Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 8 July 2021 [1]

Case C-289/20

IB

v

FA

(Request for a preliminary ruling from the cour d'appel de Paris (Court of Appeal, Paris, France))

(Reference for a preliminary ruling – Area of freedom, security and justice – International jurisdiction and the recognition and enforcement of judgments in matrimonial matters – Regulation (EC) No 2201/2003 – Concept of habitual residence)

1. Towards the end of the 20th century, in the field of judicial cooperation in civil matters, for which the conditions were created, first, by the Maastricht Treaty [2] and, later, by the Amsterdam Treaty, [3] the European Union addressed the difficulties in family law linked to the effect of integration.

2. As regards jurisdiction in matrimonial matters, an initial convention, which did not enter into force, [4] was followed by Regulation (EC) No 1347/2000, [5] which was repealed by Regulation (EC) No 2201/2003, [6] the instrument currently in force. [7]

3. The Court has interpreted Article 3 of Regulation No 2201/2003 in the course of a number of references for a preliminary ruling. [8] Unless I am mistaken, none of those references concerned the possible effects flowing from an interpretation allowing two or more 'habitual residences' on the part of one spouse (or both).

1 Original language: Spanish.

2 Treaty on European Union (OJ 1992 C 191, p. 1); in particular, Article K.3 in conjunction with Article K.1.

3 Treaty establishing the European Community (Amsterdam consolidated version) (OJ 1997 C 340, p. 173); in particular, Article 61.

4 Convention of 28 May 1998 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (OJ 1998 C 221, p. 1; 'the 1998 Convention').

5 Council Regulation of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (OJ 2000 L 160, p. 19).

6 Council Regulation of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).

7 On its period of validity, see point 27 of this Opinion.

8 For example, in relation to the dual nationality of a spouse. Judgment of 16 July 2009, *Hadadi* (C-168/08, EU:C:2009:474; 'judgment in *Hadadi*').

4. Therefore, this reference for a preliminary ruling will enable the Court to deal with a question which, although it has arisen in other areas, [9] has not yet been the subject of a ruling in this one. The answer will require, first of all, a definition of the term 'habitually resident', where it is used to establish international jurisdiction in proceedings relating to divorce, separation or marriage annulment.

I. Legal framework. Regulation No 2201/2003

5. Recital 1 reads:

'The European Community has set the objective of creating an area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the Community is to adopt, among others, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.'

6. Recital 8 states:

'As regards judgments on divorce, legal separation or marriage annulment, this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures.'

7. In accordance with Article 3:

'1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State:

(a) in whose territory:

– the spouses are habitually resident, or

– the spouses were last habitually resident, in so far as one of them still resides there, or

– the respondent is habitually resident, or

– in the event of a joint application, either of the spouses is habitually resident, or

– the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

– the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

[9] In relation to succession, judgment of 16 July 2020, *E. E.* (Jurisdiction and law applicable to succession) (C-80/19, EU:C:2020:569; 'judgment in *E. E.* (Jurisdiction and law applicable to succession)').

…’

II. Facts, proceedings and question referred for a preliminary ruling

8. Ms FA, an Irish national, and Mr IB, a French national, were married in Ireland in 1994. They have three adult children.

9. On 28 December 2018, Mr IB filed an application for divorce with the tribunal de grande instance de Paris (Regional Court, Paris, France).

10. By order of 11 July 2019, the juge aux affaires familiales du tribunal de grande instance de Paris (Family Court of the Regional Court, Paris, France) held that the French courts have no jurisdiction to rule on the divorce. It based its finding on the following facts:

– The family home was located in Ireland, where the family had settled in 1999 and had purchased a property that was their marital home; the children also resided in Ireland and studied there.

– No separation had occurred between the spouses and nothing indicated that they had a common intention to transfer their home to France.

– By contrast, many facts existed which confirmed Mr IB’s personal and family ties with Ireland, to which country he went each weekend in order to join his wife and children and to engage in sporting and leisure activities on a regular basis.

– In the six months prior to the filing of the application (therefore, after 27 June 2018), there was no change in Mr IB’s lifestyle which might suggest that he had left his residence in Ireland. On the contrary, he continued to pursue the same family life in Ireland up until the Christmas holidays of 2018, which he spent with his wife and children at the family home.

– Mr IB’s ties with Ireland do not rule out his having ties with France, to which country he has, since 2017, travelled every week to work. Mr IB in fact has two residences: one, during the week, in Paris, for professional reasons and the other, with his wife and children in Ireland, for the rest of the time.

11. Mr IB appealed against the order of the first-instance court to the cour d’appel de Paris (Court of Appeal, Paris, France), claiming that the order should be set aside and seeking a declaration that the French courts have territorial jurisdiction to rule on the divorce. In particular, Mr IB disputed that he did not intend to establish in France ‘the permanent or habitual centre of his interests, with the intention that it should be of lasting character’.

12. Ms FA claimed that the appeal court should uphold the contested order.

13. According to the cour d’appel de Paris (Court of Appeal, Paris), at least six months prior to lodging his application for divorce, Mr IB had established a stable and permanent residence in France, without however giving up his residence in Ireland, where he continued to maintain family ties and where he stayed for personal reasons just as frequently as he previously had.

14. The referring court therefore takes the view that Mr IB has a residence in France with characteristics of stability and permanence such as to make it his habitual residence, while at the same time having a residence with the same characteristics in Ireland.

15. The referring court infers from this that the French courts and the Irish courts may both have jurisdiction to rule on the divorce, in accordance with the fifth and sixth indents of Article 3(1)(a) of Regulation No 2201/2003.

