Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 29 July 2019[1]

Case C-468/18

R
v
P

(Request for a preliminary ruling from the Judecătoria Constanța (Court of First Instance, Constanța, Romania))

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Jurisdiction, recognition and enforcement of decisions in matters relating to maintenance obligations — Regulation (EC) No 4/2009 — Article 3(a) — Court of the place of habitual residence of the defendant — Article 3(d) — Court with jurisdiction in matters relating to parental responsibility — Article 5 — Appearance of the defendant — Court seised of a divorce petition and of its consequences in matters of parental responsibility and also of maintenance concerning the joint child — Decision of that court declining jurisdiction as regards parental responsibility — Jurisdiction to determine the claim relating to maintenance obligation towards the child — Court best placed to hear the case)

I. Introduction

1. The request for a preliminary ruling concerns the interpretation of Article 3(a) and (d) and of Article 5 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. The request was submitted in the context of proceedings between R, residing in the United Kingdom, and P, residing in Romania, concerning an application for maintenance for their common child brought on the occasion of divorce and parental responsibility proceedings.

3. The main proceedings provide the Court with the opportunity, first, to clarify the conditions for the application of Article 3(a) and (d) and also of Article 5 of Regulation No 4/2009 and, second, to rule on the obligation on the court having jurisdiction in relation to maintenance obligations to give priority to the concentration of the proceedings according to the child's best interests, which it took into consideration in order to declare that it had no jurisdiction in relation to parental responsibility.

1 Original language: French.

2 OJ 2009 L 7, p. 1.

II. Legal framework

A. EU law

1. Regulation (EC) No 2201/2003

4. Recitals 5, 11 and 12 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,[3] state:

'(5) In order to ensure equality for all children, this regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.

…

(11) Maintenance obligations are excluded from the scope of this Regulation as these are already covered by Council Regulation [(EC)] No 44/2001 [of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters].[4] The courts having jurisdiction under this regulation will generally have jurisdiction to rule on maintenance obligations by application of Article 5(2) of [Regulation No 44/2001].

(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.'

5. Article 1 of that regulation provides:

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

(a) divorce, legal separation or marriage annulment;

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

…

3. This regulation shall not apply to:

…

(e) maintenance obligations;

…'

3 OJ 2003 L 338, p. 1.

4 OJ 2001 L 12, p. 1.

6. Article 2(7) of that regulation is worded as follows:

‘For the purposes of this regulation:

…

7. the term “parental responsibility” shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access.’

7. According to Article 3(1)(b) of that regulation, in matters relating to divorce, jurisdiction is to lie with the courts of the Member State of the nationality of both spouses.

8. Article 8 of Regulation No 2201/2003 provides:

‘1. 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.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.’

9. Article 12(1) of that regulation provides:

‘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 child’s best interests.’

2. Regulation No 4/2009

10. This regulation replaces the provisions on maintenance obligations in Regulation No 44/2001.[5] It also replaces, as regards maintenance obligations, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims,[6] with the exception of European Enforcement Orders relating to maintenance obligations issued by Member States which are not bound by the 2007 Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, approved, on behalf of the European Community, by Council Decision 2009/941/EC of 30 November 2009,[7] namely the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Denmark.[8]

5 See, concerning the relevance of the Court’s case-law in relation to that regulation, in these matters, judgment of 18 December 2014, *Sanders and Huber* (C-400/13 and C-408/13, EU:C:2014:2461, paragraph 23).

6 OJ 2004 L 143, p. 15.

7 OJ 2009 L 331, p. 17, ‘the 2007 Hague Protocol’.

8 This protocol was ratified by the European Union on 8 April 2010 on behalf of the Member States, apart from those two States, who did not accede to it. See, in that regard, the list of States Parties as at 31 March 2017, available on the website of the Hague Conference: https://www.hcch.net/en/instruments/conventions/status-table/?cid= 133.

11. Owing to the date of application of the 2007 Hague Protocol in the European Union, Regulation No 4/2009 has been applicable since 18 June 2011.[9]

12. In accordance with recitals 1 and 2 thereof, Regulation No 4/2009 and also, in particular, Regulations Nos 44/2001 and 2201/2003 concern the adoption of measures relating to judicial cooperation in civil matters having cross-border implications and must aim, inter alia, to promote the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

13. Recitals 9, 10 and 15 of Regulation No 4/2009 state:

'(9) A maintenance creditor should be able to obtain easily, in a Member State, a decision which will be automatically enforceable in another Member State without further formalities.

(10) In order to achieve this goal, it is advisable to create a Community instrument in matters relating to maintenance obligations bringing together provisions on jurisdiction, conflict of laws, recognition and enforceability, enforcement, legal aid and cooperation between Central Authorities.

…

(15) In order to preserve the interests of maintenance creditors and to promote the proper administration of justice within the European Union, the rules on jurisdiction as they result from Regulation [No 44/2001] should be adapted. The circumstance that the defendant is habitually resident in a third State should no longer entail the non-application of Community rules on jurisdiction, and there should no longer be any referral to national law. This regulation should therefore determine the cases in which a court in a Member State may exercise subsidiary jurisdiction.'

