Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 16 April 2015 [1]

Case C-184/14

A
v
B

(Request for a preliminary ruling from the Corte suprema di cassazione (Italy))

(Best interests of the child — Charter of Fundamental Rights of the European Union — Article 24(2) — Regulation (EC) No 4/2009 — Jurisdiction in matters relating to maintenance obligations — Request relating to a maintenance obligation in respect of children raised, as ancillary to separation proceedings, in a Member State other than that in which the children are habitually resident — Regulation (EC) No 2201/2003– Jurisdiction in matrimonial matters and matters of parental responsibility))

1. For the first time the Court is being called to interpret Article 3(c) and (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. [2]

2. Under Article 3(c) and (d) of Regulation No 4/2009, in matters relating to maintenance obligations in Member States, jurisdiction lies with the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, or with the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility, if the matter relating to maintenance is ancillary to those proceedings.

3. In the case brought before the Court, the Corte suprema di cassazione (the Italian Court of Cassation) asks the Court whether a request for child maintenance, raised in the context of separation proceedings, may be regarded as ancillary both to proceedings concerning personal status and to proceedings concerning parental responsibility. Such a possibility would have the consequence of establishing jurisdiction in two courts of different Member States, namely the Italian court hearing proceedings concerning the legal separation of the spouses and the United Kingdom court which has jurisdiction to deal with proceedings relating to parental responsibility.

1 — Original language: French.

2 — OJ 2009 L 7, p. 1, corrigendum at OJ 2011 L 131, p. 26.

4. In this Opinion, I shall set out the reasons why I think that Article 3 of Regulation No 4/2009 must be interpreted as meaning that, if there are main proceedings concerning the legal separation of spouses during which a request relating to child maintenance obligations is raised, the court dealing with those main proceedings will, generally, be the court having jurisdiction to deal with that request concerning maintenance obligations. However, this general jurisdiction must give way when the best interests of the child so require. Therefore, taking into consideration the best interests of the child imposes, in this case, a duty to determine territorial jurisdiction by the criterion of proximity.

I – **The legal framework**

A – *The Charter*

5. Article 24(2) of the Charter of Fundamental Rights of the European Union [3] states that '[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.'

B – *Regulation No 4/2009*

6. The matter of maintenance obligations is far from new within the European Union, since, from as early as the end of the 1950s, applicable conventions have existed between a number of founding Member States of the European Union. [4] Subsequently, those who negotiated the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [5] desired that it should constitute an extension of those conventions. [6] Article 5(2) of the Brussels Convention provided that a person domiciled in a Member State could, in another Member State, be sued, in matters relating to maintenance, in the courts for the place where the maintenance creditor was domiciled or habitually resident or, if the matter was ancillary to proceedings concerning the status of a person, in the court which, according to its own law, had jurisdiction to entertain those proceedings, unless that jurisdiction was based solely on the nationality of one of the parties.

7. This rule was subsequently included in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. [7]

8. In order to maintain and develop a space of freedom, security and justice, the European Union has equipped itself with instruments derived, in particular, from the domain of judicial cooperation in cross-border civil matters. The European Union thus adopted Regulation No 4/2009, which seeks to make it easier to obtain a decision in another Member State concerning maintenance orders, without any further formalities. [8]

9. Recital 44 in the preamble to Regulation No 4/2009 states that that regulation is intended to replace, in matters of maintenance obligations, Regulation No 44/2001. Regulation No 4/2009 therefore constitutes a '*lex specialis*' in relation to Regulation No 44/2001.

3 — 'The Charter'.

4 — The New York Convention of 20 June 1956 on the recovery abroad of maintenance and the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children.

5 — OJ 1978 L 304, p. 36. Convention as amended by the successive conventions relating to the accession of new Member States to that convention (the Brussels Convention).

6 — See pages 24 and 25 the Jenard Report on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 1).

7 — OJ 2001 L 12, p. 1. See Article 5(2) of Regulation No 44/2001.

8 — See recital 9 in the preamble to Regulation No 4/2009.

10. In accordance with its Article 1(1), Regulation No 4/2009 is to apply 'to maintenance obligations arising from a family relationship, parentage, marriage or affinity,' recital 11 in the preamble stating that the notion of 'maintenance obligations' should be interpreted autonomously.

11. To that end, Regulation No 4/2009 establishes a system of common rules, inter alia, in matters of conflicts of jurisdiction, by establishing general jurisdictional rules governing matters of maintenance obligations.