16. Against that background, the referring court considers that an interpretation of the term 'habitually resident' is required and it has therefore referred the following question to the Court of Justice for a preliminary ruling:

'Where, as in the present case, it is apparent from the factual circumstances that one of the spouses divides his or her time between two Member States, is it permissible to conclude, in accordance with and for the purposes of the application of Article 3 of Regulation No 2201/2003, that he or she is habitually resident in two Member States, such that, if the conditions listed in that article are met in two Member States, the courts of those two States have equal jurisdiction to rule on the divorce?'

III. Procedure before the Court of Justice

17. The reference for a preliminary ruling was received at the Court of Justice on 30 June 2020.

18. Written observations were lodged by Ms FA, the German, French, Irish and Portuguese Governments, and the European Commission.

19. On 17 February 2021, Mr IB submitted a reasoned request for a hearing. However, in light of the health crisis, he consented to the replacement of the hearing by written observations, and an order was made to that effect. Written observations in lieu of a hearing were lodged by Mr IB and also by the French and Irish Governments and the Commission.

IV. Analysis

A. Introductory remarks

20. The premiss of the question referred for a preliminary ruling is that a person 'divides his time between two Member States'.[10] The referring court asks what effects this factor has on the determination of the court with jurisdiction to rule on an application for divorce.

21. In order to answer that question, a view must be taken on the meaning of an adult's 'habitual residence' for the purposes of Article 3(1)(a) of Regulation No 2201/2003. If it is confirmed that Mr IB *may*, for the purposes of that provision, be habitually resident in two Member States, it will be necessary to consider whether the courts of both Member States have equal jurisdiction to rule on the divorce.

[10] A sociological study would in all likelihood show that the instances where a person (or both spouses) is in that particular situation are currently on the rise.

22. For a better understanding of the applicable provision, I shall refer first of all to its precursors.

23. Regulation No 2201/2003 governs international jurisdiction in matrimonial matters and matters of parental responsibility, the recognition and enforcement of judgments and cooperation between authorities in respect of all Member States of the European Union with the exception of Denmark.

24. Regulation No 2201/2003 is not the first instrument in this area. As I pointed out above, a convention governing the same matters (albeit more limited in relation to parental responsibility) was concluded in 1998. It was accompanied by an explanatory report which sets out the rationale of the rules laid down in the convention. [11]

25. The 1998 Convention did not enter into force. When, not long afterwards, the Community acquired competence in the field of judicial cooperation in civil matters, its enacting terms were incorporated into Regulation No 1347/2000, recital 6 of which calls for continuity between instruments.

26. Three years later, Regulation No 2201/2003 replaced Regulation No 1347/2000, expanding its scope to cover proceedings and rulings on parental responsibility which are not linked to matrimonial proceedings. In contrast, it retained, without alteration, the rules governing international jurisdiction for proceedings relating to divorce, legal separation and marriage annulment.

27. Regulation No 2201/2003 will cease to apply on 1 August 2022, owing to the adoption, on 25 June 2019, of Regulation (EU) 2019/1111, [12] which is intended to rectify shortcomings in the application of the former in proceedings involving minors. The rules governing international jurisdiction in situations of marriage breakdown remain unchanged.

28. The identity of the rules of jurisdiction in matters of divorce, legal separation and marriage annulment in the successive instruments, in addition to the fact that Regulation No 2201/2003 contains no explanation of these, makes the earlier instruments (and by extension, in particular, the Borrás Report) the central, albeit not the only, criterion for interpretation of the term 'habitually resident' as used in Article 3 of that regulation. [13]

[11] Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (OJ 1998 C 221, p. 27; 'the Borrás Report'). It was approved by the Council on 28 May 1998.

[12] Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (OJ 2019 L 178, p. 1). Subject to the transitional arrangements laid down in Article 100 thereof, this regulation will repeal the regulation in force with effect from 1 August 2022: see Article 104.

[13] See recital 6 of Regulation No 1347/2000 and recital 3 of Regulation No 2201/2003. The judgment of 29 November 2007, *Sundelind Lopez* (C-68/07, EU:C:2007:740; 'judgment in *Sundelind Lopez*', paragraph 26), restates the recitals of the former regulation in order to interpret Article 3 of the regulation in force. Opinions of advocates general frequently refer to the Borrás Report as a basis for the interpretation of the regulation in force: see the Opinions of Advocate General Sharpston in *Purrucker* (C-256/09, EU:C:2010:296, points 13, 84, 85 and 86); of Advocate General Kokott in *Hadadi* (C-168/08, EU:C:2009:152, points 37, 57 and 58); of Advocate General Bot in *Liberato* (C-386/17, EU:C:2018:670, points 55 and 69); and of Advocate General Saugmandsgaard Øe in *UD* (C-393/18 PPU, EU:C:2018:749, point 28).

B. The term 'habitually resident' in accordance with Article 3 of Regulation No 2201/2003

29. Article 3 of Regulation No 2201/2003 is part of an instrument which is intended to ensure, within its own sphere, the free movement of persons in the European area of freedom, security and justice. [14]

30. A correct interpretation of freedom of movement requires Member States to refrain from imposing direct restrictions on the exercise of that freedom and from establishing barriers which, indirectly, create similar deterrent effects.

31. The differences between the Member States in matters of family law, and the difficulties experienced by persons seeking to have their civil status recognised outside the Member State in which it was established, are liable to produce such deterrent effects.

32. Conscious of that state of affairs, the EU legislature created a uniform legislative framework to facilitate access to the courts of the Member States in proceedings for divorce, judicial separation and marriage annulment involving any foreign element, and for the mutual recognition of decisions given. [15]

33. Article 3(1)(a) of Regulation No 2201/2003 refers repeatedly to the place where one or both spouses is/are habitually resident for the purposes of determining which courts have jurisdiction to give a decision on those proceedings.

