



Reports of Cases

OPINION OF ADVOCATE GENERAL
MELCHIOR WATHELET
delivered on 10 July 2018¹

Case C-478/17

**IQ
v
JP**

(Request for a preliminary ruling from the Tribunalul Cluj (Regional Court, Cluj, Romania))

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Jurisdiction in matters of parental responsibility — Transfer to a court better placed to hear the case — Definition of ‘courts of a Member State having jurisdiction as to the substance of the matter’)

1. This request for a preliminary ruling from the Tribunalul Cluj (Regional Court, Cluj, Romania) in proceedings in matters of parental responsibility between the appellant in the main proceedings (‘the appellant’), IQ, mother of three children below the age of majority residing with her in the United Kingdom since 2012, and the respondent in the main proceedings (‘the respondent’), JP, father of the children, a foreign national residing in Romania, concerns the interpretation of Article 15 of Regulation (EC) No 2201/2003².

I. Legal context

A. European Union law

2. Recitals 12, 13 and 21 of Regulation No 2201/2003 are worded as follows:

‘(12) 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.

(13) In the interest of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. ...

¹ Original language: French.

² 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 (OJ 2003 L 338, p. 1), known as ‘the Brussels IIa Regulation’.

(21) The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.’

3. Article 1 of that regulation provides:

‘1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

...

(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.’

4. As set out in Article 2(1) of Regulation No 2201/2003:

‘For the purposes of this Regulation:

1. the term “court” shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1;

...’

5. Article 8(1) of that regulation, which is entitled ‘General jurisdiction’, provides:

‘The 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.’

6. Article 12(1) and (2) of Regulation No 2201/2003, which is entitled ‘Prorogation of jurisdiction’ provides:

‘1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

(a) at least one of the spouses has parental responsibility in relation to the child;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

2. The jurisdiction conferred in paragraph 1 shall cease as soon as:

(a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;

(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;

(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

...’

7. Under Article 15 of Regulation No 2201/2003, which is entitled ‘Transfer to a court better placed to hear the case’:

‘1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

- (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or
- (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2. Paragraph 1 shall apply:

- (a) upon application from a party; or
- (b) of the court’s own motion; or
- (c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.

A transfer made of the court’s own motion or by application of a court of another Member State must be accepted by at least one of the parties.

3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:

- (a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or
- (b) is the former habitual residence of the child; or
- (c) is the place of the child’s nationality; or
- (d) is the habitual residence of a holder of parental responsibility; or
- (e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1.

If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

5. The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

6. The courts shall cooperate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53.’

8. Article 19 of that regulation provides, under the heading '*Lis pendens* and dependent actions':

' ...

2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.'

9. Under Article 23(e) of Regulation No 2201/2003, which is titled 'Grounds of non-recognition for judgments relating to parental responsibility':

'A judgment relating to parental responsibility shall not be recognised:

...

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

...'

B. Romanian law

10. It is apparent from the order for reference that, in Romania, Article 448(1)(1) of the Codul de procedură civilă român (Romanian Code of Civil Procedure) provides that judgments at first instance in matters of parental responsibility are enforceable. Accordingly, under Romanian procedural law, enforcement of judicial decisions handed down at first instance in matters of parental responsibility may cease only if an appeal is upheld.

II. The dispute in the main proceedings and the questions referred for a preliminary ruling

11. On 26 November 2014, the appellant, IQ, mother of three children residing with her in the United Kingdom since 2012, initiated divorce proceedings before the Judecătoria Cluj-Napoca (Court of First Instance, Cluj-Napoca, Romania) against the father of their three children, the respondent, JP, a foreign national residing in Floreşti in Romania.

12. By means of that application, the appellant also sought the award of sole parental responsibility for the three children of the marriage, the award of custody, and an order requiring the respondent to pay maintenance.

13. The respondent made a counter-claim, seeking a divorce on grounds of mutual consent or, in the alternative, on grounds of shared fault, the award of joint parental responsibility for the three children of the marriage, and the setting-up of a programme for maintaining personal links with the children.

14. At the hearing of 28 September 2015, the Judecătoria Cluj-Napoca (Court of First Instance, Cluj-Napoca) examined whether it had jurisdiction and declared that it did have jurisdiction to hear the case. The parties having agreed to a divorce on grounds of mutual consent, that court held that the requirements were met for it to give a ruling on that head of claim. Consequently it granted a divorce on grounds of mutual consent and disjoined the ancillary heads of claim from the claim for divorce, continuing its deliberations on those heads of claim by setting a date for a hearing at which the parties might submit evidence.

