailed rules relating to the assertion of the maintenance recovery were governed by the rules of the ordinary law in regard to maintenance obligations. By contrast, there was no civil matter if the maintenance recovery was not characterised by equal treatment of the parties involved, but was founded on provisions by which the legislature conferred on the public body a prerogative of its own (see judgments of the Court of Justice of 15 January 2004, *Blijdenstein*, C-433/01, [EU:C:2004:21], paragraph 20, and of 14 November 2002, *Baten*, C-271/00, [EU:C:2002:656], paragraph 37).

16 (cc) It is a matter of dispute in the German-language legal literature whether this delimitation formula can also be applied to the European Maintenance Regulation … or whether the substantive scope of the Regulation fundamentally covers all cases in which a public body seeks reimbursement from the maintenance debtor of a benefit which it has provided to the maintenance creditor in his stead, without the legal basis of the recourse and the form of the public body's powers to take action being of decisive importance here …. In the circumstances here obtaining, this matter of dispute does not require more detailed discussion because, on the basis of the earlier case-law of the Court of Justice of the European Union, a delimitation also leads to the assessment that the recovery proceedings initiated by the applicant against the defendant constitute a civil matter:

17 The claim is based on the defendant's civil-law obligation to provide maintenance for his mother who is in receipt of social assistance. The **[Or. 8]** Court of Justice of the European Union also fundamentally assumes the existence of a civil matter on a civil-law basis if a maintenance claim rooted in civil law is transferred to a public body by way of statutory subrogation, as in this case pursuant to the first sentence of Paragraph 94(1) of the SGB XII (see with regard to Paragraph 7 of the Unterhaltsvorschussgesetz (Maintenance Advance Law; UVG: judgment of the Court of Justice of 15 January 2004, *Blijdenstein*, C-433/01, [EU:C:2004:21], paragraphs 20 and 21). The transferred maintenance claim is to be pursued by the applicant pursuant to the third sentence of Paragraph 94(5) of the SGB XII via the civil-law route. As a public body, the applicant does not have a special prerogative with regard to the method of asserting the maintenance claim transferred to it, as formed the basis in particular for the situation which the Court of Justice of the European Union had to assess in the *Baten* case (see judgment of the Court of Justice of 14 November 2002, *Baten*, C-271/00, [EU:C:2002:656], paragraphs 35 and 36).

18 However, it must be pointed out in this connection that, under German law, there may also be situations in which a public body can enforce its recovery claim against a maintenance debtor, even though the latter's performance obligation has previously been waived through an agreement with the maintenance creditor. Under Paragraph 1614(1) of the BGB, in the case of relative maintenance and spousal separation maintenance (see Paragraph 1360a(3) and the fourth sentence of Paragraph 1361(4) of the BGB), agreements regarding the waiver of future maintenance payments are generally prohibited, with the intention of protecting both the maintenance creditor and the public body …. Even though no statutory prohibition applies, maintenance agreements which are objectively to the detriment of public bodies or even seek to cause harm thereto may in certain individual cases **[Or. 9]**, from the angle of the general clause under civil law of Paragraph 138 of the BGB, prove to be contrary to public policy and therefore void …. On this basis, the protection of public bodies against an agreement between the parties in a legal maintenance relationship that is disadvantageous thereto is guaranteed under German law in various forms through general civil law, but not through special intervention powers on the part of the public bodies.

19 (b) Recovery demand as maintenance obligation

20 The substantive scope of the European Maintenance Regulation is restricted to maintenance obligations arising from a family relationship, parentage, marriage or affinity (Article 1(1) of the European Maintenance Regulation). It can be seen from recital 11 that the term 'maintenance obligation' is to be interpreted autonomously from the Regulation. On the basis of the case-law of the Court of Justice of the European Union concerning the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (European Jurisdiction and Enforcement Convention), a maintenance obligation will in any event have to be assumed if the provision in question is designed to secure the living requirements of the creditor or if the needs and resources of the creditor and debtor are taken into consideration in the determination of its amount (see judgments of the Court of Justice of 27 February 1997, *van den Boogaard*, C-220/95, [EU:C:1997:91], paragraph 22, and of 6 March 1980, *de Cavel II*, 120/79, [EU:C:1980:70], paragraph 5). On this basis, the assistance recipient's claim against the defendant undoubtedly constitutes a maintenance obligation within the meaning of the European Maintenance Regulation, because the claim relates to the assistance recipient's living requirements, characterised by the residential and **[Or. 10]** care costs, and the assistance recipient's need and the defendant's ability to pay are also taken into consideration in the determination of the provision. If a claim which itself meets the requirements for a maintenance obligation within the meaning of the European Maintenance Regulation is transferred to a third party by way of statutory subrogation, it does not thereby lose its character under maintenance law ….