1. Autonomous interpretation

(a) Approach to the concept of habitual residence in other legislative texts

(1) In general

34. In line with a number of multilateral international conventions, [16] several European Union instruments governing judicial cooperation in matters of family law refer to the place where the interested party or parties is/are habitually resident as a criterion for international jurisdiction (whether direct or in the context of the recognition of judgments) and as a connecting factor for the conflict-of-law rules. [17]

[14] Judgment of 13 October 2016, *Mikołajczyk* (C-294/15, EU:C:2016:772, paragraph 33): '… according to recital 1 of Regulation No 2201/2003, that regulation is to contribute to the creation of an area of freedom, security and justice, in which the free movement of persons is ensured'.

[15] Recital 4 of Regulation No 1347/2000.

[16] For example, the Convention concerning the powers of authorities and the law applicable in respect of the protection of infants, done at The Hague on 5 October 1961; the Convention on the Recognition of Divorces and Legal Separations, done at the Hague on 1 June 1970; the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, done at The Hague on 19 October 1996; and the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, done at Luxembourg on 20 May 1980.

[17] Traditional criteria, such as nationality and domicile which were previously given precedence as an expression of the link between an individual and a legal system, are abandoned or take on secondary importance.

35. Habitual residence is also a common criterion in other areas of EU law [18] and in international conventions. [19] A general tendency in the texts concerned is that they do not usually define that concept or refer, for the purposes of interpreting it, to the legal systems of the Member States (or States parties). [20]

36. In common parlance, the term 'habitual residence' denotes a regular or stable stay in a particular place. However, its use in legal expressions necessitates rather more than an interpretation that is confined to the ordinary meaning of the words. [21]

37. The preambles, explanatory reports, preparatory documents and case-law of the Court of Justice demonstrate the tendency to identify habitual residence with the 'centre of interests' of an individual. In order to identify it in the abstract, a set of certain *linking factors* is used; to be specific, those factors are assessed in the light of the circumstances of each case. [22]

38. The nature of the interests, together with the relevant factors and indicators (in short, the *linking factors*), which will determine a person's habitual residence, will be established by the context of a provision which includes that ground of jurisdiction. It will also be necessary to have regard to the aim of that provision in addition to that of the body of legislation of which it forms part.

39. The concept of habitual residence and its interpretation for the purposes of Regulation No 2201/2003 are autonomous, as the Court has reiterated. [23] The context and the purpose of the provisions of that regulation therefore indicate the limits on the use of analogy and extrapolation between areas of law. [24]

[18] See, for example, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), which uses the word 'residence'. Article 1(j) defines this as 'the place where a person habitually resides'. The judgment of 5 June 2014, *I* (C-255/13, EU:C:2014:1291), differentiates between 'residence' and 'stay' in that context.

[19] For example, the Council of Europe Convention on preventing and combating violence against women and domestic violence, done at Istanbul on 11 May 2011 (Article 44).

[20] That absence is based on the intention not to influence other texts which use the same concept, according to Lagarde, P., *Informe explicativo al Convenio relativo a la competencia, la ley aplicable, el reconocimiento, la ejecución y la cooperación en materia de responsabilidad parental y de medidas de protección de los niños, hecho en La Haya el 19 de octubre de 1996*, in *Actes et documents de la Dix-huitième session de la Conférence de La Haye de droit international privé*, 1996, volume II, p. 552, paragraph 40.

[21] To the same effect, see the Opinion of Advocate General Kokott in *A* (C-523/07, EU:C:2009:39, point 15), in relation to habitual residence for the purposes of Article 8 of Regulation No 2201/2003.

[22] That case-by-case assessment falls, as is logical, to the national courts. Because that assessment is specific, 'the guidance provided in the context of one case may be transposed to another case only with caution'. Judgment of 28 June 2018, *HR* (C-512/17, EU:C:2018:513; 'judgment in *HR*', paragraph 54).

[23] Ibid., paragraph 40: 'Given that that regulation [No 2201/2003] does not provide any definition of the concept of … place of "habitual residence" and makes no reference to the law of the Member States in that regard, the Court has repeatedly held that the concept is an autonomous one of EU law, which has to be interpreted in the light of the context of the provisions referring to that concept and the objectives of Regulation No 2201/2003, in particular'. Autonomous interpretations are also preferred in relation to conventions: see point 35 and footnote 20 of this Opinion.

[24] I do not agree with France's assertion to the effect that the *very definition* of habitual residence in that and other regulations (inter alia, Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ 2012 L 201, p. 107)) must be common.

(2) In other areas of judicial cooperation in civil matters

(i) A child's place of habitual residence

40. As regards a child's place of habitual residence in disputes concerning parental responsibility, the Court treats this as equivalent to a child's centre of essential interests, which it identifies by grouping together certain indicators:

– which are selected for their appropriateness or correspondence to the context of the provision in which the criterion is used [25] and the aims of Regulation No 2201/2003, focused on the child's best interests; [26] and

– are applied (and weighed up) in the light of all the specific circumstances of the case. [27]

41. On the other hand, the Court refuses simply to adopt the definitions or interpretations of that concept used in other areas of EU law (in particular, in matters of social security and public service). Precisely because the context is different, such definitions or interpretations 'cannot be directly transposed in the context of the assessment of the habitual residence of children for the purposes of Article 8(1) of … Regulation [No 2201/2003]'. [28]

(ii) A deceased's place of habitual residence

42. That same approach is applied, *mutatis mutandis*, to the identification of the place of habitual residence of a deceased person, as used in Regulation (EU) No 650/2012. [29]

43. The preamble to Regulation No 650/2012 refers to a deceased's habitual place of residence as 'the centre of interests of his family and his social life', and proposes that it should be identified using 'an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence'. The habitual residence thus determined 'should reveal a close and stable connection' between the succession and a Member State, 'taking into account the specific aims of this Regulation'. [30]

[25] Relevant provisions are those which refer to habitual residence as a criterion for jurisdiction, in addition to Article 11 of Regulation No 2201/2003 in relation to cases of wrongful removal. See the judgment in *HR*, as regards the former, and judgment of 8 June 2017, *OL* (C-111/17 PPU, EU:C:2017:436; 'judgment in *OL*'), as regards the latter.

