

**Case C-35/23**

**Request for a preliminary ruling**

**Date lodged:**

25 January 2023

**Referring court:**

Oberlandesgericht Frankfurt am Main (Higher Regional Court,  
Frankfurt am Main, Germany)

**Date of the order for reference:**

16 January 2023

**Applicant and appellant:**

Father

**Defendant and respondent:**

Mother

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[...]

**HIGHER REGIONAL COURT, FRANKFURT AM MAIN**

**DECISION**

In the family matter  
concerning parental custody of L

**Parties to the proceedings:**

1. Child L, residing in PL,
2. Lawyer  
Guardian *ad litem*,
3. Father, applicant and appellant, residing in CH

[...]

4. Mother, defendant and respondent, residing in PL

the [...] [designation of the Chamber] [the Higher Regional Court] Frankfurt am Main [...] [summary of the course of proceedings]

ruled as follows on 16 January 2023:

I.

The proceedings are stayed.

II.

The following questions are referred to the Court of Justice of the European Union ('CJEU') for a preliminary ruling on the interpretation of Articles 10 and 11 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 ('Brussels IIa Regulation'):

To what extent is the regulatory mechanism provided for in Article 10 and Article 11 of the Brussels IIa Regulation limited to proceedings conducted in the context of relations between EU Member States?

More specifically:

1. Does Article 10 of the Brussels IIa Regulation apply, with the effect that the jurisdiction of the courts in the former State of residence is retained, if the child had his or her habitual residence in an EU Member State (Germany) before his or her removal and the return proceedings under the Hague Convention on the Civil Aspects of International Child Abduction ('the HCAC') were conducted between an EU Member State (Poland) and a third State (Switzerland) and, in those proceedings, the return of the child was refused?

If question 1 is answered in the affirmative:

2. In the context of Article 10(b)(i) of the Brussels IIa Regulation, what requirements are to be imposed for the purposes of establishing continuing jurisdiction?

3. Does Article 11 (6) to (8) of the Brussels IIa Regulation also apply in the case of return proceedings implemented under the HCAC in the context of relations between a third State and an EU Member State, as a State of refuge, in so far as the child had his or her habitual residence in another EU member state before the removal?

Grounds:

I.

The proceedings concern questions relating to the scope of application of Articles 10 and 11 of the Brussels IIa Regulation.

The child's parents were married in Frankfurt am Main on 7 March 2013. The father has German nationality and the mother has Polish nationality. The child's parents initially lived together in Frankfurt am Main (Germany). On 29 June 2013, the father relocated to Switzerland for professional reasons.

Their common child, L, of German nationality and now subsequently acquired Polish nationality, was born on 12 November 2014 in X (Switzerland) and lived with the mother in Frankfurt am Main from January 2015 until early April 2016.

The father regularly visited the mother and child in Germany, and they also spent holidays together. On 11 May 2015, the Migration Office approved the father's application for family reunification. The mother was granted a temporary residence permit for Switzerland, which was valid until 31 December 2019.

On 9 April 2016, the mother moved to Poland with L. In doing so, the mother deregistered the entire family from the population register in Frankfurt, providing the father's address in Switzerland. In the summer of 2016, the mother applied for jobs in Switzerland. Since November 2016, the mother has been working in Poland for Zurich Insurance.

Initially, the father made visits to Poland. As of 17 April 2017, the mother refused the father access to their common daughter and enrolled their daughter in a kindergarten in Poland without the consent of the father. In late May 2017, the mother informed the father that she intended to remain in Poland with their daughter.

By application of 7 July 2017, the father applied via the Swiss Central Authority (Federal Office of Justice in Bern) for the return of the child to Switzerland. By decision of 8 December 2017, the Sąd Rejonowy dla Krakowa-Nowej Huty w Krakowie (District Court for Krakow-Nowa Huta in Krakow, Poland) rejected that application on the ground that the father had given indefinite consent for the mother's move to Poland with L. In addition, the court affirmed that there was a grave risk to the best interests of the child in the event of her return as contemplated in point (b) of the first paragraph of Article 13 of the HCAC. The father had admitted to the (one-time) use of force against the mother. The father's appeal against that decision was dismissed by decision of the Sąd Okręgowy w Krakowie (Regional Court in Krakow, Poland) dated 17 April 2018 (XII Ca 168/18).