21 2. In cases in which the European Maintenance Regulation applies to maintenance recovery, a public body may undoubtedly pursue its claim for recovery at the place of habitual residence of the maintenance debtor pursuant to Article 3(a) of the European Maintenance Regulation. It has still not been clarified whether Article 3(b) of the European Maintenance Regulation provides a further place of jurisdiction at the habitual residence of the original maintenance creditor for the maintenance recovery of public bodies.

22 (a) This is rejected by some of the literature in Germany and Austria. In respect of the Brussels I system, the case-law of the Court of Justice of the European Union made it clear in the *Blijdenstein* decision that a public body which brings an action for recovery against a maintenance debtor is not in an inferior position with regard to the latter and that there is therefore no justification for denying the maintenance debtor protection at his habitual place of jurisdiction. This case-law is to be applied to the European Maintenance Regulation, a conclusion which also emerges from recital 14 and Article 64(1) of the European Maintenance Regulation, since the term 'creditor' (Article 2(1).10 of the European Maintenance Regulation) is applied to public bodies therein only with regard to recognition, declaration of enforceability and enforcement **[Or. 11]**, but not in relation to the rules of jurisdiction ….

23 The differing view, also endorsed by the Oberlandesgericht in its contested decision, points out in particular that the jurisdiction at the place of the habitual residence of the maintenance creditor according to the European Maintenance Regulation no longer constitutes an exceptional provision geared towards the needs of an economically weaker party, but the fundamental conception of Article 3 of the European Maintenance Regulation is based on general jurisdictions of equal status. The application of Article 3(b) of the European Maintenance Regulation to the maintenance recourse of state bodies promotes effective enforcement of the transferred maintenance claim and prevents objectively unjustified preferential treatment of a maintenance debtor living abroad …. **[Or. 12]**

24 (b) The present Chamber inclines to the latter view.

25 According to the case-law of the Court of Justice of the European Union, Article 3(b) of the European Maintenance Regulation has to be interpreted autonomously from the Regulation in the light of its aims, wording and the scheme of which it forms part (see judgment of the Court of Justice judgment of 18 December 2014, *Sanders and Huber*, C-400/13 and C-408/13, [EU:C:2014:2461], paragraph 25). Against that background, the present Chamber considers as follows:

26 (aa) It should firstly be pointed out that the Regulation says nothing on the question of whether a public body, as applicant in the scope of a maintenance recovery, can invoke the place of jurisdiction at the habitual residence of the maintenance creditor under Article 3(b) of the European Maintenance Regulation.

27 According to the legal definition in Article 2(1).10 of the European Maintenance Regulation, only a natural person can be regarded as a creditor, but not a public body seeking recovery. Under Article 64(1) of the European Maintenance Regulation, public bodies are equated with creditors for the purposes of recognition, declaration of enforceability and enforcement. As is made clear in recital 14, public bodies would not have the prerogative thereby conferred thereon to make applications for the establishment of recognition or for the declaration of enforceability without the special provision in Article 64(1) of the European Maintenance Regulation. It is true that the Regulation for proceedings leading to a judgment does not contain a provision corresponding to Article 64(1) of the European Maintenance Regulation. However, for the jurisdictional system of the Regulation, it firstly only follows that a public body cannot be regarded as a ‘creditor’ within the meaning of Article 3(b) of the European Maintenance Regulation and is therefore also not authorised **[Or. 13]** to claim the place of jurisdiction at its own habitual residence — that is to say, for example, the headquarters — for itself. Whether a public body can refer to the place of jurisdiction at the habitual residence of the original maintenance creditor is a question that is to be distinguished therefrom.

28 (bb) The present Chamber is well aware that, in so far as the rules of jurisdiction of the European Maintenance Regulation replaced the corresponding provisions of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (European Jurisdiction and Enforcement Convention) and the Brussels I Regulation, the earlier case-law of the Court of Justice of the European Union concerning jurisdiction in matters relating to maintenance obligations also remains germane for the purposes of analysing the corresponding provisions of the European Maintenance Regulation (see judgment of the Court of Justice of 18 December 2014, *Sanders and Huber*, C-400/13 and C-408/13, [EU:C:2014:2461], paragraph 23).