15. By Civil Judgment, the Judecătoria Cluj-Napoca (Court of First Instance, Cluj-Napoca) partially upheld the appellant's claim and the respondent's counter-claim. It ordered joint parental responsibility for the three children of the marriage to be exercised jointly, awarded the appellant sole custody of the children, determined the amount of maintenance payable by the respondent to the children, and set up a programme for maintaining the father's personal links with the children.

16. On 7 September 2016, the mother and father of the children brought an appeal against that judgment before the referring court.

17. Before the referring court, IQ sought the award of sole parental responsibility and to restrict the programme for maintaining the father's personal links with the children. JP requested the extension of that programme.

18. On 26 December 2016, IQ applied to the High Court of Justice (England and Wales), Family Division, Family Court, Birmingham, for a restraining order against the father of the children. On 3 January 2017, Mrs IQ also asked that court to determine who would be awarded custody of the children.

19. The same day, that court adopted an interim measure prohibiting the children's father from taking the children until such time as a final ruling might be given in the case. On 2 February 2017, it also requested the referring court to relinquish jurisdiction in the case, on the ground that the children are resident in England and Wales, with the consent of the parents.

20. Pursuant to the order of 6 July 2017 of the High Court of Justice (England & Wales), Family Division, Family Court, Birmingham, the referring court received a request for it to transfer the case to that court of the United Kingdom, in accordance with Article 15 of Regulation No 2201/2003, since the three children concerned had been habitually resident in the United Kingdom — that is to say, within its jurisdiction and not in Romania — since at least 2013 and throughout the entirety of the proceedings before the Romanian courts.

21. The referring court observes that, in the present case, the court being asked to transfer the case is at the appeal stage and that there is already a judgment at first instance.

22. It also notes that the judgment delivered at first instance by the Judecătoria Cluj-Napoca (Court of First Instance, Cluj-Napoca) is, pursuant to Article 448(1)(1) of the Romanian Code of Civil Procedure, enforceable, so that, so long as that judgment has not been set aside, the respondent may demand that it be enforced.

23. If the referring court were to transfer the case to a court of the United Kingdom on the basis of Article 15 of Regulation No 2201/2003, it would not have the opportunity to give a ruling on the appeal, so that the judgment at first instance would remain in force.

24. In those circumstances, the Tribunalul Cluj (Regional Court, Cluj) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Does the expression “the courts of a Member State having jurisdiction as to the substance of the matter” which appears in Article 15 [of Regulation No 2201/2003] refer equally to courts hearing the case at first instance and to courts of appeal? It is important to know whether the case may be transferred, on the basis of that provision, to a court better placed to hear it if the court having jurisdiction and being asked to transfer the case to a better placed court is a court of appeal, while the better placed court is a court of first instance.
- (2) If the answer to Question 1 is in the affirmative, how is the court having jurisdiction and transferring the case to a better placed court to deal with the judgment at first instance?

III. Procedure before the Court

25. Written observations were submitted only by the Romanian Government and the European Commission, since neither of the parties to the main proceedings considered it necessary to do so. No hearing has been requested or organised by the Court.

IV. Analysis

A. The first question

1. Summary of the arguments of the parties

26. The Romanian Government observes that the Court held that, in order to ensure that the best interests of the child are taken into consideration when applying the rules of jurisdiction in matters of parental responsibility, the EU legislature had recourse, as is stated in recital 12 of that regulation, to the criterion of proximity.³ Under that criterion, the jurisdiction of a court in matters of parental responsibility is, as a general rule, determined, in accordance with Article 8(1) of Regulation No 2201/2003, by where the child is habitually resident at the time the courts are seised.⁴ Article 12(1) of Regulation No 2201/2003, which provides, in essence, that the court exercising jurisdiction by virtue of Article 3 on an application for divorce also has jurisdiction in any matter relating to parental responsibility connected with that application, would be an exception to the rule of jurisdiction laid down in Article 8 of Regulation No 2201/2003.

27. First of all, so far as concerns Article 15(1) of Regulation No 2201/2003, the Romanian Government states that the notion of ‘courts of a Member State having jurisdiction as to the substance of the matter’ is not defined by that regulation. It is therefore necessary to interpret that notion by taking account of the context in which it occurs and the objectives pursued by Regulation No 2201/2003.

28. Secondly, the Romanian Government observes that the rules of jurisdiction in matters of parental responsibility are set out in Chapter II, Section 2, of Regulation No 2201/2003, of which Article 15 forms part. Accordingly, the scope *ratione materiae* of Article 15 of Regulation No 2201/2003 is the same as that of the body of rules of jurisdiction laid down in Section 2 of Chapter II of Regulation

³ See judgment of 27 October 2016, *D.* (C-428/15, EU:C:2016:819, paragraph 45).