14. In Article 2(1)(10) of Regulation No 4/2009, the term 'creditor' is defined as 'any individual to whom maintenance is owed or is alleged to be owed'.

15. Article 3 of that regulation provides:

'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.'

9 See the third paragraph of Article 76 of Regulation No 4/2009. That date of application must be distinguished from the date of entry into force of the 2007 Hague Protocol, which was fixed at 1 August 2013 between all the States Parties. See also Gaudemet-Tallon, H., and Ancel, M.-E., *Compétence et exécution des jugements en Europe, Règlements 44/2001 et 1215/2012, Conventions de Bruxelles (1968) et de Lugano (1998 et 2007)*, 6th ed., Librairie générale de droit et de jurisprudence, collection 'Droit des affaires', Paris, 2018, point 216, p. 318.

16. Article 5 of that regulation, entitled 'Jurisdiction based on the appearance of the defendant', provides:

'Apart from jurisdiction derived from other provisions of this regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction.'

17. Article 10 of that regulation, entitled 'Examination as to jurisdiction', provides:

'Where a court of a Member State is seised of a case over which it has no jurisdiction under this regulation it shall declare of its own motion that it has no jurisdiction.'

18. Articles 12, 13 and 14 of Regulation No 4/2009 set out the rules relating, respectively, to *lis pendens*, related actions and provisional, including protective, measures.

B. Romanian law

19. According to the order for reference, a Romanian court which has declared that it has jurisdiction may at each stage of the proceedings reconsider its jurisdiction, of its own motion or at the request of the parties. [10]

III. The facts of the main proceedings and the questions for a preliminary ruling

20. R and P, who are Romanian nationals, were married in Romania on 15 August 2015. They are, respectively, the mother and the father of a child born on 8 November 2015 in Belfast (United Kingdom), where they lived before separating in 2016. P returned to Romania, while R remained in Belfast with the child.

21. By application of 29 September 2016, R brought proceedings against P before the Judecătoria Constanța (Court of First Instance, Constanța, Romania) in order to obtain a divorce, the fixing of the place of residence of the child with her, authorisation to exercise sole parental responsibility and an order for P to pay maintenance for the child.

22. P contested the jurisdiction of that court. The court declared that it had jurisdiction to hear the divorce petition, owing to the nationality of the spouses, in application of Article 3(b) of Regulation No 2201/2003.

23. Following the decision taken by that court on 8 June 2017 to separate R's claims, two new cases were initiated, having as their subject matter, in the first case, parental responsibility over the child and the fixing of her place of residence with the applicant and, in the second case, an order for P to pay maintenance for the child.

24. As regards the case relating to the exercise of parental responsibility, the Judecătoria Constanța (Court of First Instance, Constanța) declared that it had no jurisdiction, in application of Article 12(1) of Regulation No 2201/2003, taking into consideration the child's best interests. In addition, that court held that the courts of the United Kingdom had jurisdiction to adjudicate on that claim, in accordance with Article 8(1) of Regulation No 2201/2003, on the ground that the child had been habitually resident in that Member State from birth. The parties did not appeal against that court's decision that it had no jurisdiction.

10 See, in that regard, Article 1071 of the Codul de procedură civilă (Code of Civil Procedure), cited in the order for reference in the case of *OF* (C-759/18), currently pending before the Court (p. 5).

25. As regards the case having as its subject matter the maintenance for the child, the referring court declared that it had jurisdiction on the basis of Article 3(a) of Regulation No 4/2009, given the place of habitual residence of the defendant, P. The referring court observes that P entered an appearance before it without raising a plea alleging lack of jurisdiction, but that he claimed that the matter should be referred to the Court for a preliminary ruling.

26. The referring court adds that the parties to the proceedings, R and P, are agreed that it is appropriate to request the Court to interpret the applicable provisions of EU law. It shares that view, and considers that, before examining the substance of the claim relating to the maintenance obligation towards the child and at any stage in the proceedings, it may still verify whether it has jurisdiction.

27. In fact, the referring court entertains doubts as to the relationship between three provisions of Regulation No 4/2009, namely Article 3(a) and (d) and Article 5.

28. That court seeks to ascertain whether, owing to the fact that the claim relating to the maintenance obligation is ancillary to the claim relating to parental responsibility, the sole criterion applicable for the purpose of determining which court has jurisdiction in the Member States is that laid down in Article 3(d) of Regulation No 4/2009, thus excluding the other criteria laid down in Article 3(a) or Article 5 of that regulation that might serve as the basis for its jurisdiction, namely the place where the defendant is habitually resident or the fact that he has entered an appearance before it.

29. The referring court expresses the view that a solution that entailed the application of the latter two jurisdiction criteria would call into question the ancillary nature of the application for maintenance and would be contrary to the child's best interests which it took into account when declining jurisdiction in relation to parental responsibility. Practical reasons linked with the taking of evidence and the rapidity of the proceedings would also support that solution.

