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Ref: TRE11015

Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 30.08.2019

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM
THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY TKF FOR JUDICIAL REVIEW
AND IN THE MATTER OF DECISIONS OF THE DEPARTMENT OF JUSTICE
FOR NORTHERN IRELAND

Before: Stephens LJ, Deeny LJ and Treacy LJ

Order for Reference to the Court of Justice of the European Union pursuant to
Article 19(3)(b) of the Treaty on European Union and Article 267 of the Treaty on
the Functioning of the European Union

Introduction

[1] By this reference Her Majesty's Court of Appeal in Northern Ireland requests the Court of Justice of the European Union ("the CJEU") to provide a preliminary ruling on an issue of EU law relating to the registration and enforcement in Northern Ireland of a maintenance order made by a Polish court before Poland's accession to the EU pursuant to Council Regulation (EC) No 4/2009 of 18 December 2008 (the "Maintenance Regulation").

[2] The Applicant, TKF, is a Polish National and is represented by P.A. Duffy Solicitors. The Respondent is the Department of Justice for Northern Ireland, which is the Central Authority for the purpose of the Maintenance Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. The Department of Justice is represented by the Departmental Solicitor's Office.

Registered at the Court of Justice under No.	1129305
Luxembourg, 03. 10. 2019	For the Registrar
Fax / E-mail:	Cecilia Strömholm
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CURIA GREFS Luxembourg
Entrée 02. 10. 2019

The Facts

[3] The Agreed material facts are as follows:

- (i) TKF and AKF, both Polish nationals, were married in Poland in 1991. They had two sons.
- (ii) On 1 April 1999 a Polish Court made a maintenance decision in favour of AKF against TKF.
- (iii) In 2001 TKF left Poland to work in Germany.
- (iv) Between December 2002 and February 2003, when TKF was resident and working in Poland, there were further maintenance proceedings in a Polish Court giving rise to an updated maintenance order dated 14 February 2003.
- (v) TKF and AKF divorced in 2004.
- (vi) On 1 May 2004 Poland acceded to the EU
- (vii) In August 2006 TKF came to Northern Ireland, where he has resided ever since.
- (viii) On 8 April 2010, Poland became bound by the Hague Protocol.
- (ix) On 18 June 2011 Council Regulation (EC) Number 4/2009 (the "Maintenance Regulation") came into operation.
- (x) On 24 October 2013 a Clerk of the Court of Petty Sessions (District of Belfast and Newtownabbey) registered, and declared enforceable, two maintenance decisions made by the District Court in Bialystok, Poland dated 14 February 2003 (those decisions being variations of original orders made on 1 April 1999 by the same court). The Northern Irish decision records that the decision to so register was made in accordance with Article 75 of Council Regulation (EC) No 4/2009. That decision also declares that the decision so registered is enforceable for the purposes of section 2 of Chapter IV of the Maintenance Regulation. Notice was given to the Applicant in accordance with Regulation 6 of Part 3 of the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.
- (xi) On 15 August 2014 a Clerk of the Court of Petty Sessions (District of Belfast and Newtownabbey) registered, and declared enforceable, a further maintenance decision made by the District Court in Bialystok, Poland dated 14 February 2003 (also being a variation of an original

order made on 1 April 1999 by the same court). The Northern Irish decision records that the decision to so register was made in accordance with Article 75 of Council Regulation (EC) No 4/2009. That decision also declares that the decision so registered is enforceable for the purposes of section 2 of Chapter IV of the Maintenance Regulation. Notice was given to the Applicant in accordance with Regulation 6 of Part 3 of the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.

- (xii) In pre-action correspondence the Respondent indicated to the Applicant that it was relying on Article 75(2)(a) to ground its decision.

[4] There are also a number of contested facts which the national court has yet to decide. These are outlined below for context only:

- (i) The Applicant claims that he had no knowledge of the 1999 Polish Court proceedings and neither attended nor was represented at any hearing.
- (ii) The Applicant claims that while he received notification of the commencement of the second set of Polish Court proceedings, which spanned the period December 2002 to February 2003, he was not notified, did not attend, and was not represented at the operative hearing, which was held on 31 January 2003.

