Case C-644/20

Request for a preliminary ruling

Date lodged:

26 November 2020

Referring court:

Sąd Okręgowy w Poznaniu (Regional Court in Poznań, Poland)

Date of the decision to refer:

10 November 2020

Appellant and defendant at first instance:

W. J.

Respondents and applicants at first instance:

L. J. and J. J. represented by their legal representative A. P.

[Or. 1] […]

ORDER

On 10 November 2020

the Regional Court in Poznań, 15th Civil Appeals Division

[…]

[…] [composition of the court]

having examined on 10 November 2020 in Poznań

in closed session

the case brought by the minors L. J. and J. J. represented by their statutory legal representative A. P.

against W. J.

concerning maintenance

following an appeal lodged by the defendant at first instance

against the judgment of the Sąd Rejonowy w Pile (Piła District Court, Poland)

of 11 April 2019

[…]

makes the following order:

1. the following question is referred to the Court of Justice of the European Union for a preliminary ruling:

‘Must Article 3(1) and (2) of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, approved on behalf of the European Community by Council Decision 2009/941/EC of 30 November 2009 (OJ 2009 L 331, p. 17), be interpreted as meaning that a creditor who is a child may acquire a new habitual residence in the State in which he or she was wrongfully retained if a court orders the return of the creditor to the State in which he or she habitually resided immediately prior to the wrongful retention?’;

2) the proceedings are stayed.

[…] [composition of the court]

[Or. 2] Grounds for the order

I. Subject matter of the proceedings

1 On 7 November 2018, in the District Court in Piła, the minor applicants L. J. and J. J., staying in K. in Poland and represented by their mother A. P., brought an action against their father W. J., staying in H. in the UK, for maintenance in the amount of PLN 1 200 per month. In his written submission of 11 February 2019, the defendant filed a defence in which he entered the dispute and did not raise a plea of lack of national jurisdiction.

2 In its judgment of 11 April 2019, the Piła District Court […] [details relating to the case number] ordered the defendant to pay to each of the applicants maintenance of PLN 1 000 (a total of PLN 2 000 per month) as of 7 November 2018, dismissed the remainder of the claim and ruled on the costs of the proceedings. In the judgment, the provisions of the Polish ustawa z 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy (Law of 25 February 1964 – Family and Guardianship Code) (Dz. U. of 2020, item 1359) were applied to the maintenance obligation between the parties.

3 The defendant appealed against that judgment, claiming that the court had made an error of fact in not taking into account that the applicants’ mother had been obliged by a court to return the children to their father by 26 June 2019, which

indicates that the imposition of the maintenance obligation on the defendant was unjustified. In the present case, the defendant's appeal is being examined by the Regional Court in Poznań.

II. Facts of the case

4 The first applicant was born on 10 June 2015 and the second applicant was born on 29 May 2017. The applicants were born in the UK and have Polish and British nationality. The applicants were born of a non-marital relationship between A. P. and W. J., Polish citizens. The applicants' parents met in 2012 in the UK where they were staying and working.

5 On 25 October 2017, the first applicant arrived with her mother in Poland where she was to stay until 7 October 2017. The reason for her arrival was the expiry of her mother's ID card. During that stay, the applicants' mother informed the defendant that she intended to stay longer in Poland, to which the defendant agreed. On 7 October 2017, A. P. returned to the UK, which she left again on 8 October 2017, **[Or. 3]** taking the second applicant with her. A few days later, the defendant was informed that A. P. intended to stay permanently in Poland together with the applicants. The defendant did not agree to this.

6 The defendant, under the Convention on the Civil Aspects of International Child Abduction, done in The Hague on 25 October 1980 (Dz. U. of 1998, No 108, item 528, 'the 1980 Hague Convention'), lodged an application with the British central authority for the applicants' return to the UK. On 3 January 2018, the application was forwarded to the District Court in P., which in its order of 26 February 2018 […] [details relating to the case number] […] refused to order the applicants' return. As a result of the defendant's appeal, the Regional Court in P. in its order of 24 May 2019 […] [details relating to the case number] […] amended the order under appeal and ordered the mother to return the minor applicants to the defendant by 26 June 2019. The basis of that order was a finding that the applicants had been wrongfully retained in Poland and that their habitual residence had been in the UK immediately prior to that retention, and at the same time there was no grave risk that the applicants' return would expose them to physical or psychological harm or otherwise place them in an intolerable situation within the meaning of Article 13(1)(b) of the 1980 Hague Convention.