12. Article 3 of Regulation No 4/2009 thus states as follows:

'In matters relating to maintenance obligations in Member States, jurisdiction shall lie with:

(a) the court for the place where the defendant is habitually resident, or

(b) the court for the place where the creditor is habitually resident, or

(c) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or

(d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.'

13. Finally, it should be noted that the United Kingdom of Great Britain and Northern Ireland, which did not participate in the adoption of Regulation No 4/2009, did, however, subsequently accept the application thereof. [9]

C — *Regulation (EC) No 2201/2003*

14. The objective of Regulation (EC) No 2201/2003 [10] is to create, within the area of freedom, security and justice, uniform rules of international jurisdiction in matters of divorce, legal separation or marriage annulment, and in matters of parental responsibility.

15. In accordance with Article 1(3)(e) of Regulation No 2201/2003, that regulation does not apply to maintenance obligations.

16. Article 3(1)(b) of Regulation No 2201/2003 provides that jurisdiction in matters relating to divorce, legal separation and marriage annulment lies with the courts of the Member State of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of their common 'domicile'.

17. Recital 12 in the preamble to Regulation No 2201/2003 states:

'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. This 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 or pursuant to an agreement between the holders of parental responsibility.'

9 — See, in this regard, Commission Decision 2009/451/EC of 8 June 2009 on the intention of the United Kingdom to accept Regulation No 4/2009 (OJ 2009 L 149, p. 73).

10 — Council Regulation 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 (OJ 2003 L 338, p. 1).

18. Thus, under Article 8(1) of Regulation No 2201/2003, '[t]he courts of a Member State shall 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.'

II – **The facts of the dispute in the main proceedings and the question referred for a preliminary ruling**

19. Mr A and Ms B, both of Italian nationality, are married and have two children of minor age, also of Italian nationality. The four members of the family have their place of normal residence in London (United Kingdom), where the children live with their mother.

20. Mr A filed an application on 28 February 2012 with the Tribunale di Milano (District Court, Milan) (Italy) for a declaration of separation from his spouse on the basis of the latter's fault, and for the right to custody of their two children to be shared between the spouses, with their place of residence being fixed with their mother. Mr A also proposes to pay a monthly allowance of EUR 4 000 for the maintenance of the children.

21. Ms B lodged a counterclaim before the Tribunale di Milano, seeking a declaration of separation on the basis of the exclusive fault of Mr A, and requesting that she be granted custody of the children and receipt of a monthly allowance of EUR 18 700. In addition, Ms B contested the jurisdiction of the Italian court in matters of rights to custody, fixing the children's place of residence, their maintenance of relationships and contacts and the contribution to their maintenance. She takes the view that, as the spouses have always lived in London and the children were born there and are resident there, the United Kingdom courts, in accordance with Regulation No 2201/2003, have jurisdiction to entertain proceedings relating to these matters.

22. By order of 16 November 2012, the Tribunale di Milano held that the Italian court did indeed have jurisdiction in the matter of the application for legal separation, in accordance with Article 3 of Regulation No 2201/2003. However, with regard to the requests relating to parental responsibility in respect of the two children of minor age, that court, following Article 8(1) of Regulation No 2201/2003, acknowledged the jurisdiction of the English court in view of the fact that the children are habitually resident in London.

23. With respect, more precisely, to the applications relating to spouse and child maintenance, the Tribunale di Milano referred to Regulation No 4/2009, and in particular to Article 3 thereof. It thus held that it had jurisdiction to decide on the application related to maintenance made by and for the benefit of Ms B, since that application was ancillary to the proceedings concerning personal status. However, that court declared that it lacked jurisdiction in relation to the application concerning maintenance of the minor children in so far as, in its view, that application was ancillary, not to the proceedings concerning personal status, but to parental responsibility, in respect of which the United Kingdom court had jurisdiction.

24. In view of the Italian court's refusal to assume jurisdiction, Mr A brought an appeal before the Corte suprema de cassazione, based on a single plea, namely that the Italian court's jurisdiction in the matter of the maintenance of the minor children could, also, be regarded as ancillary to the legal separation proceedings, in accordance with Article 3(c) of Regulation No 4/2009.

25. Since it had doubts as to the proper interpretation of Regulation No 4/2009, the Corte suprema di cassazione decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'May the decision on a request for child maintenance raised in the context of proceedings concerning the legal separation of spouses, being ancillary to those proceedings, be taken both by the court before which those separation proceedings are pending and by the court before which proceedings concerning parental responsibility are pending, on the basis of the prevention criterion, or must that decision of necessity be taken only by the latter court, as the two distinct criteria set out in points (c) and (d) of the oft-cited Article 3 are alternatives (in the sense that they are mutually exclusive)?'

