

**Case C-87/22****Request for a preliminary ruling****Date lodged:**

9 February 2022

**Referring court:**

Landesgericht Korneuburg (Austria)

**Date of the decision to refer:**

4 January 2022

**Appellant:**

TT

**Respondent:**

AK

[...]

**REPUBLIC OF AUSTRIA**

LANDESGERICHT KORNEUBURG (REGIONAL COURT, KORNEUBURG, AUSTRIA)

The Regional Court, Korneuburg, sitting as the court ruling on appeals on the merits, has [...], in the custody case concerning the minor children (1) V\*\*\* T\*\*\* and (2) M\*\*\* T\*\*\*, both born on \*\*.\*\*.20\*\*, upon the appeal brought by the father [...] T\*\* T\*, [...] against the order of the Bezirksgericht Bruck an der Leitha (District Court, Bruck an der Leitha) of 2 November 2021, [...], made the following

**Order:**

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Must Article 15 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), be interpreted as meaning that the courts of a Member State having jurisdiction as to the substance of the matter, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, may request such a court to assume jurisdiction even in the case where that other Member State has become the place of habitual residence of the child following wrongful removal?

2. If Question 1 is answered in the affirmative:

Must Article 15 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), be interpreted as meaning that the criteria for the transfer of jurisdiction that are set out in that article are regulated exhaustively, without the need to consider further criteria in the light of proceedings initiated under Article 8(f) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction?

[...]

**GROUND:**

V\*\*\* and M\*\*\* are the children, born out of wedlock, of [...] A\*\*\* K\*\*\* and [...] T\*\*\* T\*\*\*. The parents and the children are Slovak nationals. The children were born in Slovakia. Under Slovak law, the two parents have joint custody of the two children.

The father is self-employed and works in Bratislava. The mother works as a pharmacist, likewise in Bratislava. After the two children were born, they initially lived with their parents in Slovakia and moved to Austria in spring 2014.

The two children attended a crèche for approximately one and a half months in 2014 and then a nursery school in Hainburg an der Donau (Austria) for two years. Since 2017, the two children have been attending school in Bratislava. They were transported from their home in Austria to the school in Bratislava by car before school started and were picked up by one of the parents after their post-school care and brought back to the house in Austria. In that house, the children prepared for the next school day, played and ate together with their parents before going to bed at around 8 p.m.

The children speak only a few words of German. Their mother tongue is Slovak and they communicate with their parents and grandparents in that language.

The parents separated in January 2020. Since July 2020, the children have been living with their mother in Bratislava.

At the same time as an application for return under Article 8(f) of the 1980 Hague Convention, which had been brought before the Okresný súd Bratislava I (District Court Bratislava I) [...], the father applied to the court of first instance for the transfer of custody of both children to him alone, and, in the alternative, for the granting to him of primary care of the children with joint custody being retained, as well as the transfer of temporary custody to him alone until the custody proceedings have been concluded, on the grounds, in essence and in summarised form, that the mother had endangered the welfare of the children by unlawfully removing them from Austria to Slovakia. He submits that she had pulled the children out of their social integration. She had, the father argues, attempted to prevent him from having contact with the children.

The mother opposed the father's applications for custody and raised the plea of lack of international jurisdiction on the part of the District Court, Bruck an der Leitha, on the ground, in essence, that the children had been habitually resident in the Slovak Republic throughout the period in question. They attended school, had their medical appointments and engaged in their recreational activities in that country, and it was only for meals and overnight stays that the children stayed in the house in Hainburg an der Donau, where they had not been socially integrated.

By order of 4 January 2021, the District Court, Bruck an der Leitha, refused the father's application for custody and the application for transfer of temporary custody, on the ground of lack of international jurisdiction [...].

By order of the Regional Court, Korneuburg, sitting as the court ruling on appeals on the merits, of 23 February 2021 [...], the appeal brought by the father against the order of 4 January 2021 was upheld and the contested order was amended to the effect that the mother's plea of lack of international jurisdiction was rejected.