Applicable National Law Framework

[5] Regulation 4(1A) of the Magistrates Courts (Civil Jurisdiction and Judgments Act 1982) Rules (NI) 1986 provides:

“(1A) Where the clerk of petty sessions receives an application under Article 26 of the Maintenance Regulation for the registration for enforcement of a maintenance order made in a Regulation State other than the United Kingdom he shall, subject to Article 24 of the Maintenance Regulations and to paragraphs (3) and (4) of this Rule, cause the order to be registered in his court by means of a minute or memorandum entered and signed by him in the Order Book.”

[6] The Maintenance Regulation was implemented in the UK (including Northern Ireland) by the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011. Regulation 6 of Part 3 of those regulations deals with the procedure for dealing with an application for registration of a maintenance decision

under Section 2 of Chapter IV of the Maintenance Regulation and its ensuing enforceability.

Relevant sections of the Maintenance Regulations

CHAPTER I - SCOPE AND DEFINITIONS

“Article 2 - Definitions

(1) For the purposes of this Regulation:

1. The term ‘decision shall mean a decision in matters relating to maintenance obligations given by a court of a Member State, whatever the decision may be called, including a decree, order, judgment or writ of execution as well as a decision by an officer of the court determining the costs or expenses. For the purposes of Chapters VII and VIII, the term ‘decision’ shall also mean a decision in matters relating to maintenance obligations given in a third state

...”

CHAPTER IV - RECOGNITION, ENFORCEABILITY AND ENFORCEMENT OF DECISIONS

“Article 16 - Scope of application of this chapter

(1) This Chapter shall govern the recognition, enforceability and enforcement of decisions falling within the scope of this Regulation

(2) Section 1 shall apply to decisions given in a Member State bound by the 2007 Hague Protocol.

(3) Section 2 shall apply to decisions given in a Member State not bound by the 2007 Hague Protocol.

(4) Section 3 shall apply to all decisions.”

Section 1 - Decisions given in a Member State bound by the 2007 Hague Protocol

...

Section 2 - Decisions given in a Member State not bound by the 2007 Hague Protocol

“Article 23 - Recognition

(1) A decision given in a Member State not bound by the 2007 Hague Protocol shall be recognised in the other Member States without any special procedure being required.

(2) Any interested party who raises the recognition of a decision as the principal issue in a dispute may, in accordance with the procedures provided for in this Section, apply for a decision that the decision be recognised.

(3) If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition, that court shall have jurisdiction over that decision.

Article 24 - Grounds of refusal of recognition

A decision shall not be recognised:

(a) If such recognition is manifestly contrary to public policy in the Member State in which recognition is sought. The test of public policy may not be applied to the rules relating to jurisdiction;

(b) Where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;

(c) If it is irreconcilable with a decision given in a dispute between the same parties in the Member State in which recognition is sought;

(d) If it is irreconcilable with an earlier decision given in another Member State or in a third State in a dispute involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

A decision which has the effect of modifying an earlier decision on maintenance on the basis of changed circumstances shall not be considered an irreconcilable decision within the meaning of points (c) or (d).

...

Article 26 - Enforceability

A decision given in a Member State not bound by the 2007 Hague Protocol and enforceable in that State shall be enforceable in another Member State when, on the application of any interested party, it has been declared enforceable there.

...

Section 3 - Common provisions

..."

CHAPTER VII - COOPERATION BETWEEN CENTRAL AUTHORITIES

"...

Article 56 - Available applications

(1) A creditor seeking to recover maintenance under this Regulation may make applications for the following:

- a. Recognition or recognition and declaration of enforceability of a decision"

CHAPTER IX - GENERAL AND FINAL PROVISIONS

...

"Article 75 - Transitional Provisions

(1) This Regulation shall apply only to proceedings instituted, to court settlements approved or concluded, and to authentic instruments established after its date of application, subject to paragraphs 2 and 3.

(2) Sections 2 and 3 of Chapter IV shall apply:

- (a) To decisions given in the Member States before the date of application of this Regulation for which recognition and the declaration of enforceability are requested after that date;

(b) To decisions given after the date of application of this Regulation following proceedings begun before that date, in so far as those decisions fall within the scope of Regulation (EC) No 44/2001 for the purposes of recognition and enforcement.

Regulation (EC) No 44/2001 shall continue to apply to procedures for recognition and enforcement under way on the date of application of this Regulation.

The first and second subparagraphs shall apply *mutatis mutandis* to court settlements approved or concluded and to authentic instruments established in Member States.