29 With regard to Article 5(2) of the European Jurisdiction and Enforcement Convention, the Court of Justice of the European Union has recognised that a public body cannot refer to the place of jurisdiction at the domicile or habitual place of residence of the maintenance creditor for its action for recovery. The Court of Justice of the European Union based that decision on the grounds that the general principle in the system of the European Jurisdiction and Enforcement Convention was that the courts of the defendant's place of domicile **[Or. 14]** were to have jurisdiction (Article 2 of the European Jurisdiction and Enforcement Convention), whereas the special rules of jurisdiction which derogated from this general principle — in particular Article 5(2) of the European Jurisdiction and Enforcement Convention — could not give rise to a broad interpretation, especially since the Convention generally appeared hostile towards the attribution of jurisdiction to courts of the applicant's domicile (see judgments of the Court of Justice of 15 January 2004, *Blijdenstein*, C-433/01, [EU:C:2004:21], paragraph 25, and of 27 September 1988, *Kalfelis*, 189/87, [EU:C:1988:459], paragraph 19). The derogation provided for in Article 5(2) of the European Jurisdiction and Enforcement Convention was intended to offer the maintenance applicant, who is regarded as the weaker party in such proceedings, an alternative basis of jurisdiction. That specific objective had to prevail over the objective of the rule contained in Article 2 of the European Jurisdiction and Enforcement Convention, which for its part was to protect the defendant as the party who, being the person sued, was generally in a weaker position (see judgments of the Court of Justice of 15 January 2004, *Blijdenstein*, C-433/01, [EU:C:2004:21], paragraph 29, and of 20 March 1997, *Farrell*, C-295/95, [EU:C:1997:168], paragraph 19). However, a public body which brings an action for recovery against a maintenance debtor is not in an inferior position in relation to the latter. Moreover, the maintenance creditor, whose maintenance has been covered by the payments of the public body, is no longer in a precarious financial position. In addition, the courts of the place of residence of the defendant are better placed to determine the latter's resources (see judgment of the Court of Justice of 15 January 2004, *Blijdenstein*, C-433/01, [EU:C:2004:21], paragraphs 30 and 31).

30 (cc) On the other hand, the Advocate General, in his Opinion in the *Sanders and Huber* case, has already emphasised that the principles developed in the case-law on the European Jurisdiction and Enforcement Convention and the Brussels I Regulation cannot be applied mechanically to the interpretation of the rules of

jurisdiction of the European Maintenance Regulation (see Opinion of Advocate General Jääskinen of 4 September 2014 in Cases C-400/13 and C-408/13, **[Or. 15]** *Sanders and Huber*, […], points 37 and 38). In particular, the systematic and teleological considerations which led the Court of Justice of the European Union at that time to deny the applicability of Article 5(2) of the European Jurisdiction and Enforcement Convention to actions for recovery by public bodies can no longer be useful, in the opinion of the Chamber, for the interpretation of Article 3(b) of the European Maintenance Regulation in this regard.

31 (1) A rule/exception relationship between the individual places of jurisdiction can no longer be inferred from the grounds of jurisdiction cited in Article 3 of the European Maintenance Regulation. Unlike in the Brussels I system, the place of jurisdiction at the habitual residence of the maintenance creditor is configured not as a special place of jurisdiction, but as an alternative general place of jurisdiction.

32 (2) It is correct that the jurisdiction of the courts at the place of habitual residence of the maintenance creditor should still take account, even during the period of validity of the European Maintenance Regulation, of the special protection of the maintenance creditor as the typically weaker party in the maintenance proceedings (judgment of the Court of Justice of 18 December 2014, *Sanders and Huber*, C-400/13 and C-408/13, [EU:C:2014:2461], paragraph 28). However, the jurisdictional provision of Article 3(b) of the European Maintenance Regulation is not limited to this regulatory purpose. Firstly, the place of jurisdiction at the habitual residence of the maintenance creditor is usually capable of producing synchronisation between the place of jurisdiction and the applicable substantive law. Secondly, due to their proximity to the subject matter, the courts at the place of residence of the maintenance creditor are in the best position to establish the living requirements and need of the maintenance creditor (see Jenard Report on the European Jurisdiction and Enforcement Convention, OJ 1979 C 59 of 5 March 1979, p. 1, 25; also referred to in the judgments of the Court of Justice of 18 December 2014, *Sanders and Huber*, C-400/13 and C-408/13, **[Or. 16]** [EU:C:2014:2461], paragraph 34, and of 20 March 1997, *Farrell*, C-295/95, [EU:C:1997:168], paragraphs 24 and 25). If the legislature had only seen those further regulatory objectives as insignificant secondary aims which merely reinforce the actual main purpose of protecting a potentially inferior party in proceedings, it would consequently only have been able to open up the place of jurisdiction at the habitual place of residence of the maintenance creditor for actions brought by the maintenance creditor. However, according to the clear wording of the standard, this place of jurisdiction exists independently of whether the maintenance creditor himself is bringing an action or whether he is being sued by the maintenance debtor — for instance by way of a (negative) declaration action denying the maintenance obligation.