[26] Recital 12 of Regulation No 2201/2003; judgment of 2 April 2009, *A* (C-523/07, EU:C:2009:225; 'judgment in *A*', paragraph 35); judgment in *OL*, paragraph 66; judgment in *HR*, paragraph 59, among others. Obviously, that factor does not arise in relation to an adult's place of habitual residence.

[27] Inter alia, judgment in *A*, paragraph 37 et seq.; judgment of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829, paragraph 47 et seq.); and judgment in *OL*, paragraph 42 et seq.

[28] Judgment in *A*, paragraph 36.

[29] The deceased's last place of habitual residence is the general connecting factor for establishing international jurisdiction and the applicable law.

[30] Recitals 23 and 24. See also my Opinion in *E. E.* (C-80/19, EU:C:2020:230, point 45 et seq.), and the judgment in *E. E.* (Jurisdiction and the law applicable to succession), paragraphs 38 to 40.

(iii) An insolvent debtor's place of habitual residence

44. Lastly, habitual residence is an (indirect) criterion for international jurisdiction and, by extension, a connecting factor for the conflict-of-law rule in Regulation (EU) 2015/848 on insolvency proceedings. [31]

45. Under Article 3(1) of that regulation, the 'centre of the debtor's main interests' is, in the case of a private individual, presumed to be his place of habitual residence. In that connection, the interests which matter are economic and financial interests; the indicators which have to be examined are those which enable third parties to ascertain readily that 'centre of interests'. [32]

(b) Adaptation of that approach to Article 3(1) of Regulation No 2201/2003

46. The direct approach is, because of its flexibility, suitable for identifying habitual residence for the purposes of Article 3 of Regulation No 2201/2003, such that it makes it possible to allocate jurisdiction to the courts of a Member State in matters of divorce, judicial separation and marriage annulment.

47. There is no guidance in the regulation as to what the place where an adult is 'habitually resident' is or how that place is determined in a situation of marriage breakdown; nor are there any references to national legal systems for that purpose. That silence is a deliberate choice (and was common to the earlier instruments).

48. The Borrás Report draws attention to this, stating that:

– there was a discussion on the subject, in the context of the inclusion of the (current) sixth indent of Article 3(1)(a); [33] it was ultimately decided not to insert a provision concerning identification of the place of habitual residence for the purposes of the 1998 Convention; [34]

– 'particular account was taken' of the definition, used by the Court of Justice in other areas, to the effect that 'habitual residence' is 'the place where the person had established, on a fixed basis, his permanent or habitual centre of interests'; [35]

– other proposals were rejected, [36] which means that it is legitimate to assume that the definition of which 'particular account' was taken was accepted as a working definition in the negotiations.

49. In view of the continuity between the 1998 Convention and the regulation in force, it can be inferred that the current criteria for international jurisdiction in proceedings in matters of divorce, judicial separation and marriage annulment are underpinned by the same intention.

[31] Regulation of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19).

[32] Recital 28 of Regulation 2015/848, and judgment of 16 July 2020, *Novo Banco* (C-253/19, EU:C:2020:585, paragraph 21).

[33] The equivalent in the 1998 Convention was Article 2(1)(a), sixth indent.

[34] Borrás Report, paragraph 32.

[35] Loc. ult. cit. Such a definition applies to cases relating to the civil service and social security.

[36] Loc. ult. cit.

50. The concrete specification of the relevant interests for the purposes of identifying the place where the spouses are habitually resident, together with the choice of linking factors which, in an overall assessment, will lead to determination of the place of residence in each case, must, as I have already pointed out, be carried out autonomously, in the light of the context of the provision and the aim of Regulation No 2201/2003. [37]

51. It must also be recalled that, in these cases, the situation can change rapidly precisely because of the breakdown of the marriage. A transfer of the place of habitual residence is commonplace, followed, possibly, by the return of one of the spouses to his or her Member State of origin, if the spouses are of different nationalities.

2. Context of Article 3 and aim of Regulation No 2201/2003

(a) Clarification: functions of the place of habitual residence in Chapter II, Section 1 of Regulation No 2201/2003 and unity of the concept

52. Habitual residence and the nationality of a Member State are the key criteria in Chapter II ('Jurisdiction'), Section 1 ('Divorce, legal separation and marriage annulment') of Regulation No 2201/2003.

53. Those criteria perform two roles: they allocate international jurisdiction in disputes relating to marriage breakdown, pursuant to Article 3 of Regulation No 2201/2003, and they delimit the scope of the section, in accordance with Articles 6 and 7. [38]

54. The concept of 'habitual residence' is the same in both cases and therefore the definition adopted in the context of Article 3(1) of Regulation No 2201/2003 is material for the purposes of Articles 6 and 7 of that regulation. That follows from recital 8 in the preamble to Regulation No 1347/2000, the precursor to Regulation No 2201/2003, where it extends the scope of the instrument to nationals of non-Member States 'whose links with the territory of a Member State are sufficiently close, *in keeping with the grounds of jurisdiction laid down in the Regulation*'. [39]

(b) A criterion for ad hoc international jurisdiction

55. For the purposes of cases of marriage breakdown, Article 3(1)(a) and (b) of Regulation No 2201/2003 lays down rules of international jurisdiction based on the personal circumstances of one or both spouses. These are exclusive rules of jurisdiction and there is no hierarchy between them. [40]

[37] Points 38 and 39 of this Opinion.