⁴ See judgments of 15 February 2017, *W and V* (C-499/15, EU:C:2017:118, paragraph 52); and of 27 October 2016, *D.* (C-428/15, EU:C:2016:819, paragraph 46).

No 2201/2003.⁵ It follows that the ‘court having jurisdiction’ within the meaning of Article 15(1) of Regulation No 2201/2003 could be any of the courts having jurisdiction in matters of parental responsibility under Articles 8 to 14 of Regulation No 2201/2003. Consequently, according to the Romanian Government, Article 15 of that regulation confers on the court referred to therein the task of ruling on matters of parental responsibility, by virtue of the jurisdiction established by Regulation No 2201/2003, regardless of whether that court is ruling at first instance or on appeal.

29. Finally, the Romanian Government considers that the notion of ‘court ... having jurisdiction as to the substance of the matter’ in Article 15(1) of Regulation No 2201/2003 refers not only to the fact that it has jurisdiction as to the substance of the matter, but also that the court in question accepts jurisdiction.

30. With regard to the time at which the court having jurisdiction as to the substance of the matter may transfer the case to a better placed court, the Romanian Government notes that Article 15(1) of Regulation No 2201/2003 does not set any time limit.

31. In that regard, it notes that, under Article 12(2) of Regulation No 2201/2003, the extended jurisdiction provided for in Article 12(1) of that regulation is to cease, *inter alia*, as soon as a decision in relation to parental responsibility has become final, or as soon as the proceedings have come to an end for another reason. In the case in the main proceedings, the court first seised could transfer the case to a better placed court, under Article 15 of Regulation No 2201/2003, until such time as the extended jurisdiction ceases. The Romanian Government considers that, at the time of the transfer of the case, the court having jurisdiction must examine, on a case-by-case basis, whether, *inter alia*, the conditions provided for in Article 15 of that regulation have been met.⁶

32. Accordingly, in a situation such as that at issue in the main proceedings, it is for the court having jurisdiction, that is to say the court first seised, to assess whether the transfer to a court better placed to hear the case fulfils the conditions laid down in Article 15(1) of Regulation No 2201/2003 and, in particular, whether the court to which it is intended to transfer the case is better placed to deliver, in matters of parental responsibility, a judgment which is in the best interests of the child.

33. The Romanian Government proposes to answer the first question to the effect that the provisions of Regulation No 2201/2003 in general and, in particular, Article 15, must be interpreted as allowing, in circumstances such as those at issue in the main proceedings, a court of a Member State having jurisdiction as to the substance of the matter within the meaning of Article 12(1) of that regulation, to transfer the case to a better placed court until such time as its jurisdiction ceases pursuant to Article 12(2) of Regulation No 2201/2003.

34. Moreover, it is for the court having jurisdiction as to the substance of the matter to analyse and establish, on a case-by-case basis, whether the transfer of a case at the appeal stage fulfils the conditions laid down in Article 15 of Regulation No 2201/2003 and, in particular, to examine whether the court to which it is proposed to transfer the case is better placed to rule on matters of parental responsibility and whether the transfer of the case is in the best interests of the child.

⁵ See, in that regard, judgment of 27 October 2016, *D.* (C-428/15, EU:C:2016:819, paragraph 30).

⁶ See, in that regard, judgment of 27 October 2016, *D.* (C-428/15, EU:C:2016:819, paragraphs 56 to 59).

35. According to the Commission, Article 15(1) of Regulation No 2201/2003 authorises the transfer of jurisdiction only to a court ‘of another Member State, with which the child has a particular connection’. Article 15(3) of Regulation No 2201/2003 sets out an exhaustive list of criteria defining the notion of Member State with which a child has a particular connection. In that regard, the Member State of the child’s current habitual residence is not included in that list, although the jurisdiction of the courts located in the Member State of the habitual residence of the child is the cornerstone of jurisdiction in matters of parental responsibility.

36. However, the Commission considers that the application of Article 15 of Regulation No 2201/2003 cannot be ruled out where both courts have jurisdiction. It would therefore be contrary to the *ratio legis* of that provision to preclude it from applying to the court of a Member State with which the child has the most substantial connection.

37. So far as concerns the relationship between Articles 15 and 19 of Regulation No 2201/2003, although it requires the court second seised to stay the proceedings if the jurisdiction of the first court seised has been established, that requirement should not preclude the second court seised from making an application in accordance with Article 15(2)(c) of Regulation No 2201/2003.

38. With regard to the expression ‘the courts of a Member State having jurisdiction as to the substance of the matter’ set out in Article 15(1) of Regulation No 2201/2003, the Commission submits that that expression does not entail that only the courts hearing the case at first instance may have jurisdiction.

