

Case C-572/21

Request for a preliminary ruling

Date lodged:

16 September 2021

Referring court:

Högsta domstolen (Sweden)

Date of the decision to refer:

14 September 2021

Applicant:

CC

Defendant:

VO

C-572/21 -1

MINUTES

[...]

[...]

14/09/2021

[...]

PARTIES

Applicant

CC

[...]

Respondent

VO

[...]

SUBJECT-MATTER

Child custody and other issues

DECISION UNDER APPEAL

Decision of the Hovrätten över Skåne och Blekinges (Court of Appeal, Scania and Blekinge, Sweden) of 11 November 2020 [...]

The Högsta domstolen (Supreme Court, Sweden), which has provided the parties with the opportunity to express their views on the question as provisionally formulated, makes the following

DECISION

The Supreme Court decides to refer a request to the Court of Justice of the European Union for a preliminary ruling, in accordance with Annex A to these minutes.

The Supreme Court orders the proceedings to be stayed pending the preliminary ruling from the Court of Justice of the European Union.

[...]

ANNEX A TO THE MINUTES

[...]

REQUEST FOR A PRELIMINARY RULING

Background

- 1 CC and VO have a son together, M, who was born in 2011. CC has had sole custody of M since his birth. M lived in Sweden until October 2019, when he began to attend a boarding school in Russia.
- 2 On 13 December 2019 VO brought an action against CC. Among other things, he claimed that he should be awarded sole custody of M. In the alternative, VO requested that he and CC should have joint custody of M and that their son should be permanently resident with him. VO also sought interim measures to that effect.
- 3 CC contested the claims. Principally, she claimed on her own behalf that she should continue to have sole custody of M and, in the alternative, that she and VO

should have joint custody of the son. CC also sought interim measures to that effect.

- 4 In addition, CC claimed that the tingsrätten (District Court, Sweden) should dismiss VO's action as inadmissible in so far as it concerned custody and residence. In support of the claim that the action was inadmissible, she argued that M was habitually resident in Russia and that the Swedish courts consequently lacked jurisdiction to rule on questions relating to parental responsibility over M. According to CC, M had acquired habitual residence in Russia in October 2019. She claims that, even if he had not acquired habitual residence then, M had, subsequently acquired habitual residence there.
- 5 VO contested the claim raised by CC that the action was inadmissible. He argued that M was still habitually resident in Sweden and that, in any event, he was habitually resident in Sweden when the action was brought.

Examination of the question of jurisdiction by the District Court and the Court of Appeal

- 6 The District Court first determined whether the examination of the court's jurisdiction should be carried out in the light of the Brussels II Regulation¹ or the 1996 Hague Convention.²
- 7 The District Court noted that Article 61 of the regulation provides that that regulation takes precedence over the Convention if the child's habitual residence is in an EU Member State. According to that court, what counts when applying that provision is where the child had his or her habitual residence at the time the court was seised.
- 8 On that basis, and since M was not considered as having acquired habitual residence in Russia at the time the court was seised, the District Court considered that the question of jurisdiction should be examined under the Brussels II Regulation and that Article 8(1) of that regulation conferred jurisdiction on the Swedish courts to examine the case. CC's claim that the action was inadmissible was therefore dismissed.
- 9 The Court of Appeal upheld the District Court's decision that the Swedish courts have jurisdiction pursuant to Article 8(1) of the Brussels II Regulation.

Examination by the District Court and Court of Appeal of the claims for interim relief

¹ 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.

² The Convention of 19 October 1996 signed in the Hague on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.

- 10 As an interim measure, the District Court ordered that VO should have sole custody of M. The Appeal Court set that decision aside. CC therefore has sole custody of M. The case is pending before the District Court.

The case before the Supreme Court

- 11 CC claims that the Supreme Court should grant leave to appeal and dismiss VO's action as regards custody and residence. CC argues that jurisdiction should be examined in the light of the Hague Convention, which means that the Swedish courts do not have jurisdiction to hear the case. She has stated that she brought an action before a Russian court which held on 20 November 2020 that it had jurisdiction over all questions concerning parental responsibility over M.
- 12 CC has requested that the Supreme Court seek a preliminary ruling from the Court of Justice of the European Union regarding the interpretation of Article 61 of the Brussels II Regulation.
- 13 VO has maintained his position on the question of habitual residence and has submitted that it is vital that the ongoing custody proceedings are completed quickly.
- 14 The Supreme Court has not yet ruled on whether the appeal should be allowed to proceed in the case.

Legal context

The Brussels II Regulation

- 15 Under Article 8(1) of the Brussels II Regulation, the courts of a Member State are to have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised. Under Article 16, the court is normally deemed to be seised at the time when the document instituting the proceedings has been lodged with the court.
- 16 The principle of *perpetuatio fori* applies when implementing Article 8(1). Consequently, where a court having jurisdiction has been seised, it retains jurisdiction, even if the child acquires his or her habitual residence in another Member State in the course of the court proceedings. [...]
- 17 The relation between the Brussels II Regulation and the Hague Convention is governed by Article 61 of the regulation. It provides that the regulation takes precedence over the Convention, inter alia, if the child concerned has his or her habitual residence on the territory of a Member State.