7 The order of the Regional Court in P. of 24 May 2019 is final. The enforcement of that order will entail the applicants' return to the UK, since the defendant's habitual residence is still in that country.

8 As at 11 April 2019, the applicants lived in K. together with their mother in a residence belonging to her parents. In addition to the parents, the mother's brother and a minor daughter of the mother's deceased sister lived in that residence. The first applicant was attending nursery at the time, while the second applicant was in his mother's care. Due to immunodeficiency, he was under the constant care of medical facilities in both the UK and Poland, where he was periodically

hospitalised. In Poland, the mother received welfare benefits for taking care of the applicants.

9 The applicants were not returned by their mother by the prescribed deadline of 26 June 2019. The defendant filed an application for enforcement of the order to return the applicants. In its order of 28 October 2019 […] [details relating to the case number] […], the District Court in P. ordered the court-appointed guardian to forcibly remove the applicants from their mother. That order was not implemented because the mother went into hiding **[Or. 4]** together with the applicants. Therefore, a police search for the applicants was ordered. The search has not been successful to date.

III. EU law

10 Article 15 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, 'Regulation No 4/2009') provides that the law applicable to maintenance obligations is to be determined in accordance with the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations ('the Hague Protocol') in the Member States bound by that instrument.

11 The Hague Protocol was approved on behalf of the European Community by Council Decision 2009/941/EC of 30 November 2009 (OJ 2009 L 331, p. 17). Pursuant to Article 1, the Hague Protocol determines the law applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child regardless of the marital status of the parents. Article 2 of the Hague Protocol provides that its provisions apply even if the applicable law is that of a non-Contracting State. According to Article 3(1) of the Hague Protocol, maintenance obligations are governed by the law of the State of habitual residence of the creditor, save where the Protocol provides otherwise. However, Article 3(2) of the Protocol provides that in the case of a change in the habitual residence of the creditor, the law of the State of the new habitual residence is to apply as from the moment when the change occurs.

IV. Polish law

12 Pursuant to Article 63 of the ustawa z 4 lutego 2011 r. – Prawo prywatne międzynarodowe (Law of 4 February 2011 – Private International Law) (Journal of Laws [Dz. U.] of 2015, item 1792), the law applicable to maintenance obligations is determined by Regulation No 4/2009.

V. Need for the interpretation of EU law

13 Article 3(1) of the Hague Protocol links the law applicable to the maintenance obligation to the creditor's habitual residence. Pursuant to Article 3(2) of the Hague **[Or. 5]** Protocol, the law applicable to the maintenance obligation may change. Under this provision, the applicable law is the law of the State of the creditor's current habitual residence as from the moment when the change occurs.

14 The concept of 'habitual residence' is universal and is also used in other acts of European and international law. This concept provides one of the connecting factors for jurisdiction in matters relating to maintenance obligations (Article 3 of Regulation No 4/2009) and in matters of parental responsibility (Article 8 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, 'Regulation No 2201/2003'). The provisions of the 1980 Hague Convention and of Regulation No 2201/2003 also define, by means of the concept of 'habitual residence', the legal situation of a child who has been wrongfully removed or retained. These considerations militate in favour of a uniform interpretation of this concept in all acts of European and international law.

15 In the case at issue, the maintenance creditors are minors. The concept of the habitual residence of minors has been repeatedly clarified by the Court of Justice of the European Union. The case-law in this respect indicates that habitual residence corresponds to the place which reflects some degree of integration by the child in a social and family environment, as evidenced in particular by the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State (judgments of 2 April 2009, C-523/17 and of 22 December 2010, C-497/10). The child's habitual residence should therefore refer to the place which, in practice, is the centre of that child's life (judgment of 28 June 2018, C-512/17).

16 In the light of the case-law referred to, the concept of habitual residence reflects essentially a question of fact (judgments of 8 June 2017, C111/17, paragraph 51, and of 10 April 2018, C-85/18, paragraph 49). Consequently, a change of habitual residence which, in the light of Article 3(2) of the Hague Protocol, justifies the application of the law of the State of that residence as applicable to the maintenance obligation, may be caused by a change **[Or. 6]** in the facts in a manner which indicates that the creditor's residence in the new State has achieved a degree of stability characteristic of habitual residence. In this context, the question arises as to whether such a stable life situation may also be achieved if a creditor who is a child has been wrongfully retained in the new State and, at the same time, the parent who retained him or her refuses to submit to a court ruling ordering the return of the child to the State in which he or she was habitually resident immediately prior to the wrongful retention.