III – **My analysis**

26. By its question, the referring court asks the Court whether, in essence, Article 3(c) and (d) of Regulation No 4/2009 must be interpreted as meaning that the court which has jurisdiction to entertain proceedings concerning maintenance obligations towards minor children, raised in the context of legal separation proceedings, may be both the court which has jurisdiction to entertain proceedings concerning personal status and the court which has jurisdiction to entertain proceedings concerning parental responsibility.

27. In fact, the response to the question posed assumes that the following points have been resolved. First of all, in the case of children living at home, is the matter of the fixing and apportionment of maintenance obligations towards those children inextricable from the proceedings relating to the separation of their parents? Next, what consequences must be drawn from this with regard to the jurisdiction of the courts before which such separation proceedings have been brought?

28. Taking into consideration the notion of the child's best interests seems to me to dictate the nature of the response that must be provided to the referring court. Furthermore, it is in line with this fundamental principle that I have decided to reword the question in such a way that the child becomes the focal point of this issue.

29. It is indeed undeniable, both in terms of the legal texts and the Court's case-law, that this notion permeates family law in a binding manner when the child's position happens to be affected by the dispute in the main proceedings.

30. I would point out again at this juncture that Article 24(2) of the Charter states that '[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.' It cannot be disputed that the Charter applies in the present context.

31. The Court has, moreover, had the chance to reiterate, on several occasions, the primordial importance of this principle.

32. For instance, in its judgment in *Rinau*,[11] the Court stated that Regulation No 2201/2003 is based on the idea that the best interests of the child must prevail.[12] More recently, it held that it is necessary to ensure the protection of the child's best interests in the determination of that child's habitual residence.[13]

11 — C-195/08 PPU, EU:C:2008:406.

12 — Paragraph 51.

13 — See judgment in *C* (C-376/14 PPU, EU:C:2014:2268), paragraph 56. See also, for the taking into account of the best interests of the child when the Court interprets Regulation No 2201/2003, judgments in *A* (C-523/07, EU:C:2009:225); *Detiček* (C-403/09 PPU, EU:C:2009:810); *Purrucker* (C-256/09, EU:C:2010:437); and *Mercredi* (C-497/10 PPU, EU:C:2010:829).

33. It should, moreover, be noted that the Court ensures in particular that the interpretation given to the provisions of Regulation No 2201/2003 accords with Article 24 of the Charter, and in particular with the best interests of the child. In its judgment in *Aguirre Zarraga*,[14] the Court held that, 'since Regulation No 2201/2003 may not be contrary to [the Charter], Article 42 of that regulation, the provisions of which give effect to the child's right to be heard, must be interpreted *in the light of Article 24 of [the Charter*]'.[15]

34. The Court goes even further in its judgment in *McB.*,[16] since it determines whether Article 24 of the Charter precludes the interpretation which it had just given to Regulation No 2201/2003.[17] In this judgment the Court stated that it follows from recital 33 in the preamble to that regulation that the latter recognises the fundamental rights and observes the principles enshrined in the Charter, while, in particular, seeking to ensure respect for the fundamental rights of the child, as stated in Article 24 of the Charter. Accordingly, the provisions of that regulation cannot be interpreted in such a way as to disregard that fundamental right of a child to maintain, on a regular basis, a personal relationship and direct contact with both of his or her parents, the respect for which right undeniably merges into the best interests of the child.[18] It concludes that, in those circumstances, it is necessary to determine whether Article 24 of the Charter, respect for which is ensured by the Court, precludes the interpretation of Regulation No 2201/2003 set out in paragraph 44 of that judgment.[19]

35. The conclusion to be drawn from this reasoning is quite clear. The best interests of the child must be the guiding consideration in the application and interpretation of EU legislation. In this regard, the words of the Committee on the Rights of the Child attached to the office of the UN High Commissioner for Human Rights (OHCHR) are particularly relevant. That committee points out that '(the best interests of the child) constitute a standard, an objective, an approach, a guiding notion, that must clarify, inhabit and permeate all the internal norms, policies and decisions, as well as the budgets relating to children.'[20]

36. The case-law relating to Regulation No 2201/2003 is clearly transferable to Regulation No 4/2009. It would be incomprehensible if the intensity of this principle, which features among the fundamental rights of the child, could vary depending on the area of family law in question, since, whatever that area may be, the child remains directly concerned.