30. The referring court considers, moreover, as regards the application of Article 5 of Regulation No 4/2009, that such a head of jurisdiction would be precluded if the fact that the claim relating to the maintenance obligation is ancillary to the claim relating to parental responsibility were to have the consequence that P's contesting of its jurisdiction has effects when that claim relating to parental responsibility is examined. [11]

31. In support of those arguments, the referring court refers to the judgment of 16 July 2015, *A*, [12] but expresses doubts as to the scope of that judgment, on the ground that certain factual circumstances differ from those of the main proceedings. It observes that its jurisdiction has not been contested by the defendant, P, and that it is the only court seised of the family matter, in spite of its decision that it has no jurisdiction, based on the place where the child is habitually resident.

32. In those circumstances, the Judecătoria Constanța (Court of First Instance, Constanța) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) In the context of an action before the courts of a Member State which comprises three heads of claim concerning (i) the divorce of the parents of a minor child, (ii) parental responsibility for that minor child and (iii) maintenance obligations with regard to that minor child, may Article 3(a) and (d) and Article 5 of Regulation No 4/2009 be interpreted as meaning that the court seised of the divorce petition, being also a court for the place where the defendant is habitually resident and the court before which the defendant has entered an appearance, has jurisdiction to give a decision on the claim concerning maintenance obligations in respect of the

11 See point 22 of this Opinion.

12 C-184/14, 'the judgment in *A*', EU:C:2015:479.

minor child, notwithstanding its finding that it has no jurisdiction in the matter of parental responsibility for the minor child, or may the claim concerning maintenance obligations be decided only by a court having jurisdiction to adjudicate the claim concerning parental responsibility for the minor child?

(2) In the circumstances relating to the jurisdiction of the national court described above, is the claim concerning maintenance obligations with regard to the minor child ancillary to the claim concerning parental responsibility, within the meaning of Article 3(d) of that regulation?

(3) In the event that the second question is answered in the negative, is it in the best interests of the minor child for a court of a Member State which has jurisdiction pursuant to Article 3(a) of Regulation No 4/2009 to decide the claim concerning the maintenance obligations of the parents toward the minor child of the marriage of which the dissolution is sought, notwithstanding the fact that that court has found itself to have no jurisdiction in the matter of parental responsibility and has held, with the force of *res judicata*, that the conditions laid down by Article 12 of [Regulation No 2201/2003] are not fulfilled?'

IV. My analysis

33. By its questions, which I propose should be examined together, the referring court is asking, in essence, whether Article 3(a) and Article 5 of Regulation No 4/2009 must be interpreted as meaning that they preclude a court of a Member State with jurisdiction to hear an action relating to a maintenance obligation brought against a defendant who is habitually resident in that Member State or who has entered an appearance before that court from declining to exercise that jurisdiction on the grounds that such a claim is ancillary to a claim relating to parental responsibility, within the meaning of Article 3(d) of that regulation, and that the court with jurisdiction to hear the latter claim would be better placed, having regard to the best interests of the child, to adjudicate on those claims.

A. Preliminary observations

34. It is appropriate, at the outset, to underline a number of factors relating to the context in which that question arose.

35. In this case, as in numerous other earlier cases,[13] the proceedings seeking to obtain the dissolution of the marital link, in this instance the divorce, and to organise the consequences for the child of the married couple were brought before the court with jurisdiction to adjudicate on the separation, owing to the common nationality of the spouses, although the place of habitual residence of one of them, at least, and of the child, was fixed in a different Member State.

13 See, in particular, judgments in *A* (paragraphs 15 to 17), and of 6 October 2015, *A* (C-489/14, EU:C:2015:654, paragraphs 13 and 14), and order of the President of the Court of 16 January 2018, *PM* (C-604/17, not published, EU:C:2018:10, paragraphs 12 à 14), and judgment of 4 October 2018, *IQ* (C-478/17, EU:C:2018:812, paragraphs 13 and 14). See, in addition, the request for a preliminary ruling in *OF* (C-759/18), currently pending before the Court, which refers, in paragraph 13, to numerous similar cases concerning Romanian nationals habitually resident in another Member State, in that particular case in Italy, which relate to the jurisdiction of the court seised in matters of parental responsibility and the maintenance obligation, in the same circumstances as those of the main proceedings.

36. In such a case, the applicant's choice to seise a single court for all the applications is generally guided by the wish to take advantage of the concentration of the proceedings.[14] Provided that the matrimonial dispute in question has cross-border impacts, Article 12 of Regulation No 2201/2003, which establishes a prorogation of jurisdiction in parental responsibility matters, and Article 3(d) of Regulation No 4/2009 allow the applicant to achieve that objective.

37. In the present case, after the jurisdiction of the referring court, namely the Romanian court, was initially contested by the defendant, P, the father of the child,[15] that court declared that it had jurisdiction with respect to the divorce but that it had no jurisdiction to rule on the exercise of parental responsibility, having regard to the child's best interests.

38. It is therefore necessary to ascertain the precise criteria derived from Articles 3 and 5 of Regulation No 4/2009, which alone are applicable in this instance,[16] that would still allow that court to entertain the proceedings relating to the maintenance obligation.[17]

B. Conditions for application of the criteria drawn from Articles 3 and 5 of Regulation No 4/2009

39. Article 3 of that regulation contains two categories of criteria, one relating to the residence of one of the parties [subparagraph a for the defendant or subparagraph b for the creditor],[18] and the other organising the concentration of the proceedings [subparagraph c in the case of proceedings concerning the status of a person or subparagraph d in the case of proceedings concerning parental responsibility].

