Anonymised version

Case C-372/22

Request for a preliminary ruling

Date lodged:

9 June 2022

Referring court:

Tribunal d'arrondissement (Luxembourg)

Date of the decision to refer:

8 June 2022

Applicant:

CM

Defendant:

DN

[…] ***Judgment*** […] ***of 8 June 2022***

[…]

B e t w e e n:

[…] **CM**, born on […] 1979 in […] (France), resident at […] Luxembourg, […],

Applicant,

[…] **a n d:**

[…] **DN**, born on […] 1978 in […] (France), resident at […] (France), […]

Defendant […],

[…]

PROCEDURE

Having regard to the judgment […] of 1 December 2020, which stayed proceedings pending a ruling from the family judge of the Tribunal judiciaire de Nanterre (Court of Nanterre, France) as to whether that court had international territorial jurisdiction […].

[…]

Subject matter of further submissions

[…] The family judge listed a hearing for 11 May 2022 for submissions limited to the issues of *lis pendens* and international territorial jurisdiction.

[…] CM submits that the present court has international territorial jurisdiction under Article 9(1) 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 (‘Regulation (EC) No 2201/2003’), on the basis that the relevant time for determining whether a court has jurisdiction, under that article, is the time of the lawful move, and that the date of the judgment is irrelevant, and thus, given that the judgment […] of 12 June 2020 […] set the date of the move as 30 August 2020 […] [that he was] entitled to bring the matter before the family judge in Luxembourg at any time up to 30 November 2020. Having regard to the decisions handed down in France, CM submits that there is no longer any *lis pendens* for the purposes of Article 19 of Regulation (EC) No 2201/2003. In relation to Article 15 of that regulation, CM submits that Article 9(1) takes priority, given that Article 8 makes express reference to it. Furthermore, the requirements of Article 15(1) are cumulative and are not met in the present case, inasmuch as the family judge of the present court is familiar with the facts of the case and the children involved, and is therefore best placed to give substantive judgment. Given that the French court has declared that it does not have jurisdiction, it would amount to a form of denial of justice to apply Article 15 in the present case.

[…] DN also submits that, in the light of the decisions handed down in France, there is no longer a *lis pendens*. She submits, however, that Article 15 of Regulation (EC) No 2201/2003 should apply in the present case, and has formally indicated her acceptance of a transfer, as required by the closing words of paragraph 2 of that article. DN submits that all the relevant requirements of Article 15(3) are met in the present case, such that the French courts are better placed to hear the case than the Luxembourg courts.

Facts and background

By judgment […] of 12 June 2020, the family judge ruled as follows, on the application of the common children, […] AF and […] BG:

‘ (...) the common children, […] *AF, born on* […] *2009, and* […] *BG, born on* […] *2010, shall be legally domiciled and habitually resident with* […] *DN, with effect from 31 August 2020,*

[...] CM shall have rights of access and the right to have the common children, [...] AF and [...] BG, to stay, in accordance with the following arrangements, with effect from 31 August 2020, unless the parties come to a better agreement:

[…] [arrangements for the exercise of rights of access]

That judgment has become final […].

It should be observed that in the present case, following the judgment […] of 1 December 2020, the family judge of the present court stayed the proceedings, pursuant to Article 19 of Regulation (EC) No 2201/2003 *and* Article 12 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, pending a ruling from the family judge of the Tribunal judiciaire de Nanterre (Court of Nanterre, France) as to whether that latter court had international territorial jurisdiction […].

By judgment of 17 September 2021, the family judge of the Tribunal judiciaire de Nanterre (France) ruled as follows, pursuant to Articles 8 and 9 of Regulation (EC) No 2201/2003:

‘(...)- that on 14 October 2020, which was within three months of the date on which the children lawfully moved, […] *CM made an application to the tribunal d’arrondissement de Luxembourg (District Court, Luxembourg) to modify the arrangements for him to have access to the children and have them to stay* […]

- that it does not appear in any way that […] *CM accepted the jurisdiction of the French courts.*

Consequently, in the light of the legislation referred to above, the tribunal judiciaire de Nanterre (Court of Nanterre) does not have territorial jurisdiction.

[…]’

By judgment of 3 March 2022, the Cour d’appel de Versailles (Court of Appeal, Versailles, France) declared that ‘*[it had not been] seised of the case by the [appeal] filed by* […] *DN* […]*’.*

[…]

Reasons for the decision

The judgment […] of 12 June 2020 states:

- inter alia, the following reasons, based on the interests of the children […] AF and […] BG, for deferring their change of legal domicile and habitual residence: *'in order to enable the children to complete their school year in Luxembourg and to minimise the impact on any plans already made for the summer holidays, it is appropriate to order that that change shall take place on 31 August 2020, which is the day before the new school year begins in […] (France)'*;

[…]

As a result of that deferment, the date on which […] CM's application was filed with the present court, which was 14 October 2020, or six days after […] DN's application had been filed in Nanterre (France), was undoubtedly less than three months after the date on which children *actually* moved, which was 30 August 2020, but, at the same time, was over four months after delivery of the judgment […] of 12 June 2020, which made the *determination* as to the move, and which subsequently became final […].