33 (dd) The present Chamber finds its preferred legal assessment also supported by a comparative view of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance of 23 November 2007 (HMC 2007).

34 (1) Article 36(1) of the HMC 2007 specifies that public bodies as applicants within the scope of legal assistance are to be considered to be 'creditors' only with regard to recognition and enforcement (Article 10(1)(a) and (b) of the HMC 2007), but not with regard to the establishment of a decision (Article 10(1)(c) of the HMC 2007). This means that public bodies are fundamentally unable to claim any assistance from the central authorities of another Contracting State for proceedings leading to a judgment at the habitual place of residence of the maintenance debtor. In the discussions regarding the formulation of the Hague Maintenance Convention, this restriction appeared justified because public bodies will typically establish decisions in their own country, followed by recognition and enforcement in **[Or. 17]** another Contracting State (see Borräs/Degeling Explanatory Report on the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, paragraph 591, published at www.hcch.net). In the opinion of the present Chamber, this demonstrates that, in the deliberations on the Hague Maintenance Convention, it was assumed to be self-evident that public bodies are authorised to raise a maintenance order on the basis of transferred rights established at the place of jurisdiction of the maintenance creditor in need of assistance. The European Union was involved in drawing up the Hague Maintenance Convention. It therefore appears obvious that the European legislature, which, with Article 64(1) of the European Maintenance Regulation, created a provision that is essentially identical in terms of content to Article 36(1) of the HMC 2007, might have been guided by similar ideas.

35 (2) Under Article 20(1)(c) of the HMC 2007, a decision made in the State of origin is to be recognised and enforced in another Contracting State if the creditor was habitually resident in the State of origin at the time when the proceedings were instituted. If a Contracting State makes use of a reservation in this regard (Article 20(2) of the HMC 2007), that State must, pursuant to Article 20(4) of the HMC 2007, take all appropriate measures to establish a decision for the benefit of the creditor, if the debtor is habitually resident in the State of reservation. In this connection, pursuant to Article 36(1), in conjunction with Article 20(4), of the HMC 2007, public bodies are also to be deemed by way of exception to be 'creditors' when establishing the maintenance decision, which means that they may also demand support from the authorities of the State of reservation (see Borräs/Degeling Explanatory Report on the Convention on the International **[Or. 18]** Recovery of Child Support and Other Forms of Family Maintenance, paragraph 590, published at www.hcch.net). It logically follows conversely that the States which are Parties to the Hague Maintenance Convention — in so far as they have not raised a reservation under Article 20(2) of the HMC — are obliged to recognise maintenance decisions from other Contracting States which public bodies have obtained at the habitual place of residence of the original maintenance creditor.

36 The Council Decision of 9 June 2011 on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (OJ 2011

L 192 of 22 July 2011, p. 39 *et seq.*) does not contain a reservation declaration regarding public bodies under Article 20(2) of the HMC 2007, which means that the recognition obligation for the Member States of the European Union also extends to such decisions falling under Article 20(c) of the HMC 2007 from other Contracting States which are Parties to the Hague Maintenance Convention, which were made in proceedings leading to a judgment at the place of habitual residence of the maintenance creditor in favour of public bodies. Against that background too, it appears incomprehensible to deny public bodies within the European Union jurisdiction at the place of habitual residence of the maintenance creditor. **[Or. 19]**

37 3. Overall, the correct interpretation of Article 3(b) of the European Maintenance Regulation cannot, however, be derived with unambiguous clarity from the case-law to date of the Court of Justice of the European Union. Rather, reasonable doubts remain in the interpretation of the provision.

…