40. As the maintenance creditor, namely, in this case, the minor child,[19] on whose behalf the action has been brought by her mother, R, is habitually resident in the United Kingdom, the referring court therefore properly declared that it had no jurisdiction, after separating the cases,[20] to adjudicate on the claim for maintenance, in application of the criterion laid down in Article 3(a) of Regulation No 4/2009 on account of the place where the defendant, P, has his place of habitual residence.[21]

41. Since the child resides in a different Member State, the jurisdiction of the referring court could not be based on Article 3(b) of that regulation. Do the other procedural criteria likely to justify the referring court having jurisdiction apply?

14 In that regard, the referring court has observed that, 'in accordance with national law, in such a case, the matters of parental authority and maintenance are ancillary to the divorce petition (Article 931(2) of the Code of [Civil] Procedure)'. The choice of the criterion of the spouses' nationality may also be justified by the designation of the law applicable to the separation. In that regard, it may be emphasised that the United Kingdom is not bound by Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ 2010 L 343, p. 10).

15 See point 22 of this Opinion.

16 Article 4 of Regulation No 4/2009, entitled 'Choice of court', is not to apply to a dispute relating to a maintenance obligation towards a child under the age of 18, in accordance with paragraph 3. Article 6 of that regulation provides for subsidiary jurisdiction based on the common nationality of the parties, while Article 7 of that regulation establishes a *forum necessitatis*.

17 See, with regard to the lack of opposition from the father to the jurisdiction of the court seised of those proceedings, point 25 of this Opinion.

18 As regards the application of that criterion, see judgment of 18 December 2014, *Sanders and Huber* (C-400/13 and C-408/13, EU:C:2014:2461, and especially, on the justification for that criterion, paragraph 34).

19 See definition of maintenance creditor in Article 2(10) of Regulation No 4/2009. Cf. Article 46 of that regulation on free legal aid for applications concerning maintenance to children. See also judgment of 15 January 2004, *Blijdenstein* (C-433/01, EU:C:2004:21, paragraph 30, from which it is apparent that the maintenance creditor is the person whose needs must be determined by the court seised). See, in addition, Fongaro, E., and Hector, P., 'Obligation alimentaire', *Répertoire de droit européen, Encyclopédie juridique Dalloz*, Dalloz, Paris, 2018, point 97, and also Ancel, B., and Muir Watt, H., 'Aliments sans frontières', *Revue critique de droit international privé*, Dalloz, Paris, 2010, No 3, pp. 457 to 484, in particular point 4, footnote 9 (p. 460), and point 8 (pp. 463 and 464). See, to the same effect, Hellner, M., 'Maintenance obligations', *Encyclopedia of Private International Law*, Edward Elgar Publishing, Cheltenham, 2017, pp. 1185 to 1194, in particular p. 1190.

20 CF. the judgment of 4 October 2018, *IQ* (C-478/17, EU:C:2018:812, paragraph 16).

21 It may be observed that this criterion was not taken into consideration for the divorce.

42. While a court of the United Kingdom must be seised of the application relating to parental responsibility,[22] the jurisdiction of the referring court, which has jurisdiction to deal with the divorce, based on Article 3(c) of that regulation, would remain. The Court precluded that possibility in the judgment in *A*, which concerned factual circumstances comparable with those of the main proceedings. That is the essential scope of that judgment, delivered in a different procedural context in which the Court was required to determine to which proceedings the proceedings relating to maintenance for the child were ancillary.[23]

43. The Court thus ruled that 'Article 3(c) and (d) of Regulation No 4/2009 must be interpreted as meaning that, where a court of a Member State *is seised* of proceedings involving the separation or dissolution of a marital link between the parents of a minor child and a court of another Member State *is seised* of proceedings in matters of parental responsibility involving the same child, an application relating to maintenance concerning that child is ancillary only to the proceedings concerning parental responsibility, within the meaning of Article 3(d) of that regulation'.[24]

44. It thus follows from the analysis of the criteria established in Article 3 of Regulation No 4/2009 that in the main proceedings only one of those criteria, that established in Article 3(a), allows the referring court to adjudicate in matters relating to maintenance obligations.

45. Consequently, in the first place, it must be made clear that Article 5 of that regulation, to which the referring court refers because the defendant entered an appearance before it, is not applicable, on the ground that that provision establishes a head of jurisdiction applicable in the event of the court seised not having jurisdiction.[25]

46. In that regard, the main proceedings are a perfect illustration of the fact that, where the court has jurisdiction because of the habitual residence of the defendant, the criterion based on his having entered a personal appearance before the court seised without contesting its jurisdiction[26] is of no particular relevance.

47. In the second place, as regards the effects which the referring court would derive from the fact that the application relating to the maintenance obligation is ancillary to the application relating to parental responsibility, it must first of all be pointed out that, in the main proceedings, the finding that no court of the United Kingdom has been requested to hear such an application and, if necessary, the application relating to the maintenance obligation, following disjoinder of the initial applications, is sufficient to remove all doubt as to the application of the single jurisdiction criterion, which as it stands is satisfied, namely that drawn from Article 3(a) of Regulation No 4/2009.