By application of 27 September 2017, the mother initiated divorce proceedings in Poland. In October 2017, the mother deregistered L from the residents' register of the municipality X in Switzerland.

By decision of 5 June 2018, the Regional Court in Krakow provisionally entrusted the mother with parental custody of the common child and set the father's maintenance obligation.

The father did not continue to pursue an application that was lodged with the German Federal Office of Justice in Bonn on 29 June 2018, which sought the return of the child on the basis of the HCAC.

In the present proceedings, the father applied, under point I of an application dated 12 July 2018, which was lodged with the Amtsgericht Frankfurt am Main (Local Court in Frankfurt am Main, Germany) on 13 July 2018, for the transfer of sole parental custody of the child and, in the alternative, for the right to determine the place of residence.

Under point II of that application, the father also requested that the mother be ordered to return the child to the father in Switzerland as of the effective date of the decision.

The father submitted that, in the spring of 2015, the child's parents had agreed that they would continue to live with L in Switzerland in the future. In April 2016, the mother had decided to join her parents in Poland for a temporary period in order to assist them in building a house. The father had allegedly agreed to this but had expressly limited the period to two years, or three years at the maximum. In any case, it was allegedly agreed that the child was to attend kindergarten in Switzerland as of November 2017 at the latest.

The mother opposed the application.

The mother claims that the father consented to the move to Poland and provided assistance there in the process of obtaining a Polish passport. According to the mother's submissions, there had been no agreement on a time limited move to Poland, just as there had been no agreement on a move to Switzerland.

At first instance, the father was heard on 9 May 2019. The mother, who had also been summoned and had, by letter of 19 April 2019, requested the hearing beforehand by means of mutual legal assistance procedures, did not appear at that hearing.

During that hearing, the father stated that the parents had, in a telephone conversation held on 29 January 2016, discussed the issue that L was to stay in Poland for a maximum period of two to three years and was, in any event, to attend kindergarten in Switzerland.

By decision of 3 June 2019, notified on 7 June 2019, the Local Court dismissed the father's application for the transfer of parental custody.

In its reasoning, that court stated that the court seised lacked international jurisdiction. The father had failed to demonstrate that a suitably specific agreement had been made to the effect that the mother and child would reside in Poland on a time limited basis. His statements during the oral arguments on 9 May 2019 had contradicted his earlier submission contained in the written statement of 3 August 2018, from which it was apparent that, in May 2017, the parents were still engaged in open-ended communications concerning the duration of the stay in Poland.

The father considers that the Local Court in Frankfurt am Main has jurisdiction on the basis of Article 11(6), read in conjunction with Article 11(7), of the Brussels IIa Regulation, as well as on the basis of Article 10 of the Brussels IIa Regulation. In its decision of 8 December 2017, the District Court in Krakow found that the child had not had her place of residence in Switzerland prior to being resident in Poland because the child had been living with the mother in Germany.

The father is of the opinion that the principles applicable in the HCAC proceedings – according to which the person opposing the return of the child must prove that the person having the (joint) care of the person of the child had consented to or subsequently acquiesced in the removal or retention – apply also in the present proceedings. According to the father's submissions, the mother has not provided proof of consent for an unlimited period.

With respect to the substance of the case, the father further submits that a transfer of parental custody to the father would be in the best interests of the child. By acting unilaterally, the mother had effectively overridden the powers of the father, who held rights of custody, and had therefore not acted in the best interests of the child. In that regard also, the father refers to the principles applicable to HCAC proceedings.

By his appeal lodged with the Local Court on 8 July 2019, the father is continuing to pursue the application he made at first instance.

The mother requests that the appeal be dismissed.

The Chamber has repeatedly informed the father that his appeal lacks any prospect of success; this is because, even if it were to be assumed that the court had international jurisdiction, it could not be assumed that transferring parental custody to the father would be most conducive to the best interests of the child; Paragraph 1671 of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB').