17 This doubt can be resolved bearing in mind that the determination of habitual residence is a purely factual question. Under this approach, the fact that a child has been wrongfully retained should not affect the possibility of that child having his or her new habitual residence in the State of retention, since this depends solely on the assessment as to whether centre of that child's life has actually been transferred to that State. It cannot therefore be ruled out that also following a wrongful abduction, the State to which the abduction took place may become the child's habitual residence (judgment of the Court of Justice of the European Union of 1 July 2010, C-211/10, paragraphs 41 and 44). A similar position can also be found in the case-law of some national courts (compare, for instance, the judgment of the Austrian Oberster Gerichtshof (Supreme Court) of 27 June 2013, 1Ob 91/13h, and the judgment of the Polish Sąd Najwyższy (Supreme Court) of 31 August 2017, V CSK 303/17). This possibility also follows from Article 10 of Regulation No 2201/2003, which expressly states that another Member State may become the habitual residence of the child in case of wrongful removal or retention.

18 However, the case-law of the Court of Justice of the European Union may also point to a different solution to this problem. In the light of that case-law, court rulings which determine the State in which the child should reside are also relevant in establishing the child's habitual residence. It was therefore assumed that in the examination of the habitual residence in the State of retention, the time which has passed since the judgment that fixed the child's residence in the State of origin should not in any circumstances be taken into consideration (judgment of 9 October 2014, C-376/14, paragraph 56). One can similarly understand the position that, where a child who was habitually resident in a Member State has been wrongfully removed by one of the parents to another Member State, the courts of that other Member State **[Or. 7]** do not have jurisdiction to rule on an application relating to the determination of a maintenance allowance with respect to that child, in the absence of any indication that the other parent consented to his or her removal or did not bring an application for the return of that child (Order of 10 April 2018, C-85/18, paragraph 57). Article 3(b) of Regulation No 4/2009 provides that jurisdiction in such cases shall also lie with the courts of the place where the creditor is habitually resident.

19 Regulation No 4/2009 and the Hague Protocol govern jurisdiction and applicable law only in matters relating to maintenance obligations. Unlike Regulation No 2201/2003, these two instruments do not contain separate provisions governing the relationship between habitual residence and court jurisdiction in cases where the creditor is a child and has been wrongfully retained in another Member State. This may justify the conclusion that under Article 3(2) of the Hague Protocol, the wrongfulness of retention has no bearing on a child acquiring a habitual residence in the State of retention, and as a result the law of that State as the law of the new habitual residence may become applicable to the maintenance obligation from the moment the change occurs. Indeed, in determining the law applicable to maintenance obligations, no direct or indirect basis has been provided for disregarding the effects of a change in facts relating to the child's

habitual residence in the case where that change is due to wrongful retention. This matter can only be assessed differently where habitual residence is the connecting factor for the court's jurisdiction in a maintenance case, since under Article 9(d) of Regulation No 4/2009, jurisdiction in such a case also lies with the court which has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings. This opens the way for the application in the alternative in this respect of Article 10 of Regulation No 2201/2003, which ensures that the jurisdiction of the courts of the State where the child was habitually resident immediately prior to the wrongful removal or retention is maintained (to this effect, order of the Court of Justice of the European Union of 10 April 2018, C-85/18, paragraph 55). However, it is not possible to use a similar analogy if the determination of habitual residence is not intended to determine the jurisdiction of the court provided for in Article 3 of Regulation No 4/2009, but merely serves, under Article 3 **[Or. 8]** of the Hague Protocol, to determine the law applicable to a maintenance obligation.

20 Nevertheless, the interpretation of the concept of habitual residence must also take into account the purposes for which the 1980 Hague Convention was adopted. As stated in the preamble, its objective is to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence. This is confirmed by Article 1(a) of the 1980 Hague Convention, which states that its object is to ensure the prompt return of children wrongfully removed to or retained in any Contracting State. The solutions adopted in this respect aim to ensure and maintain the child's integration into the family and social environment in which he or she was immediately prior to the wrongful abduction or retention. This objective is also protected under European law as indicated in recital 17 of Regulation No 2201/2003, which states that in cases of wrongful removal or retention of a child, the return of the child should be obtained without delay.