[38] Pursuant to Article 6, the rules governing jurisdiction in force under the laws of each Member State may not be used in disputes in which the respondent is habitually resident in or holds the nationality of one of the Member States (or, in the case of Ireland, has his or her 'domicile' in the territory of a Member State). In the judgment in *Sundelind Lopez*, the Court held that the residual rules of jurisdiction may be used against an individual who is not habitually resident in a Member State and is not a national of one of the Member States, provided that there is no Member State with jurisdiction in accordance with the regulation.

[39] Italics added.

[40] Judgment in *Hadadi*, paragraph 48. No formal hierarchy exists between the rules of jurisdiction despite calls for the introduction of such a hierarchy when the regulation was recast (for example, by the Groupe européen de droit international privé, at its meeting in Antwerp in September 2018: https://www.gedip-egpil.eu/documents/Anvers %202018/DivorceCompletV5.7.2.19.pdf). The new Article 3 retains the same rules of jurisdiction, all on an equal footing. The degree of acceptance of each of those rules is a different matter; in that connection, the Borrás Report, at paragraphs 30 and 32, points out that a number of the criteria included were widely accepted in the Member States whereas others required a political compromise. The latter are reflected now in the fifth and sixth indents of Article 3(1)(a).

56. The list of rules of jurisdiction reproduces the criteria laid down in Article 3 of Regulation No 1347/2000, while the latter reproduces those laid down in Article 2 of the 1998 Convention. As regards the place of habitual residence, those criteria refer to:

– the place of habitual residence which is *common to both parties*, or which was common to both parties in the past; [41]

– the place of habitual residence of *only one party*:

  – subject to the prior consent of the other party, if the application is a joint application; in such cases, jurisdiction may lie with the courts of the Member State where the applicant is habitually resident or with those of the Member State where the respondent is habitually resident;

  – if it is the respondent's place of habitual residence;

  – if it is the place of habitual residence of the applicant, provided that it has been his or her place of habitual residence for at least a year before the application was made, or six months if the place of habitual residence is situated in the applicant's Member State of nationality (or, in the case of the United Kingdom and Ireland, the applicant has his or her domicile there).

57. The Borrás Report explains the selection of forums and the fact that they are alternatives: they reflect the interests of the parties, involve flexible rules to deal with mobility and reveal proximity, construed as a real link between an individual and a Member State. In short, they are intended 'to meet individuals' needs without sacrificing legal certainty'. [42]

58. The Court adopted those explanations in a number of judgments given on the subject of Article 3(1) of Regulation No 2201/2003. [43]

59. The Borrás Report also indicates that the possibility of bringing proceedings in a place which is the centre of interests of only one of the spouses, where that spouse is not the respondent and there is no agreement between the spouses, is also found in the text because it was a *sine qua non* for acceptance of the 1998 Convention by a number of States. [44]

60. That reflects the concern with the specific instance of movement of a spouse who, as a result of the breakdown of the marriage, transfers his or her residence to another Member State, a situation referred to above. [45] That transfer frequently entails the return, including the immediate

[41] In the latter case, it is a requirement that one of the spouses must still reside in that State. The point in time when that fact must be verified is not specified. The fifth and sixth indents indicate the time when the application was made and it is reasonable to infer the same point in time in respect of the other rules of jurisdiction.

[42] Borrás Report, paragraphs 27, 28 and 30. In Regulation No 1347/2000, recital 12 referred to the existence of a real link between the party concerned and the Member State exercising jurisdiction, without differentiating between proceedings relating to marriage breakdown and those relating to parental responsibility.

[43] Judgments in *Sundelind Lopez*, paragraph 26; in *Hadadi*, paragraph 48; and of 13 October 2016, *Mikołajczyk* (C-294/15, EU:C:2016:772, paragraphs 49 and 50).

[44] Footnote 40 of this Opinion.

[45] Point 51 of this Opinion.

return, to what was that spouse's residence before he or she was married or to the residence of his or her nationality. In such cases, it is appropriate to assess the link between the individual and the forum, even if objective geographical proximity has not yet been established.

3. The use of the place of habitual residence to allocate international jurisdiction

61. The concept underpinning the grounds of jurisdiction laid down in Article 3(1)(a) of Regulation No 2201/2003:

– corresponds to the centre of *essential* interests of the individual concerned, such interests being treated as those relating to social and family life. The place where *professional* and *financial* interests are located helps to identify that centre; however, those factors alone cannot detract from the importance of personal interests where their geographical location is not the same;

– means, in principle, that the individual concerned *stays* (and is not merely present) in a place, in a qualified manner: either because that stay is permanent or because it involves a certain regularity or constancy, such that the conditions arise for genuine integration into the social environment.

62. Characterisation of a stay as being 'habitual residence' by an adult does not depend *in every case* on the passage of particular period of time. Nor does it depend on whether, during that period, *objective* geographical proximity has been established between the individual concerned and the court seised of the divorce, legal separation or marriage annulment proceedings.