Similarly, the Chamber drew the father's attention to the fact that, in the opinion of the Chamber, the application of Article 10 of the Brussels IIa Regulation is restricted to relations between EU Member States and that proceedings conducted

between Poland and Switzerland cannot trigger the effects of Article 10 of the Brussels IIa Regulation.

The father proposes that, in the context of preliminary ruling proceedings, the following questions be referred to the Court of Justice of the European Union in Luxembourg for a preliminary ruling:

[...]

[Questions for which the father proposes that clarification be sought. Partially included in the questions actually referred for a preliminary ruling, which are the only relevant questions]

In 2022, the father had contact with the child in Poland on the basis of a court order issued in that country.

## II.

### 1. International jurisdiction

As a general rule, the international jurisdiction of the German courts to hear parental custody proceedings initiated before 1 August 2022 stems from Article 8(1) of Council Regulation (EC) No 2201/2003 of 27 November 2003 ('the Brussels IIa Regulation'), unless priority rules laid down in Articles 9, 10 and 12 apply (Article 8(2) of the Brussels IIa Regulation). The successor regulation, Regulation (EU) 2019/1111 of 25 June 2019 ('the Brussels IIb Regulation'), applies only to proceedings initiated after 1 August 2022; [Article] 100(1) of the Brussels IIb Regulation. In the present proceedings, the Brussels IIa Regulation, in the version of Regulation (EC) No 2201/2003, continues to apply; Article 100(2) of the Brussels IIb Regulation.

According to Article 8(1) of the Brussels IIa Regulation, the relevant connecting factor for a finding of international jurisdiction is the place where the child is habitually resident (a), unless any priority provisions apply; in this case, Article 10 of the Brussels IIa Regulation (b.).

#### a. Article 8(1) of the Brussels IIa Regulation

According to Article 8(1) of the Brussels IIa 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.

Habitual residence is to be determined taking account of all the circumstances of fact specific to each individual case reflecting the integration of the child in a social and family environment as a centre of the child's life and existence; in this respect the duration, regularity and conditions of the stay on the territory of a State are relevant factors (CJEU, judgments of 2 April 2009, (C-523/07, paragraphs 42

and 44); of 22 December 2010, (C-497/10 PPU, paragraph 47); and of 8 June 2017, (C-111/17 PPU, paragraph 42).

L has lived in Poland with her mother since April 2016 and attended a daycare centre there since April/May 2017.

At the time when the application was lodged, in July 2018, L had established her habitual residence in Poland, which means that the German courts cannot have jurisdiction on the basis of Article 8(1) of the Brussels IIA Regulation.

b. Jurisdiction in cases of child abduction

Article 10 of the Brussels IIA Regulation contains a more extensive jurisdiction provision for cases of wrongful removal or retention of a child. In such cases, the international jurisdiction of the State of former habitual residence is retained, even if the child establishes a new habitual residence in another State, unless specific conditions are met.

In this respect, the scope of application of Article 10 of the Brussels IIA Regulation would first have to be established in the present proceedings.

According to the wording of Article 10 of the Brussels IIA Regulation ('Member State'), application of the provision is limited to relations between Member States bound by the Brussels IIA Regulation. In this regard, the CJEU has clarified that the fact that Article 10 of the Brussels IIA Regulation uses the expression 'Member State' and not the words 'State' or 'third State', and that it provides that the conferral of jurisdiction is subject to current or previous habitual residence 'in a Member State', while making no reference to the possibility of a residence being acquired in the territory of a third State, also implies that that article deals solely with jurisdiction in cases of child abductions from one Member State to another (CJEU, judgment of 24 March 2021, C-603/20 PPU, paragraphs 38-40).

The father considers that this condition is fulfilled since the present proceedings are being conducted in the context of relations between Germany and Poland and thus between two EU Member States bound by the Brussels IIA Regulation. L lived with her mother in Frankfurt and thus had her habitual residence in Germany.