That decision of that court was confirmed by order of the Oberster Gerichtshof (Austrian Supreme Court) of 23 June 2021 [...] following an extraordinary appeal on a point of law brought by the mother, and that extraordinary appeal was dismissed.

On 23 September 2021, the mother applied to the District Court, Bruck an der Leitha, for it to request a court in the Slovak Republic, in accordance with Article 15(1)(b) and 15(2)(a) of Regulation No 2201/2003, to assume jurisdiction in accordance with Article 15(5) of that regulation, or, in the alternative, to fulfil the request of its own motion in accordance with Article 15(1)(b) and 15(2)(b) of that regulation [...], on the grounds that, in addition to the return proceedings under the 1980 Hague Convention before the District Court Bratislava I [...] and before the District Court Bratislava V [...], several sets of proceedings were pending before courts of the Slovak Republic, which had been instituted by both the father and the mother, and those courts had already taken extensive evidence

and the courts of the Slovak Republic were for that reason better placed to rule on the parental responsibility for the two children.

The father opposed the mother's application, contending, in essence, that a transfer of jurisdiction under Article 15 of Regulation No 2201/2003 can take place only in exceptional cases and in any event not in the case where return proceedings under the 1980 Hague Convention are pending before the courts of the Member State that are to assume jurisdiction.

By the order now being contested, the District Court, Bruck an der Leitha, requested the District Court Bratislava V, in accordance with Article 15(1)(b) of Regulation No 2201/2003, to assume, by way of a judicial decision taken once that contested order has become final, jurisdiction in the proceedings concerning the custody of the two children and the father's right of access to his children. The Austrian court proceeded on the assumption that, in view of the fact that both children are Slovak nationals who have been living with the mother in Bratislava since July 2020 and are not socially integrated in Austria, courts of the Slovak Republic would be better placed to rule on parental responsibility and on rights of access in respect of the two children. It stated that the District Court Bratislava V has already taken several final decisions on the father's right of access to his two children. By contrast, the conduct of proceedings before an Austrian court would be made more difficult by the fact that, both with regard to investigations carried out by the Austrian child and youth welfare agency and with regard to the child psychology expert already appointed, all questioning and inquiries would have to be conducted with the assistance of a court-certified interpreter, which would not only be costly and time-consuming, but would also give rise to the possibility of essential content of conversations being lost or conveyed inaccurately in translation.

The father's appeal is directed against that order, on the ground of incorrect legal assessment, and with the request that the contested order be amended to the effect that the mother's application for transfer of the case to the Bratislava District Court V in accordance with Article 15(1) of Regulation No 2201/2003 be refused; in the alternative, he requests that the contested decision be set aside without replacement or that the court of first instance take a new decision after conducting further proceedings.

The mother requests that the appeal be dismissed. Moreover, she requests that the matter be brought before the Court of Justice for an interpretation of Article 15 of Regulation No 2201/2003.

The Regional Court, Korneuburg, sitting as the court ruling on the appeal on the merits, is called on to rule on the mother's application at second instance.

Question 1:

## 1. Legal framework:

According to recital 12 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:

*'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.'*

According to recital 13 of that regulation:

*'In the interest of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court.'*

According to recital 17 of Regulation No 2201/2003:

*'In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.'*

Article 15 of that regulation provides as follows:

*'Transfer to a court better placed to hear the case*

1. *By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to*

*hear the case, or a specific part thereof, and where this is in the best interests of the child:*

- (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or*
  - (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.*
2. *Paragraph 1 shall apply:*
- (a) upon application from a party; or*
  - (b) of the court's own motion; or*
  - (c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.*

*A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.*

3. *The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:*
- (a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or*
  - (b) is the former habitual residence of the child; or*
  - (c) is the place of the child's nationality; or*
  - (d) is the habitual residence of a holder of parental responsibility; or*
  - (e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.*

4. *The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1.*

*If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.*

5. *The courts of that other Member State may, where, due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction.*

*Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.*

6. *The courts shall cooperate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53.'*

The Court of Justice has hitherto interpreted the provision of Article 15(1) of Regulation No 2201/2003 as meaning that it constitutes a special rule of jurisdiction that derogates from the general rule of jurisdiction laid down in Article 8(1) of that regulation and the transfer of the case to a court better placed to hear it may occur only in exceptional cases (see [order] of 10 July 2019, C-530/18, paragraph 24, among many others).