The Hague Convention

- 18 Under Article 5(1) of the Hague Convention, the judicial or administrative authorities of the Contracting State of the habitual residence of the child have

jurisdiction to take measures directed to the protection of the child's person or property. The general rule laid down by Article 5(2) of the Convention is that where the child acquires a new habitual residence in another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

- 19 Unlike the Brussels II Regulation, the *perpetuatio fori* principle is not applied when implementing the Hague Convention. If a child acquires a new habitual residence in a new Contracting State, the jurisdiction of the first Contracting State thus ceases. [...]

Need for a preliminary ruling

- 20 Both the District Court and the Court of Appeal found that M had his habitual residence in Sweden at the time when the District Court was seised and that the Swedish courts therefore had jurisdiction to hear the case, in accordance with Article 8(1) of the Brussels II Regulation. M's connection with Russia has strengthened since that time, and a Russian court has found that it has jurisdiction to hear an action brought before it.
- 21 In those circumstances, the question of whether the principle of *perpetuatio fori* applies in the present case may be of some significance. The fact that that principle applies in relation to other Member States means that the jurisdiction of Swedish courts is not affected if a child acquires his or her habitual residence in another EU country in the course of the proceedings (see paragraph 16 [above]). The question is whether Article 8(1) of the Brussels II Regulation is to be applied in the same way where a child changes his or her habitual residence during the proceedings to a third country which is a party to the Hague Convention.
- 22 The case also raises questions relating to the interpretation of Article 61 of the Brussels II Regulation. As already noted, that article lays down that the regulation takes precedence over the Hague Convention when the child has his or her habitual residence on the territory of a Member State. However, that article does not make clear the point in time to be used as the basis for determining where the child is habitually resident (see the foregoing considerations concerning the corresponding question for the purposes of applying Article 8(1)). It is likewise not apparent whether that article is limited in its application to relations between Member States or whether it has a wider scope (see Article 60 [of the Brussels II Regulation]).
- 23 These issues have been examined by national courts in Member States. The French Cour de Cassation (Court of Cassation) has held that the French courts lost jurisdiction when the children concerned in the case changed their habitual residence from France to Switzerland during the proceedings (see judgment No 557 of 30 September 2020, 19-14.761, Cour de cassation, Première chambre civile (First Civil Chamber of the Court of Cassation), FR:CCASS:2020:C100557). Similar findings have been made by courts in Germany (see, for example, Oberlandesgericht Frankfurt am Main (Higher

Regional Court, Frankfurt am Main, Germany) of 5 November 2019, 8 UF 152/19, DE:OLGHE:2019:1105.8UF152.19.00; Saarländisches Oberlandesgericht (Higher Regional Court, Saarland, Germany) of 26 August 2015, 9 UF 59/15, DE:OLGSL:2015:0826: 9UF59.15.0A; Kammergericht Berlin (Higher Regional Court, Berlin, Germany) of 2 March 2015, 3 UF 156/14; and Oberlandesgericht Karlsruhe (Higher Regional Court, Karlsruhe, Germany) of 12 November 2013, 5 UF 140/11).

- 24 Varying views have been expressed in legal academic texts as regards how Article 8(1) and Article 61 should be interpreted in the current circumstances. Some writers maintain that the principle of *perpetuatio fori* applies even in the event of a change of habitual residence to a third country which is a party to the Hague Convention (see, for example, Blauwhoff, Richard and Frohn, Lisette in Lazić, Vesna (ed.), *Regulation Brussels II bis Guide for Application*, 2018, p. 86 et seq.), and Kruger, Thalia and Samyn, Liselot, ‘Brussels II bis: successes and suggested improvements’, *Journal of Private International Law*, 2016, p. 153). Others argue that the Brussels II Regulation does not prevail over the Hague Convention if the child acquires his or her habitual residence in a third country which is a party to the Convention (see, for example, de Boer, T.M., ‘What we should not expect from a recast of the Brussels II bis Regulation’, *Nederlands Internationaal Privaatrecht*, 2015, p. 15 et seq., and Magnus, Ulrich and Mankowski, Peter (eds) ‘*European Commentaries on Private International Law*’, Vol. IV, Brussels II bis Regulation, 2017, Art. 61 note 2).
- 25 In those circumstances, it cannot be considered that it is clear or established whether a court in a Member State retains jurisdiction in cases concerning parental responsibility if the child changes his or her habitual residence to a third country that is a party to the Hague Convention after a court in a Member State has been seised but before the case has been decided.

Request for a preliminary ruling

- 26 The Supreme Court asks the Court of Justice of the European Union to answer the following question by way of a preliminary ruling:

Does the court of a Member State retain jurisdiction under Article 8(1) of the Brussels II Regulation if the child concerned by the case changes his or her habitual residence during the proceedings from a Member State to a third country which is a party to the 1996 Hague Convention (see Article 61 of the regulation)?

Request for an expedited procedure

- 27 These proceedings concern the custody and residence of a boy born in 2011. They began in December 2019. It is vital that the question of jurisdiction should be resolved as soon as possible. The Supreme Court therefore requests that the request for a preliminary ruling be dealt with under the expedited procedure (Article 105 of the Rules of Procedure).