37. Taking into account these observations, I believe I can add the following clarifying details in response to the first point raised through the rewording of the question referred by the Corte suprema di cassazione.

38. In this context, the interpretation of Article 3(c) of Regulation No 4/2009 has to be addressed.

39. According to the Commission, the connecting factor provided for in Article 3(d) of that regulation can relate only to maintenance obligations with regard to minor children, which are cleared linked to parental responsibility, whereas the connecting factor provided for in Article 3(c) of that regulation can relate only to maintenance obligations between spouses and not also to those concerning minor children.

14 — C-491/10 PPU, EU:C:2010:828.

15 — Paragraph 60 and the case-law cited. Emphasis added.

16 — C-400/10 PPU, EU:C:2010:582.

17 — On this subject, see, A. Devers, 'Les praticiens et le droit international privé européen de la famille', *Revue Europe*, No 11, November 2013, study 9, paragraph 22 et seq.

18 — Paragraph 60.

19 — Paragraph 61.

20 — See 'Article 3: Intérêt supérieur de l'enfant', *Revue Droit de la famille*, No 11, November 2006, file 16, concerning Article 3 of the Convention on the Rights of the Child signed in New York on 20 November 1989 and ratified by all Member States. Article 3(1) provides that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

40. I disagree with that line of reasoning on the following grounds.

41. The way in which Article 3 of Regulation No 4/2009 is structured strikes me as significant. Article 3(a) and (b) of that regulation establishes two grounds for jurisdiction governing situations in which the application concerning maintenance obligations is the main action. In this case it is either the place of the defendant's habitual residence or the place of the creditor's habitual residence that determines this jurisdiction.

42. The two other grounds for jurisdiction provided for in Article 3(c) and (d) of that regulation govern, for their part, situations in which the application concerning maintenance obligations is ancillary, respectively, to proceedings concerning personal status or to proceedings concerning parental responsibility.

43. It is clear that the situation of a single, married, legally separated or divorced person concerns that person's personal status and that it produces effects in regard to third parties.

44. It is also clear that, as the rupture of married status or conjugal life results in the separation of the spouses and the breakup of domestic life, the matter of fixing the maintenance allowance for the children living at home and of allocating the burden of that allowance between the parents is one that must be addressed not only as a matter of course, according to simple common sense, but also, and even more so, for purely legal issues. I would be denying the daily reality of actions of this sort if I did not acknowledge with the strength of the evidence that one aspect — the fixing of the children's maintenance allowance and the allocation of the burden thereof — is the automatic and natural consequence of the other aspect, namely the discontinuance of domestic life. The ancillary character, in the legal sense of the term, that links the first aspect to the second therefore appears to me to be irrefutably established in the present case.

45. What consequences are to be drawn from this first conclusion? The second point arising from the rewording of the question now calls for examination.

46. The consideration of the best interests of the child here assumes its role as the guiding principle.

47. Any solution that consists in drawing a distinction between, on the one hand, the separation proceedings that have been brought before the court of a Member State and, on the other hand, the proceedings concerning the children's maintenance allowance, coming within the jurisdiction of the court of another Member State, runs, in my view, totally counter to the best interests of the child.

48. In order to satisfy oneself in this regard, one need only consider that the legal logic of this system would mean that the court with jurisdiction to rule on the application concerning the maintenance allowance would have to wait until the decision on the cessation of conjugal life (legal separation or divorce) had first been definitively handed down. This would result in an inevitable period of latency during which the children's future would be uncertain.

49. Even if the court with jurisdiction to entertain the proceedings concerning the matrimonial link were to take what it might regard as provisional measures on these points, the solution of continuity between the different phases of the proceedings would not generate any fewer unacceptable delays concerning the principles mentioned above, since it would be imposing measures for an indeterminate period, taken in breach of the principle of the best interests of the child.

50. It should also be added, perhaps even unnecessarily, that this clearly prejudicial situation would not have to be faced by children whose parents remained established in the Member State of their nationality. In other words, the parents' exercise of the freedom of movement and freedom of establishment lies at the root of an unfavourable situation which would not affect children whose parents divorce or separate legally and have not left their Member State of origin.

51. It is thus necessary to bring together in one court the jurisdiction to entertain both the main initial proceedings concerning the dissolution of conjugal life as well as ancillary actions of fundamental importance for the child. The key issue is to determine where jurisdiction lies and, in this, the notion of the child's best interests should guide our consideration. The immediate and simplest idea would be to link everything to the jurisdiction of the court called to deal with the proceedings concerning the parents' separation.