The Court of Justice of the European Union (CJEU) has ruled, in relation to Article 15 of Regulation (EC) No 2201/2003:

- *'Article 15(1) of Regulation No 2201/2003 must be interpreted as meaning that: [(a)] in order to determine that a court of another Member State with which the child has a particular connection is better placed, the court having jurisdiction in a Member State must be satisfied that the transfer of the case to that other court is such as to provide genuine and specific added value to the examination of that case, taking into account, inter alia, the rules of procedure applicable in that other Member State; [(b)] in order to determine that such a transfer is in the best interests of the child, the court having jurisdiction in a Member State must be satisfied, in particular, that that transfer is not liable to be detrimental to the situation of the child'* (CJEU, 27 October 2016, Case C-428/15);

- *'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, must be interpreted as not applying in circumstances, such as those in the main proceedings, in which both courts seised have jurisdiction as to the substance of the matter under Articles 12 and 8, respectively, of that regulation'* (CJEU, 4 October 2018, Case C-478/17).

In the present case, the four criteria which (given that the fifth criterion, which relates to '*measures for the protection of the child*', is not applicable in the present case) are relevant, under Article 15(3) of Regulation (EC) No 2201/2003, in determining whether there is a particular connection, and which are alternative criteria under that regulation, are all met in relation to […] AF and […] BG:

(a) since the move on 31 August 2020, France has clearly become the habitual residence of the children,

(b) the children had formerly been habitually resident in France, the inter partes judgment […] of 21 January 2019 stating in that regard that *'both parties are originally from the Paris area, and the family were resident in that area until they moved to Luxembourg, with* […] *CM moving on 1 July 2015 and* […] *DN* […] *at the end of August 2015'*.

(c) the two children are French nationals,

(d) their mother, […] DN, is habitually resident in France.

Furthermore, having regard to the facts of the case, the family judge of the present court considers that any measure of inquiry – and it must be regarded as likely that such measures would be needed, given the age of the children and the fact that it has been almost two years since the judgment […] of 12 June 2020 was delivered – would either require the application of Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (which becomes applicable on 1 July 2022), or create difficulties associated with the geographical separation (for example, in hearing the children pursuant to Article 388-1 of the Civil Code). Lastly, supposing that […] CM's application concerning the arrangements for exercising his rights of access and right to have the children to stay is admissible, the French family judge would be best placed to assess the factual situation of the children – who, since 30 August 2020, have been habitually resident in France – and to make an order, if necessary, making the relevant arrangements in the light of the social setting and the options actually presented; there would thus be *'genuine and specific added value'* as referred to in the judgment of the CJEU of 27 October 2016, cited above.

In declaring a lack of territorial jurisdiction, the family judge of the Tribunal judiciaire de Nanterre (Court of Nanterre, France) was implicitly but necessarily holding that Article 9(1) of Regulation (EC) No 2201/2003, which is expressed '*by way of exception to Article 8*' of that regulation, applied so as to exclude that article, […][which lays down] a general rule of jurisdiction […] which, under the judgment of the CJEU of 4 October 2018, prevents the application of Article 15, which reads '*by way of exception …*'.

In the circumstances set out above, it is necessary in the present case to seek clarification, with a view to considering the pleas advanced by the parties and

ruling on international territorial jurisdiction, as to the interaction between Article 9(1) of Regulation (EC) No 2201/2003 and Articles 8 and 15 of that regulation. It is also necessary to ensure that the residual jurisdiction provided for by Article 9(1) of Regulation (EC) No 2201/2003 is not, potentially, being used, on the facts and by virtue of a broad interpretation, as a fulcrum for purely tactical considerations (relating for example to procedural time limits and preliminary requirements, which vary from Member State to Member State, or the benefit of the rule of ad hoc jurisdiction contained in Article 3(d) 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– which would seem, in the present case, to be the only basis on which the Luxembourg family judge could have international territorial jurisdiction in that field).

It is therefore appropriate to stay proceedings and make a reference to the Court of Justice of the European Union for a preliminary ruling on the questions set out in the operative part of this judgment […].

ON THOSE GROUNDS:

[…] stays the proceedings and refers the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Does Article 9(1) 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 apply:

   (a) to an application to modify rights of access as defined by Article 2(10) of that regulation, made by a person granted such rights by a judicial decision which, in the interests of the children, was not to take effect until a future time, but which became final and has the status of res judicata, delivered in the State in which the children were formerly habitually resident more than four months before the application is brought before the court on the basis of Article 9(1);

   (b) so as to exclude, if it does so apply, the general rule of jurisdiction contained in Article 8 of that regulation,

   notwithstanding that recital 12 of that regulation states that *'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[; t]his 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 …'*?

2. If question 1 is answered in the affirmative, does the jurisdiction which thus exists under Article 9(1) 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, which is expressed to be *'by way of exception to Article 8'* of that regulation, preclude the application of Article 15 of the same regulation, which is expressed to apply *'by way of exception'* and where it *'is in the best interests of the child'*?

[…]