The Chamber does not share this view; instead, it regards the application of Article 10 and Article 11 of the Brussels IIA Regulation in the context of implementation of a return procedure under the HCAC. Article 11 of the Brussels IIA Regulation contains additional procedural rules that apply in return proceedings under the HCAC, where both the State of origin and the State of refuge are EU Member States or are bound by the Brussels IIA Regulation [...] [reference to legal literature]. Whereas, on the one hand, the provisions contained in Article 10 and Article 11 of the Brussels IIA Regulation bolster the return mechanism provided for under the HCAC by limiting the scope of application of the exceptions and favouring the enforcement of a return order,

there are, on the other hand, special expediting provisions and provisions governing hearings, as well as protection and information requirements vis-à-vis the parties involved.

In its judgment of 24 March 2021, C-603/20 PPU, on the interpretation of Article 10 of Regulation (EC) No 2201/2003 (here: determination of residency in cases of child abduction), the CJEU stated that in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules (CJEU, judgment of 24 March 2021, C-603/20 PPU, paragraph 37). Accordingly, as regards the interpretation of Article 10 of the Brussels IIa Regulation, it follows clearly from the wording of that provision and from the interpretation set out in the Practice Guide for the application of Regulation No 2201/2003, published by the European Commission, that the rule concerns only conflicts of jurisdiction between Member States and not those between a Member State and a third State (CJEU, judgment of 24 March 2021, C-603/20 PPU, paragraph 29). At the same time, the CJEU emphasised that special grounds of jurisdiction are to be interpreted restrictively and cannot, therefore, give rise to an interpretation that goes beyond the situations expressly envisaged by the regulation concerned, or which results in only one part of its wording being taken into account so as to apply that part independently (CJEU, judgment of 24 March 2021, C-603/20 PPU, paragraphs 47 and 48).

Accordingly, it is the Chamber's understanding that Articles 10 and 11 of the Brussels IIa Regulation are not to be considered in isolation from each other.

In the return proceedings initiated at the father's request of 7 July 2017 via the Federal Office of Justice in Bern, which sought the return of the child to Switzerland, the requirements under Article 11 of the Brussels IIa Regulation governing the conduct of HCAC proceedings were not applied because Switzerland is not bound by the Brussels IIa Regulation. Accordingly, following the rejection of the application for return, the court in Poland also had no reason to act in accordance with Article 11(6) and (7) of the Brussels IIa Regulation and thus inform the courts or central authority in Germany of the order on non-return.

The second application for return, which the father lodged with the German Federal Office of Justice in Bonn shortly before the initiation of the present proceedings, cannot form the basis for continuity of jurisdiction under Article 10 of the Brussels IIa Regulation because those proceedings are not being pursued. It is the receipt of an application by a court that is decisive in that regard. According to the father's statements, no further return proceedings have been initiated in Poland.

Moreover, the admissibility of a second HCAC application appears doubtful in principle, since the final decision of the court of appeal in Poland is likely to preclude the initiation of further HCAC proceedings on the same subject matter. The decisions of the Polish courts also contain remarks on the issue of the wrongful retention of the child.

## 2. Application of Article 10 of the Brussels IIa Regulation

If, in principle, Article 10 of the Brussels IIa Regulation applies also to the situation at issue in the present case, a change of jurisdiction (in the absence of acquiescence by both holders of rights of custody, point (a)) occurs only when the child has acquired a new habitual residence, has resided in the new State of residence for a period of at least one year, has settled in his or her new environment, and at least one of the situations referred to under point (b) (i) – (iv) has been met. Point (i) is at issue in the instant case; according to that provision, continued jurisdiction ceases if, within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being wrongfully retained (Article 10(b)(i) of the Brussels IIa Regulation).

Accordingly, the father had to lodge the application for return within one year of acquiring knowledge, or of occurrence of the wrongful situation, in order for the international jurisdiction of the local courts to be maintained.

The father claims that he consented to the mother residing with L in Poland on a time limited basis. After the expiry of that time limit, the mother had not moved to Switzerland with L, contrary to the agreement alleged by the father.

In this regard the father submits that the child has been wrongfully retained in Poland since 24 May 2017 at the latest (attendance at a daycare centre). The father also maintains that the parents had made an agreement that the child was to attend a daycare centre in Switzerland as of November 2017.