22 See points 24 and 31 of this Opinion.

23 In that case, the spouses and their two minor children were Italian and lived permanently in London (United Kingdom). An Italian court had been seised of claims relating to the marital link and to its consequences for the children, while proceedings had subsequently been initiated by the same applicant before a court of England and Wales to have the procedures for the exercise of parental responsibility defined. The court first seised inferred from Article 8(1) of Regulation No 2201/2003 that only the United Kingdom courts had jurisdiction to entertain proceedings relating to parental responsibility, within the meaning of Article 2(7) of that regulation, because the children were habitually resident in London.

24 Judgment in *A* (paragraph 48). Emphasis added.

25 I share the opinion expressed by the European Commission that that article is a form of 'tacit prorogation' of jurisdiction. To the same effect, see, in particular, Gallant, E., *Droit processuel civil de l'Union européenne*, LexisNexis, Paris, 2011, point 319, p. 109, who uses the same expression and explains that that rule authorises a court not having jurisdiction to adjudicate on maintenance obligations. Cf. Article 26(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

26 That, in my view, is the position in the context of the case relating to the maintenance obligation following the separation of the cases and, consequently, of the proceedings. See, in that respect, the referring court's questions referred to in point 30 of this Opinion.

48. Next, it may be observed that, in those circumstances, there is no need to address the possible consequences of the application of the provisions relating to *lis pendens* [27] and related actions [28] by the second court seised.

49. Nor, last, can any solution along the lines suggested by the referring court and also supported by the Romanian Government be inferred from the judgment in *A*. They are of the view that, in the case of joined applications concerning the common child and relating to parental responsibility and the maintenance obligation, the court of the Member State in which the child is habitually resident would have exclusive jurisdiction.

50. In that regard, the referring court has emphasised that the Court had held that, 'by its nature, an application relating to maintenance in respect of minor children is … intrinsically linked to proceedings concerning matters of parental responsibility' and that 'the court with jurisdiction to entertain proceedings concerning parental responsibility, as defined in Article 2(7) of Regulation No 2201/2003, is in the best position to evaluate *in concreto* the issues involved in the application relating to child maintenance, to set the amount of that maintenance intended to contribute to the child's maintenance and education costs, by adapting it, according to (i) the type of custody (either joint or sole) ordered, (ii) access rights and the duration of those rights and (iii) other factual elements relating to the exercise of parental responsibility brought before it'. [29]

51. Did the Court thus implicitly consider that in all circumstances the criterion of the habitual residence of the child, and therefore of the maintenance creditor, must be given priority owing to the risk of inconsistency between the decision of the court having jurisdiction in matters relating to maintenance obligations and that of the court having exclusive jurisdiction to rule on parental responsibility? [30]

52. In other words, must it be deduced from the judgment in *A* that the court, which does not have jurisdiction to rule on the application for parental responsibility for a child, must refuse to accept jurisdiction in respect of maintenance obligations concerning that child in favour of a court better placed to rule on that application?

53. I do not think so. Although the judgment in *A* clarifies the relationship between the criteria set out in Article 3(c) and (d) of Regulation No 4/2009, it does not rule on the other criteria of jurisdiction laid down in Article 3 or in Article 5 of that regulation. An examination of those criteria would not have assisted the referring court in that case, since, unlike the factual circumstances of the main proceedings in the present case, the spouses — the parents of the maintenance creditor children — had their habitual residence in the same Member State as the children.

54. Thus, it was necessary to take the child's best interests into account in order to interpret Article 3(c) and (d) of Regulation No 4/2009 for the purpose of distinguishing them. [31]

27 See Article 12 of Regulation No 4/2009.

28 See Article 13 of Regulation No 4/2009.

29 Judgment in *A* (paragraphs 40 and 43).

30 See, to that effect, Gallant, E., op. cit., point 313, p. 108.

31 See judgment in *A* (paragraphs 43 to 46 and, more particularly, the latter paragraph).

55. That analysis of the scope of the judgment in *A* is corroborated by the recent orders of 16 January 2018, *PM*,[32] and of 10 April 2018, *CV*.[33] It follows that, if a court does not have jurisdiction to rule on an application relating to parental responsibility concerning a minor child and therefore does not have jurisdiction on the basis of Article 3(d) of Regulation No 4/2009 relating to a maintenance obligation for that child, it is nonetheless appropriate to ascertain whether that court may have jurisdiction to rule on that application on another basis under that regulation.[34]

56. Furthermore, any interpretation of the judgment in *A* in the sense suggested by the referring court would have the consequence of disregarding the fact that the grounds of that judgment serve mainly to justify the linking of the application relating to the maintenance obligation with the application relating to parental responsibility rather than with the application relating to the marital link. In addition, affording such a scope to that judgment would fail to take account of the wording and the context of Regulation No 4/2009 or of the objectives pursued by that regulation.[35]

57. As regards the wording of Article 3 of that regulation, the Court has already stated, in the judgment in *A*, that the criteria for attributing jurisdiction are alternative and now, since that judgment, all doubt is removed as to the interpretation of that provision when a court is seised of proceedings relating to the status of a person and parental responsibility.[36]