52. Beneath its simplicity, the idea hides a genuine difficulty. This relates back to Article 3(1)(b) of Regulation No 2201/2003, which gives the parents the option of, inter alia, bringing the case before a court that has jurisdiction merely by reason of their shared nationality, something which the parents have done in this case. However, Regulation No 4/2009, in Article 3(c) and (d), expressly excludes such jurisdiction, in terms of an action relating to maintenance obligations both in the framework of proceedings concerning personal status and in the framework of proceedings concerning parental responsibility.

53. This finding therefore appears to place these two regulations on a collision course, making it necessary to choose a solution consisting of dividing up the proceedings which we earlier described as not being an option.

54. The contradiction is, in fact, merely apparent. Regulation No 2201/2003 must be made subject to the mandatory requirement that the best interests of the child be taken into account. With respect to this matter, it also suffices to recall the Court's case-law referred to in points 32 to 34 of this Opinion.

55. In addition, the actual text of recital 12 in the preamble to Regulation No 2201/2003 states, as it may be recalled, that '[t]he 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. This 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 or pursuant to an agreement between the holders of parental responsibility.'

56. It is precisely this criterion of proximity that must be taken into account.

57. It is, indeed, this criterion that renders Regulations No 2201/2003 and No 4/2009 compatible in this area.

58. The criterion of proximity, being closely linked to the best interests of the child, imposes an obligation to place the matter within the overall jurisdiction of the courts of the children's place of residence. This explains that, within the framework of Regulation No 4/2009, jurisdiction based solely on the parents' nationality is excluded, whether with regard to the maintenance allowance or to parental responsibility, since, in that case, the proximity criterion would clearly be set at nought, and, with it, the best interests of the child.

59. Furthermore, and by reason of the same principles, amongst the grounds for jurisdiction set out in Article 3 of Regulation No 2201/2003, this time the same criterion of proximity itself, the preponderant nature of which is expressed in recital 12 in the preamble to that regulation, imposes a duty to uphold the habitual residence of the spouses as a ground for jurisdiction. It must also be noted — and this point, too, is not bereft of significance — that the criterion of habitual residence is the first of those listed in Article 3 of that regulation.

60. It is clear that this criterion of habitual residence of the spouses designates the place where the family residence was to be found, and, of course, that of the children, prior to separation.

61. As such, the proximity criterion is satisfied. Moreover, if any doubt should remain as regards the compatibility of Regulations No 2201/2003 and No 4/2009 on this specific point, the '*lex specialis*' character of Regulation No 4/2009 will suffice to resolve the debate in its favour along the lines of the interpretation here proposed.

62. In summary, it therefore appears possible to describe the situation that results from divorce or legal separation of a couple with children at home, namely that the initial determination of the maintenance allowance and the allocation of the parents' responsibility to contribute to their children's maintenance must be raised — as well as, by virtue of similarity, matters relating to parental authority — in the context of the proceedings initiated to secure a divorce or legal separation.

63. Because of the binding nature of the requirement that account be taken of the child's best interests, the court with jurisdiction to entertain the proceedings must respect the criterion of proximity, to the exclusion of any other.

64. In the dispute in the main proceedings, the best interests of the child therefore require that jurisdiction of the Italian courts be declined in favour of that of the courts of the Member State in which the children are habitually resident, namely the courts of the United Kingdom, those latter courts, moreover, having jurisdiction to entertain the proceedings concerning parental responsibility in accordance with Article 8(1) of Regulation No 2201/2003.

65. It follows, admittedly, in a situation such as that in the main proceedings, that the parties' freedom to choose the court having jurisdiction is limited. That does not appear to be questionable or at variance with the fundamental principles governing this area since the parties in question are the parents and the restriction of their choice is imposed upon them for the sake of the best interests of their child/children.

IV – **Conclusion**

66. In the light of the foregoing considerations, I propose that the Court's reply to the question referred by the Italian Corte suprema di cassazione should be as follows:

(1) Article 3 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 must be interpreted as meaning that, where there are main proceedings concerning legal separation of spouses and a request concerning maintenance obligations in respect of minor children is raised within the framework of those separation proceedings, the court dealing with those proceedings has jurisdiction to deal with that request concerning maintenance obligations.

(2) Regard for the child's best interests requires, in this case, that territorial jurisdiction should be determined by the criterion of proximity.