63. The reason why Article 3(1)(a), fifth and sixth indents, of Regulation No 2201/2003 stipulates that, in addition to the place of habitual residence, a number of temporal conditions must be met is because those temporal conditions are not essential to residence itself for the purposes of classifying it as 'habitual'. [46]

64. The requirement that one year must have elapsed in the applicant's State of residence, or six months in the State of his or her nationality (domicile, where appropriate), reduces the importance of 'time' as an indicator of the habitual nature of residence.

65. Accordingly, it is legitimate to take the view that, for the purposes of Article 3 of Regulation No 2201/2003, it is possible for a spouse to acquire habitual residence almost immediately (or after a short period of time) as a result of a transfer following the breakdown of the marriage.

66. In those circumstances, the duration, regularity or permanence of a physical presence, which normally denote 'habitual residence', can be supplemented or even replaced by the *intention* of an adult to settle and integrate in another State (or re-settle and reintegrate in the State of origin), thereby acquiring a new habitual residence and abandoning the previous one. [47]

[46] The addition of those conditions is usually explained as an indication of the intention to limit the *forum actoris* which is enshrined in the final two indents of Article 3(1)(a). That explanation, while correct, does not deny the effects of such requirements on the concept of habitual residence.

[47] Where there is no intention to abandon it, the previous place of residence remains the habitual residence.

67. That intention may exist from the outset or be forged gradually. In both cases, for it to be taken into account, the intention must be identifiable through tangible evidence or external signs. [48] Otherwise, the application of the rule of jurisdiction becomes excessively complicated to the extent that it is rendered impossible.

68. In order to identify a person's centre of essential interests (or, as the case may be, the intention to establish it) in a particular place for the purposes of Article 3(1)(a) of Regulation No 2201/2003, all the factors capable of showing an essential connection between the person concerned and that place must be taken into account, as in other closely related areas. [49]

69. Such factors may be, inter alia, the conditions and the reasons for that person's stay in the territory concerned, and, subject to the qualifications which I set out above, the length and regularity of that stay. While not intended to be an exhaustive list, such indicators include:

– the place is the State of origin;

– it is the place where family members and friends are;

– the individual resides on a regular basis in that place and has a rental agreement or owns a property or has taken steps to rent or own a property;

– the place is the individual's State of nationality;

– the individual has or is looking for stable employment in that place;

– the individual shares the culture of that place.

70. The relevance of those or similar indicators (which, I repeat, are not part of an exhaustive list of possibilities) [50] is confirmed by the case-law of the Court regarding the habitual residence of a young child or infant. The centre of a child's life can be inferred from his or her integration in a family and social environment, that of the parent on whom the child is dependent, using the criteria which the Court has set out for identifying such an environment. [51]

C. One habitual residence

71. Determining the place where an adult is habitually resident and deciding, on that basis, which court has jurisdiction to rule on an application for divorce are tasks which fall to the court seised of that application. The court must endeavour to identify *one* (that is, *the*) habitual residence of either one spouse or of both.

48 Judgment in *HR*, paragraph 46 and the case-law cited.

49 See, to that effect, in relation to a deceased's habitual residence, the judgment in *E. E.* (Jurisdiction and law applicable to succession), paragraph 38, and my Opinion in the same case (C-80/19, EU:C:2020:230, point 49 et seq.). As regards a child's place of habitual residence see, inter alia, judgment in *A*, paragraph 39.

50 Additional examples are notifying the authorities of the new address, or, if the adult lives with children of school age, placing the children in a kindergarten or school: in that connection, see the Opinion of Advocate General Kokott in *A* (C-523/07, EU:C:2009:39, point 44).

51 Judgments in *A*, paragraph 40; of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829, paragraphs 53 to 56); of 9 October 2014, *C* (C-376/14 PPU, EU:C:2014:2268, paragraph 52); and in *HR*, paragraphs 44 to 47.

72. It is true that Article 3(1) of Regulation No 2201/2003 does not exclude the possibility that a number of courts may have jurisdiction or that there may be a choice of jurisdiction (*forum shopping*) in proceedings concerned solely with divorce, judicial separation or marriage annulment. Simultaneous proceedings are referred to, and dealt with, in Article 19(1) and (3) of the regulation.

73. In my view, however, that argument does not justify a further increase in the number of forums, owing to a general acceptance that it is possible to be *habitually* resident in several places at once for the purposes of Article 3(1) of Regulation No 2201/2003.

74. The wording and objective of that provision, and other considerations of a schematic nature, militate against such an interpretation.

1. Wording and meaning of the terms

75. Article 3(1)(a) of Regulation No 2201/2003 refers at all times to the courts *of the Member State* of *habitual residence*, using the singular.

76. In parallel, under Article 66 of that regulation, which governs the application of the rules of jurisdiction in Member States having two or more legal systems, 'any reference to habitual residence in that Member State shall refer to habitual residence in *a* territorial unit'. [52]

77. Moreover, if the place of habitual residence were equivalent to the *centre* of an individual's essential interests, it would be inconsistent to allow a number of residences having that character at the same time.

78. On the other hand, there is nothing to preclude the existence of several 'de facto' residences, [53] whereby a person has, in addition to their habitual or main residence, another or other secondary residence(s) (a holiday home or a residence for work-related or similar reasons). The latter have no effects for the purposes of Article 3 of Regulation No 2201/2003.

2. Objective of the provision

79. Allowing the possibility of a number of *habitual* residences does not reflect the objective pursued by Regulation No 2201/2003 through Article 3(1)(a) thereof either.

80. As I have already explained, [54] that objective is:

– first, to contribute to the mobility of individuals within the Union, including where the transfer of residence from one Member State to another occurs after a marriage breakdown;

– secondly, to ensure legal certainty and proximity between individuals and the court with jurisdiction.