39. The Commission considers that the *ratio legis* of Article 15 of Regulation No 2201/2003 confers a margin of discretion on the court allowing it to take, if necessary, a decision to transfer jurisdiction provided that it is in the ‘best interests of the child’.

2. Assessment

(a) Introduction

40. In a very short order for reference, containing no more than 21 paragraphs, the Tribunalul Cluj (Regional Court, Cluj) asks, by its first question, in essence, how to interpret the notion of ‘courts of a Member State having jurisdiction as to the substance of the matter’ referred to in Article 15(1) of Regulation No 2201/2003 and whether, pursuant to that provision, it is possible to transfer the case in the main proceedings to a court better placed to hear it where the court making the transfer is a court of appeal and the better placed court is a court of first instance.

41. First of all, it should be borne in mind that the Court has already had the opportunity to examine the interpretation of Article 15 of Regulation No 2201/2003, but has not yet ruled on the interpretation of the notion of ‘courts of a Member State having jurisdiction as to the substance of the matter’, as provided for in Article 15(1).

42. Accordingly, in the judgment of 27 October 2016 in *D.* (C-428/15, EU:C:2016:819), that I will cite repeatedly in the present opinion, concerning, above all, the interpretation of Article 15 of Regulation No 2201/2003, the referring court was uncertain of the scope and the conditions for the application of that provision, the notion of ‘court better placed’ and the relevant criteria to determine what that court

is, and the notion of ‘the best interests of the child’.⁷ The Court held that the requirement that the transfer is in the best interests of the child means that the court having jurisdiction must be satisfied, in particular, in the light of the specific circumstances of the case, that the transfer of the case to a court of another Member State is not liable to be detrimental to the situation of the child.⁸

43. As the Commission points out, the present case seems to be characterised by a situation in which two courts have, in principle, jurisdiction on the basis of Regulation No 2201/2003.

44. In that regard, since the children’s habitual residence seems to have been, from 2012, in the United Kingdom, and without any interruption throughout the case, the jurisdiction of the Romanian courts (the courts first seised) in matters of parental responsibility can only have been established on the basis of Article 12(1),⁹ in conjunction with the third indent of Article 3(1)(a) of Regulation No 2201/2003 (‘[the habitual residence of the respondent]’), by virtue, therefore, of the accessory jurisdiction of that court in matters of divorce. Article 12 constitutes an exception to the rule of jurisdiction provided for in Article 8 of Regulation No 2201/2003.¹⁰

45. Even though the divorce has been granted by the Romanian court, the accessory jurisdiction in matters of parental responsibility continues to be governed by Article 12(2)(b) of Regulation No 2201/2003 until such time as a judgment delivered in proceedings relating to parental responsibility has become final, which is not yet the case.

46. In so far as the three children have their habitual residence in the United Kingdom, where they have been living with their mother since 2012, the jurisdiction of the courts of the United Kingdom (the courts second seised by the appellant) in matters of parental responsibility is based on Article 8 of Regulation No 2201/2003.¹¹

47. I therefore consider it necessary to clarify whether Article 15 of Regulation No 2201/2003 relating to the transfer of jurisdiction is applicable: either to a case where the courts of two Member States have jurisdiction under that regulation, or where the transfer of jurisdiction is permitted only to the courts of a Member State which otherwise would not have jurisdiction under that regulation.

48. In the latter case, the answer is simple: Article 15 of Regulation No 2201/2003 would not apply to the present case. Accordingly, the matter then becomes a straightforward issue of *lis pendens* to be settled in accordance with Article 19 of Regulation No 2201/2003.¹²

7 See also my Opinion in that case (C-428/16, EU:C:2016:458). See, also, a similar case decided on recently by the Supreme Court of the United Kingdom: In the matter of N (Children) [2016] UKSC 15. For analysis, see, for example, Pirrung, J., *Forum (non) conveniens — Art. 15 EuEheVO vor zwei obersten Common law-Gerichten*, IPRax, 2017, 562, No 6 for whom both the Court in D. (C-428/15) and the Supreme Court of the United Kingdom ‘sind auf unterschiedlichen Wegen zu richtigen Ergebnissen gekommen und haben einem besseren Verständnis der *forum non conveniens*[...] -Regel in europäischen Sorgerechtsverfahren beigetragen’.

8 See judgment of 27 October 2016, D. (C-428/15, EU:C:2016:819, paragraph 61). See, also, judgment of 19 November 2015, P (C-455/15 PPU, EU:C:2015:763) which concerns, in essence, Article 23(a) of Regulation No 2201/2003 relating to the grounds of non-recognition for judgments relating to parental responsibility based on public policy and, indirectly, the interpretation of Article 15 of Regulation No 2201/2003.