58. As regards the context and the objectives pursued, it should be borne in mind, in the first place, that the sole purpose of the addition, in Regulation No 4/2009, of Article 3(d) to the earlier provisions, taken from Article 5(2) of Regulation No 44/2001,[37] is to organise the concentration of the jurisdiction of the court where the criterion of the place where the creditor is habitually resident, namely the criterion laid down in Article 3(b) of Regulation No 4/2009, is not applicable.[38]

59. In the second place, since the Brussels Convention, which made options of jurisdiction available by establishing criteria of special jurisdiction, which derogate from the criterion of the place of residence of the defendant, to favour 'territorial or procedural proximity, depending on the case',[39] the criteria of jurisdiction specific to disputes relating to maintenance obligations have been determined in order to satisfy two objectives, namely, one to preserve the interests of creditors, as the Court has observed, and the other to promote the proper operation of justice.[40] It should therefore be accepted that the criteria relating to jurisdiction are alternative and the applicant's choice is given priority.[41]

32 C-604/17, not published, EU:C:2018:10.

33 C-85/18 PPU, EU:C:2018:220.

34 See order of the President of the Court of 16 January 2018, *PM* (C-604/17, not published, EU:C:2018:10, paragraph 33), and order of 10 April 2018, *CV* (C-85/18 PPU, EU:C:2018:220, paragraph 55).

35 See, in particular, for a reminder of the interpretation method normally applied by the Court, judgment of 21 June 2018, *Oberle* (C-20/17, EU:C:2018:485, paragraph 34).

36 See judgment in *A* (paragraphs 33, 34 and 48).

37 This article reproduced, without amendment, the wording of Article 5(2) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the successive Conventions relating to the accession of the new Member States to that Convention ('the Brussels Convention), including the addition in 1978 of the jurisdiction of the court seised of proceedings concerning the status of a person. See also Gaudemet-Tallon, H., and Ancel, M.-E., op. cit., point 219, p. 320.

38 See, to that effect, Boiché, A., 'Les règles de compétence judiciaire', dossier 'Recouvrement des obligations alimentaires dans l'Union', *Actualité juridique: famille*, Dalloz, Paris, 2009, No 3, pp. 107 to 112, in particular the commentary on Article 3(d) of Regulation No 4/2009.

39 Expression summarising the justification for the special jurisdiction, used by Gaudemet-Tallon, H., and Ancel, M.-E., op. cit., point 180, p. 246.

40 See judgment of 18 December 2014, *Sanders and Huber* (C-400/13 and C-408/13, EU:C:2014:2461, paragraphs 26 to 29). See also recital 15 of Regulation No 4/2009.

41 See, in particular, concerning the preference given to the creditor in the determination of the court with jurisdiction, Joubert, N., 'La mise en œuvre de l'obligation alimentaire en présence d'un élément d'extranéité dans les relations entre parents et enfants', *Droit de la famille*, LexisNexis, Paris, 2018, No 1, dossier 3, point 7. See also Farge, M., 'Promotion transfrontière du droit à obtenir des aliments: l'apport du règlement (CE) nº 4/2009 du 18 December 2008 (1ère partie)', *Droit de la famille*, LexisNexis, Paris, 2011, No 9, study 18, point 16.

60. In the third place, I would emphasise, as does the Commission, that to give special priority to the concentration of the proceedings in consideration of the child's place of residence would, in the absence of other proceedings concerning parental responsibility initiated in the Member State concerned, lead to a denial of justice, as regards the pending application relating to the maintenance obligation, which would be contrary to the child's best interests and would undermine the principle of foreseeability of the rules on jurisdiction.

61. Consequently, it must be noted that the provisions of Regulation No 4/2009, in particular those relating to jurisdiction, are intended to allow the maintenance creditor to obtain satisfaction in protective conditions on the basis of restrictive and non-hierarchised criteria.

62. In addition, it is appropriate to emphasise the difference between Article 10 of Regulation No 4/2009 and Article 17 of Regulation No 2201/2003. While they provide that a court which is incorrectly seised must declare of its own motion that it has no jurisdiction, in the case of maintenance proceedings the court is not required to ascertain that a court of another Member State has jurisdiction. Owing to the exhaustive nature of the jurisdiction criteria,[42] the court with jurisdiction in maintenance matters must adjudicate on the action. Failing that, it may nonetheless adjudicate on an application for provisional or conservatory measures, as available under the law of the Member State concerned.[43]

63. Thus, in the absence of an option available to the applicant to choose another criterion of jurisdiction, the court seised of the application for maintenance must divide the proceedings.

64. Contrary to the submissions of the referring court and the Romanian Government, in particular as regards the evidential requirements,[44] a number of arguments, compatible with the objectives pursued by Regulation No 4/2009, may be put forward to justify the application of the criterion of jurisdiction laid down in Article 3(a) of that regulation in the main proceedings.

C. Arguments justifying the application of Article 3(a) of Regulation No 4/2009

65. First, as the Commission emphasises, the creditor, represented by one of her parents, was able deliberately to choose the criterion of the place where the defendant is resident.

66. Second, that choice may be justified by the assurance that the court of the place where the defendant is habitually resident will be aware of the ability to pay of the parent who is the debtor of the maintenance obligation.