[52] Italics added.

[53] I have taken the expression 'de facto', as opposed to 'habitual', residence from the Opinion of Advocate General Cruz Villalón in *Mercredi* (C-497/10 PPU, EU:C:2010:738, point 71).

[54] Points 57 and 58 of this Opinion.

81. The connecting factors used strike a balance between those two objectives: they serve the interests of the parties concerned and those of the administration of justice. That balance is contributed to by the fact that the grounds of jurisdiction based on habitual residence do not open up as many options as there are indents in Article 3(1)(a) of Regulation No 2201/2003, even though it may appear that way at first sight. [55]

82. A liberal interpretation concerning the number of habitual residences the same individual may have at once could, in fact, upset the balance between the parties, by broadening the opportunities for bringing proceedings in the *forum actoris*. It would also increase the difficulties in identifying in advance which courts may rule on a divorce, legal separation or marriage annulment within the EU. [56]

83. Those considerations, together with the considerations that I shall set out below, lend support to a strict interpretation of the concept of habitual residence in Article 3 of Regulation No 2201/2003, even if a person carries on their life in more than one Member State.

3. Habitual residence viewed from the perspective of the schematic criterion for interpretation (in the broad sense)

84. Since the wording, meaning and aim of Article 3 of Regulation No 2201/2003 preclude the application of the legal effects provided for therein to more than one habitual residence, that premiss extends beyond proceedings concerning marriage breakdown, notwithstanding what is suggested by recital 8 of the regulation. [57]

85. The EU legislature applied the same criterion for international jurisdiction to later instruments governing: (a) the law applicable to divorce and legal separation; [58] (b) international jurisdiction for actions relating to maintenance obligations; [59] and (c) international jurisdiction for claims relating to matrimonial property regimes which are connected to applications for dissolution, separation or annulment. [60]

[55] The conditions to which habitual residence is made subject as a criterion for jurisdiction mean that a number of forums are mutually exclusive while others are liable to overlap. It is not unusual for several criteria to tend in the direction of the same Member State.

[56] According to the Commission (paragraph 14 of its written observations in lieu of a hearing), allowing a person to have two habitual residences for the purposes of Article 3 of Regulation No 2201/2003 'supprime un aléa et augmente la sécurité juridique, en apportant à l'époux qui partage sa vie entre deux États, l'assurance qu'il peut saisir les juridictions de l'un de ces États sans risquer une décision d'incompétence, et les coûts associés à une telle procédure'. I am not persuaded by that view. The difficulty in deciding on the place of habitual residence does not disappear if the possibility of more than one such place is allowed; on the contrary, that plurality constitutes an additional question on which the court seised of the dispute must be convinced. The addition of yet another ground of jurisdiction in Article 3 of the regulation increases uncertainty regarding where proceedings may be brought against a respondent, including for a spouse who has more than one habitual residence.

[57] 'As regards judgments on divorce, legal separation or marriage annulment, this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures'.

[58] In 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).

[59] Article 3(c) 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 (OJ 2009 L 7, p. 1).

[60] Article 5 of Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ 2016 L 183, p. 1).

86. The broader the concept of 'habitually resident' in Article 3 of Regulation No 2201/2003 becomes, the greater the number of courts of Member States also potentially having jurisdiction in those other areas will be, at the cost of predictability for the persons concerned. [61]

87. I shall focus in particular on the effects on the law applicable to divorce and legal separation.

88. The aim of Regulation No 1259/2010 is to 'provide citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility'. [62] The attainment of that aim requires in all cases the application of only one system of law to the substance, irrespective of the court of an EU Member State which is seised of the divorce or legal separation proceedings. That is why, although a number of connecting factors are provided for in Regulation No 1259/2010, these are 'cascading' rather than alternatives.

89. Albeit to a lesser extent, [63] the objective described is also based on the correlation between the forum and the law enshrined in Article 8 of Regulation No 1259/2010, which deals with the applicable law in the absence of a choice by the parties:

– as a basic approach, through the correspondence between a number of the grounds of jurisdiction laid down in Article 3(1) of Regulation No 2201/2003 and the connecting factors set out in Article 8 of Regulation No 1259/2010;

– directly, as a residual approach: in the absence of a choice of law by the parties, and where the grounds laid down in points (a), (b) and (c) of Article 8 of Regulation No 1259/2010 also fail, the law of the forum applies in accordance with Article 8(d).

90. A lax interpretation of the concept of habitual residence for the purposes of Article 3 of Regulation No 2201/2003, according to which two or more courts could have international jurisdiction based on that criterion, would jeopardise the aim of Regulation No 1259/2010 in two ways:

– by breaking the correlation between the forum and the court, if the court acts as a court for one of the places where a spouse is habitually resident but the law of another Member State has to be applied because that is where both spouses are habitually resident; [64]

– by meaning that two (or more) courts having jurisdiction, on the basis of the place or places, situated in different Member States, where one spouse is habitually resident, apply the law 'of the forum' pursuant to Article 8(d) of Regulation No 1259/2010.

[61] It is not unreasonable to assume that, if it is accepted, using this indirect route, that more than one habitual residence may be used as a ground of jurisdiction, it must also be accepted when interpreting the requirement of 'habitual residence' in the same instruments with regard to applications which are not ancillary but separate.

[62] Recital 9. It also seeks to 'prevent a situation from arising where one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he or she considers more favourable to his or her own interests'. That concern does not apply in the case of Article 3 of Regulation No 2201/2003, which provides for alternative forums; as far as possible, that article must be interpreted in such a way that it does not undermine the objectives of the other regulation.