9 See paragraphs 2 and 10 of the order for reference.

10 See Opinion of Advocate General Bot in *W and V* (C-499/15, EU:C:2016:920, point 51).

11 ‘As to the context of which Articles 8(1) and 2(3) of Regulation No 2201/2003 form part, recital 12 in the preamble to that regulation states that jurisdiction should lie in the first place with the Member State of the child’s habitual residence. In accordance with that recital, Article 8(1) of that regulation provides that the general jurisdiction in matters of parental responsibility is to be established on the basis of that residence’ (judgment of 1 October 2014, E., C-436/13, EU:C:2014:2246, paragraph 41).

12 In the event that only Article 19 were applicable, since it becomes apparent that the two proceedings have the same purpose, in so far as they both relate to matters of parental responsibility, as the court second seised, the court of the United Kingdom should decline jurisdiction. See, in that regard, *Liberato* (C-386/17), currently pending, where the Court is asked to examine the consequences of a manifest infringement of the rules on *lis pendens* contained in Article 19 of Regulation No 2201/2003 in matters of parental responsibility. The referring court asks whether such an infringement would constitute a ground for withholding recognition of a judicial ruling made in breach of those rules on the ground that such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought, having regard to Article 24 of Regulation No 2201/2003 or imperative provisions of public policy under EU law.

(1) Does Article 15 of Regulation No 2201/2003 apply where the courts of two Member States have jurisdiction as to the substance of the matter under that regulation?

49. Article 15 of Regulation No 2201/2003 contains an innovative rule which allows, by way of exception, that a court which is seised of a case, and has jurisdiction as to the substance of the matter, can transfer it to a court of another Member State if the latter is better placed to hear the case. The court may transfer the entire case or a specific part thereof.¹³

50. Indeed, ‘in matters of parental responsibility, one of the great innovations of ... Regulation [No 2201/2003] — thus imitating the [c]onvention [of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (“the 1996 Hague Convention”) — is to establish a dialogue mechanism between European courts, based on the assessment of their jurisdiction in accordance with considerations of expediency. Inspired by the *forum non conveniens* doctrine, Article 15 of Regulation [No 2201/2003] [— an exceptional provision,¹⁴ but often considered a little complex —] permits a “transfer” to a court better placed to hear the case (in comparison with Articles 8 and 9 of the 1996 Hague Convention ..., which breaks down the mechanism into a transfer [of jurisdiction — *forum non conveniens*] and an assertion of jurisdiction [*forum conveniens*] ...’.¹⁵

Article 8 of the 1996 Hague Convention allows for a request to be made where the authority having jurisdiction considers that the authority of another Contracting State would be ‘better placed’ in the particular case to assess the best interests of the child. Pursuant to Article 8(2)(d) of the 1996 Hague Convention, the existence of a substantial connection with the child constitutes the criterion of evaluation of the authority ‘better placed’ to assess the interests of the child but does not create an obligation.

51. Even though the *modus operandi* of the mechanism of Regulation No 2201/2003 is not identical to that of the 1996 Hague Convention, I see no reason, in principle, why Article 15 of Regulation No 2201/2003 cannot apply in cases of ‘concurrent’ jurisdiction, that is to say where two courts (of different Member States) have jurisdiction under that regulation.

52. Indeed, I believe, a fortiori, that such a transfer of jurisdiction must be permitted under Article 15 of Regulation No 2201/2003 because the court to which it is intended to transfer the case, *ex hypothesi*, must have a substantial connection with the child.

¹³ See Practice Guide for the application of Brussels Iia Regulation published by the European Commission, 2015, available on <http://e-justice.europa.eu>, p. 34.

¹⁴ If we take account of the various European legal systems and especially the Brussels I and Brussels Iia systems, which do not permit such judicial cooperation between the Member States (in any event, not at the moment). See, judgment of 1 March 2005, *Owusu* (C-281/02, EU:C:2005:120, paragraphs 38 and 41), in which the Court considers that ‘[a]pplication of the *forum non conveniens* doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention’. See, in that regard, for example, Ni Shuilleabhain, M., *Cross-Border Divorce Law, Brussels II bis*, Oxford University Press, 2010, p. 202 et seq. (at page 225, the author proposes that a provision modelled on Article 15 of Regulation No 2201/2003 is included in the new legislation which permits, in certain circumstances, transfer in matters of divorce).

