

Anonymised version

Translation

C-381/23 – 1

Case C-381/23 [Geterfer]ⁱ

Request for a preliminary ruling

Date lodged:

19 June 2023

Referring court:

Amtsgericht Mönchengladbach-Rheydt (Germany)

Date of the decision to refer:

19 June 2023

Applicant:

ZO

Defendant:

JS

[...]

Amtsgericht Mönchengladbach-Rheydt (Local Court, Mönchengladbach-Rheydt, Germany)

Familiengericht (Family Court)

Order

In the family-law case

1. ZO, [...] Mönchengladbach,

applicant,

ⁱ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

[...]

v

2. JS, [...] Belgium,

defendant,

[...]

The Amtsgericht Mönchengladbach-Rheydt (Local Court, Mönchengladbach-Rheydt, Germany)

ordered as follows on 19 June 2023:

[...]

The order for reference of 9 March 2023 is amended as follows:

The case is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU concerning the question whether, according to 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, there is *lis alibi pendens* with the same subject matter if there are proceedings concerning child maintenance in Belgium between the child's father and the child's mother while proceedings concerning child maintenance have been brought at a later stage by the child, who has in the meantime come of age, against the child's mother in Germany.

Facts:

The father of the child and the defendant were married to each other. The marriage was terminated by divorce on 29 November 2010.

On 29 November 2001, the applicant was born of the marriage.

On 5 May 2000, a son was also born of the marriage.

Following the separation, the children first of all lived with their mother in Belgium.

The applicant and her brother are registered at their father's address and at their mother's address in [...] Belgium. During the week, the applicant is in fact resident at a boarding school [...]

Since April 2019, the applicant's brother has been wholly resident at the defendant's address, after also having resided at a boarding school.

By judgment of the Seventh Chamber of the Familiengericht, Gericht Erster Instanz Eupen (Seventh Chamber of the Family Court, Court of First Instance, Eupen, Belgium) of 17 December 2014, [...] the children's father was required to pay maintenance to the children's mother of EUR 358 per month for each child.

By judgment of the Seventh Chamber of the Family Court, Court of First Instance, Eupen, of 31 August 2017, [...] the 'principal right of custody' over the applicant and her brother was transferred to the father of the children.

Child maintenance proceedings (between the defendant and the children's father) are pending before the Court of First Instance, Eupen, under reference No 362/14. These proceedings were suspended since the summer of 2018 and were resumed by the defendant by a letter of 17 August 2021.

The applicant claims that she resides primarily with her father during school holidays and time away from school. She states that she refuses to have contact with her mother.

By way of an action by stages, the applicant requests that the defendant be required:

1. to provide information on her income and financial position for the period from November 2017 to October 2018 and, in order to substantiate the information, to provide the following documents:

- income tax declaration together with all associated annexes for 2015, 2016 and 2017 as well as income tax assessments for 2015, 2016 and 2017 together with any notices of adjustment

In the event of income received from employment:

- submission of salary statements for the period from November 2017 to October 2018

In the event of income received from leasing or letting of immovable property:

- revenue/net income statements for 2015, 2016 and 2017

In the event of income received from capital gains:

- submission of the respective bank certificates for 2015, 2016 and 2017

In the event of receipt of social benefits:

- submission of the current notification of benefits

2. at the second stage, if necessary, to make a statutory declaration, if necessary under oath, concerning the accuracy and completeness of the information provided by the defendant

3. at the third stage, to pay the applicant maintenance arrears, to be quantified, from November 2017 until the moment at which the proceedings were initiated as well as current maintenance, to be quantified, from the moment at which the proceedings were initiated.

The defendant contends that the applications should be dismissed.

The defendant is of the view that the Local Court – Family Court – Mönchengladbach-Rheydt has neither international nor territorial jurisdiction.

She claims that the applicant is resident at a boarding school and stays with friends at the weekends. Until approximately one year ago, the applicant regularly spent every second weekend with the defendant in Belgium. In addition, the defendant alleges *lis alibi pendens* and that the applicant's application is therefore inadmissible.

By order of 3 November 2021, the court had dismissed the application in its entirety on the ground of *lis alibi pendens* in respect of child maintenance proceedings in Belgium. In that regard, the court found, the subject matter of the disputes is identical. It is true that German law separates the right to maintenance into a claim to maintenance of under-age children and maintenance of children who have come of age. However, both claims are submitted by the applicant in the present proceedings.