67. Third, with regard to the factors to be taken into account to determine the amount of the maintenance claimed, it appears less difficult to ascertain the needs of the child than to ascertain the debtor's ability to pay. Indeed, if parental responsibility proceedings are brought, the court having jurisdiction in respect of the maintenance obligations must merely stay the proceedings pending the decision which will serve as the basis for the creditor's application for maintenance. Conversely, the court having jurisdiction in parental responsibility matters may be faced with serious difficulties in gathering and verifying the supporting documents relating to the resources and expenditure of the debtor parent, especially where he has engineered his insolvency.

42 See also, to that effect, Boiché, A., op. cit., in particular commentary on Article 10 of Regulation No 4/2009.

43 See Article 14 of Regulation No 4/2009.

44 See point 29 of this Opinion.

68. Fourth, the absence of a decision on the exercise of parental responsibility is not such as to prevent a court from assessing the needs of the child, as shown, in particular, by the other criteria of jurisdiction provided for by the EU legislature. It is also possible to take into consideration an agreement by the parents on the maintenance of the child's habitual residence.

69. Other arguments derived from the rules relating to the substance of the decision and its enforcement may also be put forward.

70. In fact, it should be borne in mind that the United Kingdom, like the Kingdom of Denmark, has not acceded to the 2007 Hague Protocol.[45] Consequently, those States are not bound by the rules designating the applicable law set out in that protocol.[46] Furthermore, decisions delivered in those States are not exempt from the requirement to seek leave to enforce decisions in the other Member States. An application for a declaration of enforceability in respect of those decisions must be submitted in the other Member States.[47]

71. Thus, the choice of the criterion of the place of residence of the defendant may also be influenced by concerns linked with the recovery of the maintenance debt in favourable conditions,[48] as recovery should not be delayed by a discussion of the recognition or enforceability of the decision delivered in another Member State.[49]

72. Consequently, having regard to all the foregoing, I am of the view that Article 3 of Regulation No 4/2009 must be interpreted as meaning that the fact that the application concerning the maintenance obligation is ancillary to an application concerning parental responsibility, within the meaning of Article 3(d) of that regulation, does not have the effect of precluding a court of a Member State from having jurisdiction on the basis of Article 3(a) of that regulation or, failing that, of Article 5 of that regulation.

73. However, it must be ensured that such an interpretation of the rules of jurisdiction does not prove to be contrary to the child's best interests.

D. Taking into consideration the child's best interests

74. As the Court recalled in the judgment in *A*, 'the implementation of Regulation No 4/2009 must occur in accordance with Article 24(2) of the Charter of Fundamental Rights of the European Union, according to which, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'.[50]

45 See footnote 8 of this Opinion.

46 Namely, if the Member State concerned is bound by that protocol, the creditor's choice of a court of the Member State in which the defendant is habitually resident ensures the application of the *lex fori*, in application of Article 4(3) of that protocol.

47 See Article 23 et seq. of Regulation No 4/2009. See also, as regards the consequences of Brexit, which would lead to the United Kingdom being regarded as a third State and to the absence of effect as concerns the recognition of decisions since, as matters now stand, decisions delivered in the United Kingdom are not enforceable, Farge, M., 'Conjectures sur le Brexit …' in 'Droit de la famille', *La Semaine juridique, Édition générale*, LexisNexis, Paris, 2016, No 38, pp. 1723 to 1729, in particular p. 1725. See also, Pilich, M., 'Brexit and EU private international law: May the UK stay in?', *Maastricht Journal of European and Comparative Law*, Sage Publishing, New York, 2017, Vol. 24, No 3, pp. 382 to 398, in particular pp. 391 to 393.

48 See, in that regard, judgment of 9 February 2017, *S.* (C-283/16, EU:C:2017:104, paragraphs 32 to 34 and the case law cited), and also recital 9 of Regulation No 4/2009, for a reminder of the objectives of simplicity and rapidity pursued by that regulation.

49 See, for a reminder of the objectives of Regulation No 4/2009 intended to ensure the effective recovery of maintenance claims in cross-border situations, recital 15 of that directive and also judgment of 18 December 2014, *Sanders and Huber* (C-400/13 and C-408/13, EU:C:2014:2461, paragraph 41). See also, for a detailed account of the rules on the recognition and enforcement of decisions delivered in a Member State not bound by the 2007 Hague Protocol, in particular, Fongaro, E., and Hector, P., op. cit., points 78 to 90.

50 See judgment in *A* (paragraph 46).

75. However, as the case in the main proceedings, paradoxically, shows, an applicant for maintenance can find himself obliged, having regard to the child's best interests, to accept the dissociation of the applications which he made before a single court following that court's decision that it does not have jurisdiction to hear the application concerning parental responsibility.

76. Although the inconveniences of the decision on the lack of extension of jurisdiction on the basis of Article 12 of Regulation No 2201/2003 must, in my view, be put into perspective, *in abstracto*, as I have stressed above, the need to take into account the child's best interests justifies an examination, *in concreto*, of the consequences of the fact that two courts must be seised in order to obtain, in succession, a decision on parental responsibility then a decision on the application for maintenance, when the second is ancillary to the first.