¹⁵ Gallant, E., *Le forum non conveniens de l'article 15 du règlement Bruxelles II bis (affaire C-428/15, D)*, *Revue critique de droit international privé* (RCDIP), 2017, p. 464. See, also, with regard to Article 15: Ancel, B., and Muir Watt, H., *L'intérêt supérieur de l'enfant dans le concert des juridictions: le règlement Bruxelles II bis*, RCDIP, 2005, p. 569; Gallant, E., *Règlement II bis, Rép. Internat. Dalloz*, 2007, spéc. No 157; and Joubert, N., *Autorité parentale, J.-Cl. int. fasc. 549-20*, 172.

53. Indeed, Article 15(1) of Regulation No 2201/2003 permits the transfer of a given case to a court of a Member State other than that of the court that normally has jurisdiction, only if, as is stated in recital 13 of that regulation, such a transfer meets specific and strict conditions,¹⁶ on the one hand, and that it occurs by way of exception, on the other.¹⁷

54. As the Court held, first of all, in the judgment of 27 October 2016 in *D.* (C-428/15, EU:C:2016:819, paragraph 50), under Article 15(1) of Regulation No 2201/2003, the transfer of a case concerning matters of parental responsibility, by a court of a Member State, must be made only to a court of another Member State with which the child concerned has a ‘particular connection’.

55. Next, in accordance with the judgment of 27 October 2016, *D.* (C-428/15, EU:C:2016:819, paragraph 51), in order to establish the existence of such a connection in a given case, reference must be made to the factors that are listed, exhaustively, in Article 15(3)(a) to (e) of Regulation No 2201/2003. It follows that cases where those factors are lacking are immediately excluded from the transfer mechanism.

56. According to paragraph 53 of that judgment, the first two factors relate to the residence acquired by the child concerned in the other Member State in question, either before or after the court normally having jurisdiction has been seised and, according to paragraph 52, those factors are evidence of a relation of proximity between the child concerned in the case and a Member State other than that of the court having jurisdiction to hear the case on the basis of Article 8(1) of Regulation No 2201/2003.

57. It is therefore clear that the Member State of the child’s current habitual residence is not one of the Member States listed in that provision, although the jurisdiction of the courts located in the Member State of habitual residence of the child is the cornerstone of jurisdiction in matters of parental responsibility. This seems to indicate that Article 15 of Regulation No 2201/2003 relates exclusively to the conferral of jurisdiction through transfer to the courts of a Member State which, under Regulation No 2201/2003, do not yet have jurisdiction to hear the case.

58. In my opinion, however, this does not preclude the application of Article 15 in cases where the two courts have jurisdiction, particularly if they agree that one of them is better placed than the other to hear the case.

59. Indeed, I take the view (like the Commission) that it is common sense that the ‘current habitual residence’ in a Member State, which is the cornerstone of jurisdiction in matters of parental responsibility, necessarily implies a closer connection than the former residence (as acknowledged by the Romanian court). Article 15 of Regulation No 2201/2003 — which should allow a certain degree of flexibility in exceptional cases in order to ensure better protection of the best interests of the child — favours an interpretation of the words ‘a particular connection to a Member State’ which includes the current habitual residence (in the present case since 2012) of the child in a Member State, as a result of which that provision applies to cases where the better placed court already has jurisdiction under Regulation No 2201/2003.

60. That argument is also supported by academic writings.

¹⁶ For example: ‘in Spain, a decision from the Supreme Court which refused to transfer the jurisdiction to a Belgian court, whereas the whole family was now living in Belgium. The refus[al] was based on the fact that a significant period of time had elapsed since the beginning of the proceedings and that the best interests of the child required a quick resolution of his situation’ (see judgment of the Tribunal supremo [Supreme Court] of 7 July 2011, 496/2011, SP/SENT/639104), that passage is cited in Pataut, E., and Gallant, E., in Magnus, U., and Mankowski, P. (editors), *ECPIL — European Commentaries on Private International Law, Brussels IIbis Regulation*, Otto Schmidt, 2017, p. 175. See, also, judgment [2016] UKSC 15, cited in Footnote 7.

¹⁷ See judgment of 27 October 2016, *D.* (C-428/15, EU:C:2016:819, paragraph 47).

61. In the first place, '[Article 15 is about] a court having jurisdiction as to the substance of the matter pursuant to Articles 8-14 of the Regulation [transferring jurisdiction to a Member State] not necessarily also having jurisdiction pursuant to Article 8 et seq. of the Regulation'.¹⁸

62. In the second place, '[a]nother and far more important principle laid down in Article 15(1) is that this transfer can be for the benefit of *any* Member State's court. The provision states that this transfer should concern a court "with which the child has a particular connection", and the exact nature of these connections is listed in paragraph (3). However, Article 15(1) does not require that the designated court would otherwise have jurisdiction over the subject matter. Therefore, the transfer mechanism is [...] [one] allowing a competent court to transfer a case to *any* Member State court, provided that the particular connection is identified. This analysis implies that Article 15 is not only a court cooperation provision, but contains also a jurisdictional rule. The effect of this rule is to give jurisdiction to *any* Member State court, providing there is a particular connection between the court and the child'¹⁹, which seems to be the case here.