(3) Chapter VII on cooperation between Central Authorities shall apply to requests and applications received by the Central Authority as from the date of application of this Regulation.”

Legal Proceedings to Date

[7] The Applicant/Appellant challenged the decisions to register and declare enforceable the three Polish maintenance decisions before the High Court of Northern Ireland on the following grounds:

(a) **Illegality**: as Poland was not a Member State of the European Union when the Polish Court decisions were made, Section 2 of Chapter 4 of Council Regulation (EC) no 4/2009 of 18 December 2008 did not apply, thereby vitiating in law all of the impugned decisions.

(b) **Illegality in the alternative**: in any event the Maintenance Regulation, specifically Articles 23 and 26, did not apply to the Polish Court decisions, with the result that the impugned decisions could not be made under paragraph 6 of Part 3 of the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.

(c) **Illegality in the further alternative**: the Polish Court decisions were not in compliance with Article 24 of the Maintenance Regulation, there being no evidence that the Applicant was aware of, attended or was represented at the proceedings in question.

[8] The Applicant relied on the following case law:

(a) AB v JJB [2015] EWHC 192;

(b) Wolfgang Naturproducte v SEWAR spol, judgment 21 June 2017, Case C-514/10 [2012]

[9] The Respondent argued that article 75(2)(a) of the Maintenance Regulation applies to decisions given in Member States before the date of application of the Regulation for which recognition and the declaration of enforceability are requested after that date and submitted that that chronology is satisfied in the instant case. It submitted that the effect of this is that sections 2 and 3 of Chapter IV of the Regulation would apply to the Polish maintenance decisions as Article 75 is silent as to Hague Protocol requirements.

[10] The Respondent drew support for this interpretation from Section 1 of Chapter IV which is excluded from application to any transitional provision scenario under Article 75 and which applies "to decisions given in a Member State bound by the 2007 Hague Protocol". The Respondent submits that this establishes that cognisance was given to the specific exclusion of Section 1, notwithstanding that it purports to apply to all Member States bound by the 2007 Hague Protocol.

[11] In relation to the first ground of challenge, the Learned Trial Judge found against the Applicant on the basis that the Maintenance Regulation contains no provision restricting its temporal scope to court maintenance orders made in Poland only after the date of Polish accession to the EU.

[12] In addition, the Learned Trial Judge found that Article 75(2) did not apply as Poland is a Hague Protocol State. Finally, the Judge found Chapter VII of the Maintenance Regulation did apply (by virtue of article 75(3)) to the matters at hand and that the Orders were properly registered and enforced on foot of that Chapter.

[13] The referring Court is seized of an appeal as to the proper temporal application of the Maintenance Regulation for the purpose of registering and declaring enforceable maintenance decisions and as to the applicability of Article 75(2) to decisions issued in Hague Protocol states.

Issues of EU Law arising (and necessity)

[14] The Court is mindful of the need for uniform interpretation of Community Legislation and in circumstances where several competing interpretations have been contended for as to whether:

- (a) The Maintenance Regulation is applicable to maintenance decisions given in Poland before its accession to the EU; and

- (b) Whether the Northern Irish Court of Petty Sessions had jurisdiction to register the relevant decisions under any part of Article 75 of the Maintenance Regulation.

It appears that neither issue can be considered an *acte claire*. It is therefore necessary to obtain a preliminary ruling from the CJEU in order to resolve the core issues in the domestic proceedings.

The Questions Referred

- [i] Must Article 75(2) of the Maintenance Regulation EC 04/2009 be interpreted as applying only to “decisions” which were given in States that were member states of the EU at the time those decisions were made?
- [ii] Bearing in mind that Poland is now a Member State of the European Union which is bound by the Hague Protocol, are maintenance decisions made by a Court in Poland in 1999 and 2003, that is, prior to Poland becoming a member state of the European Union, now capable of being registered and enforced in another EU Member State pursuant to any part of EC Regulation 04/2009 (the Maintenance Regulation), and in particular:
- (a) Pursuant to Article 75(3) and Article 56 of the Maintenance regulation;
 - (b) Pursuant to Article 75(2) and Section 2 of Chapter IV of the Maintenance regulation;
 - (c) Pursuant to Article 75(2)(a) and Section 3 of Chapter IV of the Maintenance regulation;
 - (d) Pursuant to any other Articles of the Regulation?

Jean Healy
2/09/15