The father's application for custody was lodged with the Local Court on 13 July 2018. The one-year time limit laid down in Article 10(b) (i) of the Brussels IIa Regulation would be complied with only if the later date – that is to say, the date of admittance to the daycare facility – were to be applied. On the basis of the submission lodged in the return proceedings (occurrence of the wrongful situation upon enrolment at a daycare centre as of May 2017), the application was not received within the one-year time limit laid down in Article 10(b) (i) of the Brussels IIa Regulation.

The question at issue here is whether the father is precluded from making further submissions as a result of the HCAC proceedings being conducted in Poland or if, in the context of Article 10 of the Brussels IIa Regulation, later start dates may also be applied. This would mean that, upon conclusion of the return proceedings, it would be possible to delay the start date for commencement of the one-year time limit, which is ultimately inconsistent with the intention of obtaining a prompt clarification of the rights of custody in line with the best interests of the child.

Furthermore, the parents disagree on the question of whether the mother's stay in Poland with the child had been subject to a time limit. The mother denies that such a time limit had been agreed upon.

With respect to the question concerning the requirement to state the case and the burden of proof, the father refers to the principles applicable to the proof of consent or agreement in HCAC proceedings, according to which the parent who opposes the return must establish that the applicant consented to or (subsequently) acquiesced in the removal (see Article 13(1)(a) of the HCAC).

In the Chamber's opinion, the special rules governing the burden of proof that apply in HCAC proceedings cannot be transposed to the present proceedings. The present proceedings do not concern the return of the child in the context of HCAC proceedings, but rather a transfer of parental custody, which is subject to the principles of procedural law that are generally applicable to custody proceedings. The conditions laid down in Article 10 of the Brussels IIa Regulation must be examined independently by the courts in the former State of residence (CJEU, judgment of 22 December 2010, Case C-497/10 PPU, paragraphs 62 et seq.). They are not bound by the decision handed down in the new State of residence on the application for return under the HCAC. In this respect, the principle of ex officio inquiry set forth under Paragraph 26 of the Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction) applies, which also requires that the international jurisdiction is to be examined ex officio (Bundesgerichtshof (Federal Court of Justice (Germany) [...] [reference to legal journal] [Decision 17 February 2010 – XII ZB 68/09]). In that regard, in the context of application proceedings such as the present application for transfer of parental custody pursuant to Paragraph 1671 of the BGB, the parties are subject to a certain requirement to substantiate the facts that are favourable to them. Thus, contradictions in the father's submission must also be assessed accordingly by the court.

### 3. Application of Article 11(8) of the Brussels IIa Regulation

In the event that an order of non-return of the child is issued in the HCAC proceedings on the basis of Article 13 of the HCAC, the provisions laid down in Article 11 (6) to (8) of the Brussels IIa Regulation provide that custody proceedings are to be initiated in the former State of residence. In particular, parental custody decisions falling within the scope of application of Article 11 of the Brussels IIa Regulation that are rendered following an order of non-return of the child in HCAC proceedings, and which include the surrender (return) of the child, are subject to privileged enforcement in accordance with Article 11(8) of the Brussels IIa Regulation and Article 40(1)(b), read in conjunction with Article 42 of the Brussels IIa Regulation.

The father considers that a decision of the Chamber on parental custody that is associated with an order for the return of the child is subject to Article 11(8) of the Brussels IIa Regulation and hence to the rules on privileged enforcement.

However, in the opinion of the Senate, the application of Article 10 (6) to (8) of the Brussels IIa Regulation necessarily presupposes that HCAC proceedings have been conducted in the context of relations between two Member States bound by the Brussels IIa Regulation, which means that Article 11(8) of the Brussels IIa Regulation would not apply in the present case. The purpose of Article 11(8) of the Brussels IIa Regulation is to facilitate the enforcement of custody decisions rendered following HCAC proceedings that are subject to the specific requirements laid down in Article 11 (2) to (5) of the Brussels IIa Regulation. As previously explained, the return proceedings conducted in the context of relations between Switzerland and Poland did not fall within the scope of application of the Brussels IIa Regulation. In this respect, the decisive factor is not the father's place of residence but the question of the mutual commitments and obligations of the States under the Brussels IIa Regulation.

[...]

[...]

[Signatures; certification as a true copy]

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