63. 'Article 15(1) can therefore be analysed in connection with Article 12(3) of the Regulation, which also provides for a very open jurisdictional rule. The difference lies [in] the fact that Article 12(3) relies on party autonomy, whereas Article 15(1) relies on judicial cooperation. The bases of jurisdiction are therefore very different, but the main effect of both provisions is very similar: giving jurisdiction to a court that is not designated by any of the connecting factors of the Regulation'.²⁰

64. It follows from the above that Article 15 of Regulation No 2201/2003 is applicable in the present case.

(2) *The notion of 'courts of a Member State having jurisdiction as to the substance of the matter'*

65. I note that that notion is not defined as such by Regulation No 2201/2003.

66. In that respect, it is necessary to interpret that notion by taking account of the context in which Article 15 occurs and the objectives pursued by Regulation No 2201/2003.²¹

67. Accordingly, I take the view (like the Romanian Government) that the notion of 'courts ... having jurisdiction as to the substance of the matter' must be interpreted in the light of the term 'court'. In accordance with Article 2(1) of Regulation No 2201/2003, the term 'court' covers all the authorities in the Member States with jurisdiction in the matters falling within the scope of Regulation No 2201/2003 pursuant to Article 1.²²

68. According to the judgment of 27 October 2016 in *D.* (C-428/15, EU:C:2016:819, paragraph 61), Article 15(1) of Regulation No 2201/2003 must be interpreted as meaning that 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 and that 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.

18 Staudinger-Pirrung, *BGB, Vorbem C-H zu Art. 19 EGBGB, Internationales Kindschaftsrecht*, 2009, Art 15 Regulation No 2201/2003, para. C 89.

19 The emphasis is mine. See Pataut, E., and Gallant, E., op. cit., p. 176.

20 See Pataut, E., and Gallant, E., op. cit., p. 176.

21 See, by analogy, judgment of 27 October 2016, *D.* (C-428/15, EU:C:2016:819, paragraph 41).

22 In accordance with Article 1, the regulation applies, inter alia, to applications relating to matters of divorce and parental responsibility.

69. Suffice it to say there is nothing in the terms used ('the courts of a Member State having jurisdiction as to the substance of the matter') to indicate that the possibility of transferring jurisdiction under Article 15(1) of Regulation No 2201/2003 is permissible only for courts hearing the case at first instance.

70. In so far as the court first seised has a wide margin of discretion in its decision whether to transfer jurisdiction (which is, moreover, logical because it is consistent with the *forum non conveniens* doctrine underlying the transfer procedure provided for in Article 15 of Regulation No 2201/2003), I take the view (like the Commission) that there is no reason to reserve that margin of discretion for a court of first instance. Particularly if the possibility of transfer of jurisdiction arises only when the case is being examined by a higher court.

71. Indeed, in the present case, the matter was being examined by the appellate jurisdiction of the Romanian courts when it received the request to transfer the case from the court of the United Kingdom seised by the mother approximately two years after she seised the Romanian court. Throughout the entirety of the proceedings, the children have resided in the United Kingdom. If the proceedings continue in Romania, the children must be heard and the opinion of a British expert may be necessary in order to assess properly the decision to be taken relating to parental responsibility (custody and access). This could increase the costs and length of the proceedings, whereas it is always in the interests of the child that decisions in matters of parental responsibility are taken as quickly as possible.

72. Therefore, the expression 'the courts of a Member State having jurisdiction as to the substance of the matter' set out in Article 15 of Regulation No 2201/2003 must be interpreted as referring also to courts of appeal which may, by application or of its own motion, transfer the case to a better placed court, provided that the conditions laid down in Article 15 of Regulation No 2201/2003 have been met.

B. The second question

1. Summary of the arguments of the parties

73. The Romanian Government observes that Regulation No 2201/2003 is based on the principles of judicial cooperation and mutual trust which lead to mutual recognition and enforcement of judicial decisions handed down in the Member States.²³ According to the Court, the principle of mutual trust implies that the court of a Member State hearing an application relating to parental responsibility must determine whether it has jurisdiction having regard to Articles 8 to 14 of Regulation No 2201/2003.²⁴ As stated in Article 24 of Regulation No 2201/2003, courts of other Member States may not review the assessment of its jurisdiction made by the first court before which proceedings were brought.²⁵

74. Moreover, the purpose of legal provisions on the declinature of jurisdiction would be to preclude parallel proceedings from being conducted before courts in different Member States and to prevent conflicting judicial decisions.