Pursuant to Article 203(1) of the Belgian Code Civil, parents are under an obligation to maintain their children until they have completed their education, even beyond the end of minority when they attain 18 years of age (Article 388 of the Belgian Civil Code). Without prejudice to the child's rights, there is, in that regard, a mutual obligation to contribute on the part of the parents (Article 203a of the Belgian Civil Code).

While it is true that the parties to both sets of proceedings are not identical (here: the child who has attained the age of majority/in Belgium: the father of the child), the subject matter of the proceedings is identical, with the result that there is a risk of irreconcilable judgments.

By letter of 30 November 2021, the applicant appealed against that decision.

By order of 26 April 2022, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) set aside the decision of the present court and referred the case back to the present court for a fresh hearing and decision.

The reason given for that referral was that the subject matter of the proceedings in Belgium differed from the subject matter of the present proceedings.

Relevant provisions:**National provisions: Paragraph 261 of the ZPO (Zivilprozessordnung; German Code of Civil Procedure) (Lis pendens)**

- (1) By the bringing of the complaint, the dispute becomes pending.
- (2) A claim lodged only in the course of the proceedings becomes pending at that point in time at which the claim was lodged in the hearing or at which a written pleading in accordance with the requirements of point 2 of Paragraph 253(2) has been served.

(3) Once the dispute is pending, this will have the following effects:

- **1. For as long as the dispute is pending, none of the parties may bring the dispute before another court or tribunal;**
- 2. The jurisdiction of the court hearing the case will not be affected by any change to the circumstances giving rise to its jurisdiction.

Provisions of EU law**Article 12 of Regulation (EC) No 4/2009 of 18 December 2008 (Lis pendens)**

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Reasons for the request for a preliminary ruling:

On the basis of the following considerations, the case is referred to the Court of Justice of the European Union for a decision pursuant to the second paragraph of Article 267 TFEU:

The question whether there is *lis alibi pendens* is relevant to the resolution of the dispute, since the maintenance application in this case could, pursuant to Article 12(2) of Regulation (EC) No 4/2009 of 18 December 2008, be refused directly without suspension in the event of *lis alibi pendens*.

Regulation (EC) No 4/2009 of 18 December 2008 is applicable to the present proceedings.

According to its Article 1, this regulation is to apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity. At issue in the present case are child maintenance claims which are asserted against the mother

by the applicant who has since attained the age of majority, these being claims which had previously been asserted by the father of the child during the applicant's minority.

In the alternative, under point (b) of Article 3 of Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, jurisdiction is to lie with the Member State for the place where the creditor (here: 'the applicant') is habitually resident. This is likely to be Germany on account of the stay at the boarding school, even if the applicant occasionally resides in Belgium, a matter which is disputed.

Where, pursuant to Article 12 of this regulation, proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised must decline jurisdiction in favour of that court.

The present court takes the view that the decision of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) is contrary to EU law. The present case concerns the question whether there is *lis alibi pendens* in accordance with Article 12 of Regulation (EC) No 4/2009 of 18 December 2008. In that regard, in the view of this court, the Belgian proceedings and the present proceedings involve the same parties. In this respect, pursuant to Article 12, the roles of the parties in the respective proceedings are not relevant. The EU Court of Justice regards two different persons as being 'one and the same party' if there is such a degree of identity between their interests that a judgment delivered against one of them would have the force of *res judicata* as against the other (EU Court of Justice judgment of 19 May 1998, *Drouot assurances*, C-351/96, EU:C:1998:242, paragraph 19). If the case-law of the EU Court of Justice on the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters) were applied to Regulation (EC) No 4/2009, the parties to the proceedings for child maintenance are also deemed to be the same if the child is not a party to the proceedings but a parent is asserting the claim for child maintenance as a party to the proceedings, in so far as the judgment is also effective for and against the child [...] [reference to academic writing]. That is, in the view of the present court, the case here.

The present court considers that the subject matter of the actions is also the same. The action for performance seeking payment of maintenance and an action by stages for payment of that maintenance have the same content [...] [reference to academic writing].

Notification of legal remedies:

The present order is not amenable to appeal.

[...]

WORKING DOCUMENT