21 Bearing in mind the objective of the 1980 Hague Convention, it may be assumed that the facts arising from wrongful retention and the subsequent failure to submit to a court ruling ordering the return of a child should not result in the acquisition of a new habitual residence in the State of retention and thus to a change under Article 3(2) of the Hague Protocol of the law applicable to the maintenance obligation. Such a change would defeat the purpose of the 1980 Hague Convention, which is to respond promptly to wrongful interference in a child's life, the aim of this response being to prevent the breaking of ties with the child's previous habitual residence and the establishment of relations in the State of retention. On the other hand, a change in the applicable law on the basis that a new habitual residence has been acquired in the State of retention where a ruling ordering the return of the child has not been enforced would be tantamount to confirming the child's integration into the environment of that State and into its legal space, which in turn would result in the wrongful failure to return the child to his State of origin being indirectly sanctioned. In order to prevent such consequences, it may be presumed that the fact that the court has ordered the return of the child is a fact which demonstrates that the child's residence in the

State of retention is only temporary in nature and, consequently, by reason of this temporary **[Or. 9]** nature, cannot be considered habitual residence. This would justify the conclusion that if a court orders the return of a child to the State where he or she was habitually resident immediately prior to the wrongful retention, the child's residence in the State of retention does not result, under Article 3(2) of the Hague Protocol, in a change in the law applicable to the maintenance obligation.

VI. Interpretation required for a ruling

22 In the case at issue, Polish courts have jurisdiction pursuant to Article 5 of Regulation No 4/2009, since the defendant entered the dispute by filing a defence in which he did not raise a plea of lack of jurisdiction.

23 In order to resolve the case, the law applicable to the maintenance obligation between the parties must be determined. In its judgment of 11 April 2019, the District Court in Piła applied Polish law in this respect. This law can only be applied if the applicants, despite their wrongful retention and the ruling ordering their return to the UK, acquired a habitual residence in Poland on account of their integration into the local social and family environment after their arrival in 2017, which justifies determining the applicable law under Article 3(2) of the Hague Protocol.

24 However, in the case at issue it is not possible to determine whether Polish law applies on the basis of the specific connecting factors provided for in Article 4 of the Hague Protocol, since this would require the assumption that the applicants' habitual residence is still in the UK. In this situation, there are no grounds for establishing that the applicants could not obtain a maintenance allowance from the defendant under the law of that State. Therefore, at the present stage of the proceedings it is not possible to apply Polish law under Article 4(2) of the Hague Protocol as the law of the forum, or under Article 4(4) of the Hague Protocol as the law of the State of common nationality of the parties. Nor is Article 4(3) of the Hague Protocol (where the creditor has seised the competent authority of the State where the debtor has his habitual residence) applicable to the case at issue, since the defendant's habitual residence is in the UK, which also rules out the possibility of using Polish law as the law of the forum.

[Or. 10]

25 Nor is the application of Polish law is justified by the parties' choice. Although this possibility is provided for in Article 7 of the Hague Protocol, there are no grounds for establishing that the parties have chosen Polish law as applicable in the manner set forth in Article 7(2) of the Hague Protocol before initiating the proceedings. Therefore, the Regional Court has taken steps of its own motion to determine whether the parties, solely for the purposes of these proceedings, wish to designate Polish law as applicable to the maintenance obligation between them. This would allow the adoption of Polish law as applicable under Article 7(1) of the Hague Protocol, since proceedings between the parties are conducted before a

Polish court. The applicants' submission of 25 August 2020 was accompanied by their mother's statement that for the purposes of these proceedings Polish law was selected as applicable to the dispute. In turn, the relevant request to the defendant, which was made twice, remained unanswered. In this situation it must be concluded that the defendant has not expressly chosen the applicable law of the State in which the proceedings concerning the maintenance obligation imposed on him are pending. On the other hand, the partial acceptance of claim submitted by the defendant in his defence cannot be classified as constituting a choice of law, as Article 7(1) of the Hague Protocol requires an express designation of applicable law, and therefore this law cannot be designated implicitly by way of accepting the claim. In addition, in his appeal, the defendant effectively revoked his acceptance of claim.

26 On the other hand, were it to be accepted that in the event of wrongful retention and where a court orders the child's return to the State of origin, the child cannot acquire a new habitual residence in the State of retention, the law applicable to the maintenance obligation in question would, under Article 3(1) of the Hague Protocol, be UK law as the law of the State in which the applicants' habitual residence may continue. In that case it would be necessary, as provided for in Polish procedural law, to amend the judgment appealed against by the defendant due to the application in that judgment of Polish law as applicable to the maintenance obligation between the parties.

[…]