²³ See judgment of 15 February 2017, *W and V* (C-499/15, EU:C:2017:118, paragraph 50).

²⁴ See judgment of 15 July 2010, *Purrucker* (C-256/09, EU:C:2010:437, paragraph 73).

²⁵ See, judgment of 15 July 2010, *Purrucker* (C-256/09 (EU:C:2010:437, paragraph 74).

75. The Romanian Government proposes to answer the second question to the effect that the provisions of Regulation No 2201/2003 in general and, in particular, Article 15, must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, where, under Article 15(1) of Regulation No 2201/2003, the court having jurisdiction decides to transfer the case to a better placed court to hear the case, and where the better placed court accepts jurisdiction, pursuant to the first sentence of Article 15(5) of that regulation, and the court first seised declines jurisdiction, pursuant to the second sentence of Article 15(5) of Regulation No 2201/2003.

76. The Commission claims, in essence, that, in the event of the transfer of jurisdiction to a court of another Member State, the judgment delivered at first instance will continue to have effects under national law until such time as it has been amended or replaced with prospective effect by a new judgment of any other court exercising its jurisdiction under Regulation No 2201/2003.

2. Assessment

77. By its second question, the referring court asks the Court, if the answer to the first question is in the affirmative, to rule on how the judgment delivered at first instance by the Romanian courts should be dealt with, since the case was transferred to a court better placed to hear the case in the main proceedings.

78. Pursuant to Article 448(1)(1) of the Romanian Code of Civil Procedure, judgments at first instance in matters of parental responsibility are enforceable.

79. As the Commission points out, so far as concerns how the judgment delivered at first instance by the Romanian courts should be dealt with prior to the possible transfer of jurisdiction by the court of appeal — in the present case, the referring court —, although recital 13 of Regulation No 2201/2003 refers to the transfer of the ‘case’, the wording of Article 15(1) and (5) of Regulation No 2201/2003 refers only to the transfer or exercise of jurisdiction.

80. In accordance with Article 15(5) of Regulation No 2201/2003, the court first seised either declines jurisdiction if the court of the other Member State accepts jurisdiction and thus puts an end to the proceedings pending before it or, otherwise, continues to exercise jurisdiction.

81. In other words, while the transfer of jurisdiction is being processed, it is the court seised at first instance in the case in question that has jurisdiction. Consequently, in the event that it believes that the child is at imminent risk during that time, it is for that court to exercise its jurisdiction, in accordance with Regulation No 2201/2003, in order to take all necessary measures for the protection of the child. Those measures are legally recognised under Regulation No 2201/2003 (Article 21 entitled ‘Recognition of a judgment’) and remain in force until such time as the court of the other Member State which has agreed to exercise its jurisdiction decides to lift or amend those measures.

82. Likewise, how the judgment delivered at first instance is treated must be determined in accordance with the national law of the Member State which has transferred jurisdiction.

83. I take the view (like the Commission) that once the court in the requesting State has declined jurisdiction and new proceedings have been initiated, the court of the Member State in which recognition is sought, to which jurisdiction has been transferred, may exercise it.

84. I observe that Article 21 et seq. of Regulation No 2201/2003 relate to the recognition and enforcement of judgments and that Article 23(e) provides, in particular, that a judgment relating to parental responsibility is not to be recognised if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought.

85. It follows that the judgment delivered at first instance by the Romanian court will continue to have effects under national law until such time as it has been amended or replaced with prospective effect by a new judgment of any other court exercising its jurisdiction under Regulation No 2201/2003.

V. Conclusion

86. For those reasons, I propose that the Court answers the questions referred for a preliminary ruling by the Tribunalul Cluj (Regional Court, Cluj, Romania) as follows:

- (1) The expression ‘the courts of a Member State having jurisdiction as to the substance of the matter’ set out in 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, also refers to courts of appeal which may, upon request or of their own motion, transfer the case to a better placed court, provided that the conditions laid down in Article 15 of Regulation No 2201/2003 have been met.
- (2) The court of appeal which has transferred jurisdiction to a court of another Member State declines jurisdiction pursuant to Article 15(5) of Regulation No 2201/2003 and thus puts an end to the proceedings pending before it in accordance with its national procedural law. The judgment delivered at first instance in the proceedings in question will continue to have effects under national law until such time as it has been amended or replaced with prospective effect by a new judgment of any other court exercising its jurisdiction under Regulation No 2201/2003.