77. Specifically, in the present case, the position of R, the applicant, on the appropriateness of referring the matter to the Court for a preliminary ruling, suggests that she seeks to confirm her initial decision to seise a single court with jurisdiction to rule on the divorce petition and on all of the consequences of that petition for the common child.

78. In addition, as the Romanian Government has emphasised in its written observations,[51] it is also necessary to take into account the fact that a fresh application for maintenance made before another court is liable to deprive the creditor of the right to obtain maintenance from the date of her first application, namely, in this instance, 29 September 2016.

79. Accordingly, that separation of the proceedings imposed on the maintenance creditor,[52] following the absence of prorogation of jurisdiction of the court seised of the divorce petition, in relation to parental responsibility, and also the disadvantages of a withdrawal of the initial application, on the assumption that it would be permissible under the *lex fori*,[53] make it highly doubtful that the interests of the maintenance creditor would be satisfied. In those circumstances, I share the concerns expressed by the referring court and by the Romanian Government.

80. Accordingly, it is necessary in my view to seek a solution that protects of the interests of the creditor, in accordance with the objectives of Regulation No 4/2009 and with Article 24(2) of the Charter of Fundamental Rights.

81. In that regard, the judgment in *A* constitutes a relevant foundation for the development of the case-law of the Court on the interpretation of Regulation No 4/2009, in that it underlines the interest of the concentration of proceedings relating to the pecuniary consequences, for children, of their parents' separation.[54] The same applies to the finding of the absence of coordination between that regulation and Article 12 of Regulation No 2201/2003 and to the ineffectiveness of the rules relating to *lis pendens* or related actions in such a situation.[55]

82. Consequently, it seems conceivable to me, in keeping with the logic of Regulation No 4/2009 and in consideration of the child's best interests, that the court seised of the application relating to the maintenance obligation of which the child is the creditor may, because of the decision that it has no jurisdiction in parental responsibility matters, inform the applicant that it has jurisdiction on the basis of Article 3(a) of that regulation and ask him whether he maintains his application for maintenance.

51 See paragraph 31 of those observations.

52 See, for observations on the consequences of the system chosen in Regulation No 2201/2003, Ancel, B., and Muir Watt, H., 'L'intérêt supérieur de l'enfant dans le concert des juridictions: le Règlement Bruxelles II *bis*', *Revue critique de droit international privé*, Dalloz, Paris, 2005, No 4, pp. 569 to 606, in particular footnote 7 and reference to recital 6 of that regulation.

53 In fact, in that procedural context, a renunciation of that head of claim before the court initially seised, which has jurisdiction, might be regarded as a waiver of the maintenance obligation, contrary to public policy in the *locus fori*.

54 See judgment in *A* (paragraph 43).

55 In that regard, comparison may be made with the judgment of 4 October 2018, *IQ* (C-478/17, EU:C:2018:812, paragraph 47).

83. In the absence of specific provisions made by the EU legislature in Regulation No 4/2009,[56] such as those set out Article 15 of Regulation No 2201/2003,[57] or ensuring coordination with Article 12 of that regulation, the court seised may not refuse to exercise its jurisdiction in favour of a court better placed to rule on all the applications concerning the child.

84. In addition, although the court having jurisdiction to hear an action concerning parental responsibility would be better placed to rule on an application concerning maintenance ancillary thereto, I do not see how the child's best interests could justify the maintenance creditor being forced to alter his choice of court having jurisdiction.

85. That analysis is all the more necessary where, as in the present case, no other court has been seised.

V. Conclusion

86. Having regard to the foregoing considerations, I propose that the Court answer the questions for a preliminary ruling referred by the Judecătoria Constanța (Court of First Instance, Constanța, Romania) 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 the fact that the application relating to the maintenance obligation is ancillary to an application relating to parental responsibility, within the meaning of Article 3(d) of that regulation, does not have the effect of precluding the jurisdiction of the court of a Member State based on Article 3(a) of the regulation or, failing that, on Article 5 of thereof.

(2) In the absence of specific provisions made by the EU legislature in Regulation No 4/2009, such as those set out 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, or ensuring coordination with Article 12 of Regulation No 2201/2003, the court seised may not refuse to exercise its jurisdiction in favour of a court better placed to rule on all the applications concerning the child.

56 See, in that regard, the reasoning for the lack of anticipation of current difficulties to be managed based on the finding, set out in recital 11 of Regulation No 2201/2003, that 'the courts having jurisdiction under this regulation will generally have jurisdiction to rule on maintenance obligations', referred to in the Commission's Green Paper of 15 April 2004 on maintenance obligations (COM(2004) 254 final), point 5.1.1, p. 14.

57 That article introduced a rule inspired by the theory of *forum non conveniens*. It is also to be found in Articles 8 and 9 of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (available at the following web address: https://www.hcch.net/en/instruments/conventions/full-text/?cid=70) which 'breaks the mechanism down into a transfer or claim of jurisdiction', in the words of Gallant, E., 'Le forum non conveniens de l'article 15 du règlement Bruxelles II bis', *Revue critique de droit international privé*, Dalloz, Paris, 2017, No 3, pp. 464 to 471, point 2.