The Court of Justice has hitherto not answered the question as to the relationship between the provisions of Article 15(1) of Regulation No 2201/2003 and those of Article 10 of that regulation. In principle, the provision of Article 10 of the regulation strengthens the position of the courts of the Member State of origin, where the child was habitually resident prior to the abduction. Given that it is a *lex specialis* constituting a derogation from the general rule of Article 8 of the regulation, those courts remain competent for all new proceedings relating to parental responsibility that are instituted after the abduction until one of the cases referred to in Article 10 of the regulation occurs. Until then, proceedings concerning parental responsibility may not be instituted either in a host State or in a third country (C-403/09).

The question that now arises is whether, in those cases in which a Member State that is requested to assume jurisdiction in accordance with Article 15(1)(b) of the regulation is at the same time the State in which the child has in the meantime established his or her habitual residence following an unlawful abduction, jurisdiction can be transferred to that Member State.

In that regard, it might be argued, on the one hand, that such a transfer is precluded by the fact that Articles 10 and 11 of Regulation No 2201/2003 contain a complex system for handling questions of jurisdiction, with detailed rules aimed at guaranteeing the jurisdiction of the Member State of origin and ensuring that no advantage is conferred on the abductor, for which reason Article 15 of the regulation is not compatible with that concept and, as *leges speciales*, Article 10 and 11 of the regulation take precedence over Article 15 thereof.

On the other hand, it might be argued that the very wording of Article 15 of Regulation No 2201/2003 allows a transfer of jurisdiction even where the court of the first State has jurisdiction under Article 10, 11 or 12 of that regulation, with the objective of ensuring that, even in those cases, there is a certain degree of flexibility in the exercise of jurisdiction in order to take the interests of the child into account in the best way possible. In addition, it might be argued, in support of that legal view, that it follows from the scheme of the jurisdiction rules that the substantive rule on the transfer of jurisdiction under Article 15 of the regulation is

set out only at the end of the second section of the regulation on jurisdiction and can therefore be applied to all the bases of jurisdiction that precede that provision and not merely to the general rule on jurisdiction in Article 8 of the regulation, since the transfer of jurisdiction under Article 15 of the regulation could have been regulated immediately after Article 8 thereof.

There is no national case-law on the relationship between, on the one hand, Articles 10, 11 and 12 and, on the other hand, Article 15 of Regulation No 2201/2003.

Question 2:

In the event that the first question is answered to the effect that a transfer of jurisdiction is permissible even in cases of wrongful removal, the question arises as to whether an assessment is then permissible only on the basis of the criteria and conditions hitherto referred to in the case-law of the Court of Justice, namely that

1. there is a connection between the child and another Member State;
2. the court having jurisdiction as to the substance of the case considers that a court of that other Member State is better placed to hear the case; and
3. the transfer is in the best interests of the child (*[order] of the Court of Justice of 10 July 2019, C-530/18*); or whether, in addition, other circumstances that specifically take into account the special nature of the wrongful removal under the Hague Convention must be weighed up, and, if so, what those circumstances might be. That question has also thus far not been answered by the Court of Justice.

Consideration of all of these questions is necessary to enable the appellate court to rule definitively on the application to have jurisdiction in respect of the present custody case transferred to the courts of the Slovak Republic. Depending on whether or not a transfer of jurisdiction under Article 15 of Regulation No 2201/2003 is also permissible in those cases in which the Member State of the courts requested to assume jurisdiction is also the Member State in which the child has in the meantime established his or her habitual residence following a wrongful removal, the contested order will have to be confirmed in favour of the mother's application – following a review of the criteria relevant to the transfer of jurisdiction. If, however, such a transfer of jurisdiction is not permissible, the contested order will have to be set aside and the mother's application refused.

[...]

**Korneuburg, 4 January 2022**

[...]