[63] In contrast to other areas, the parallel in this area between international jurisdiction and the applicable law is not a priority concern: it is possible that it may not arise at the outset when the parties choose the law applicable pursuant to Article 5(1)(a), (b) and (c) of the regulation. It should also be recalled that the instrument, which is the result of enhanced cooperation, does not apply in every Member State.

[64] That combination may arise in the proceedings if the French court declares that it has jurisdiction pursuant to the sixth indent of Article 3(1)(a) of Regulation No 2201/2003, after accepting that Mr IB is also habitually resident in Ireland. In those circumstances, in the absence of a valid choice of another law by the parties, Irish law will be applicable, as regards the substance, in accordance with Article 8(a) of Regulation No 1259/2010.

(a) Article 3(1)(a) and the judgment in Hadadi *(Article 3(1)(b))*

91. The strict interpretation that I propose is not at odds with that applied by the Court in *Hadadi*,[65] in which it recognised, in the context of Article 3(1)(b) of Regulation No 2201/2003, the jurisdiction of the courts of more than one Member State where the persons concerned have more than one nationality.[66]

92. The differences between the case giving rise to the judgment in *Hadadi* and the present case are significant. In *Hadadi*, the Court refused to accept that the connecting factor of 'nationality' was confined to 'effective nationality', a matter completely outside the scope of these proceedings:

– First, the status of 'effective' nationality is not referred to in Article 3 of Regulation No 2201/2003; by contrast, that article does refer to the status of 'habitual' residence.

– Secondly, nationality which confers jurisdiction for the purposes of Article 3(1)(b) of Regulation No 2201/2003 must in all cases be the nationality of both spouses. Where only one spouse, and not the other, has dual nationality, the shared nationality of the spouses alone counts for the purposes of the provision: the spouse who has single nationality is placed neither at a disadvantage nor at an advantage.[67] That could occur, however, if several places of habitual residence were permitted pursuant to the rules of jurisdiction which are based on the habitual residence of only one spouse.[68]

– Thirdly, the connecting factor of nationality is, as the Court observed, 'unambiguous and easy to apply',[69] whereas identification of 'effective' nationality requires consideration to be taken in each case of a whole set of factors, without any certainty of a clear result.[70]

93. That is also possible where the 'habitual residence' connecting factor is applied. However, I do not believe that the difficulty is resolved (quite the opposite in fact) by accepting that, in case of doubt, it is preferable to allow the existence of more than one habitual residence.

94. An approach of that kind does not ensure less discussion between the parties concerning which of a number of residences is material for the purposes of proceedings. Rather, it adds a new complex factor to the dispute: each time a party claims to have two or more habitual residences, it will be necessary to establish whether those residences really are habitual. Ultimately, it increases the risk that a 'de facto' residence (and not the habitual residence for the purposes of Article 3 of Regulation No 2201/2003) will eventually determine the court having international jurisdiction.

[65] That judgment is referred to in their written observations by Ms FA, paragraph 71 et seq., the Portuguese Government, paragraph 36 et seq., and the Commission, paragraphs 13 and 32, and also by Mr IB in his written observations in lieu of a hearing, paragraph 31.

[66] Judgment in *Hadadi*, paragraph 51 et seq.

[67] As applicant, a spouse with dual nationality does not have an additional forum available to him or her for that reason, but nor is there an additional forum for the purposes of filing an application against that spouse.

[68] The existence of several habitual residences is liable to work in favour of a spouse who has more than one residence, if he or she is the applicant (as a result of the fifth and sixth indents of Article 3(1)(a)), and of working against that spouse if he or she is the respondent, as a result of the third indent of Article 3(1)(a).

[69] Judgment in *Hadadi*, paragraph 51.

[70] Ibid., paragraph 55.

D. Can it be impossible to identify the place of habitual residence?

95. Regulation No 2201/2003 provides solutions for the situation where it is impossible to identify a child's place of habitual residence; however, it does not do so in relation to adults.

96. That *silence* is not accidental. In a positive sense, it rules out the possibility of there being individuals whose habitual residence cannot be determined (albeit with evidential difficulties). In a negative sense, it confirms, in my view, that an adult is not recognised as having two or more places of habitual residence in a number of Member States, for the purposes of Article 3 of Regulation No 2201/2003.

97. If, for the sake of argument, it is accepted that that is not the case and that there is genuinely no way to establish [71] which of several possibilities is *the* habitual residence for the purposes of Article 3 of Regulation No 2201/2003, two outcomes may be envisaged:

– In line with the first, preferred by the Commission, [72] it would suffice if one of the two (or more) centres of the interested party's life is situated in the Member State of the court seised of the divorce proceedings for that court to be declared to have jurisdiction.

– In line with the second, none of those centres of life in a number of different Member States would be capable of attributing jurisdiction based on habitual residence.

98. Rather than allowing the same individual to have a number of simultaneous habitual residences, for the purposes of Article 3(1)(a) of Regulation No 2201/2003, the arguments developed above lead me to prefer the second option, being as it is less disruptive to the system as a whole.

99. That second option (which is exceptional in nature) confirms the unsuitability of the 'habitual residence' connecting factor for determining international jurisdiction. The fact that that is the case would not necessarily deprive the parties of judicial protection within the EU if one or more of the other criteria laid down in Article 3(1) of Regulation No 2201/2003 were applicable, [73] or if recourse were had to the rules of jurisdiction laid down in the laws of each Member State, [74] the residual application of which is provided for in Article 7.

100. In my view, it would be permissible only in the alternative (having exhausted or excluded those possibilities) and on an exceptional basis, if it were necessary in order to prevent a denial of justice, to allocate jurisdiction to courts situated in any of the Member States of residence of a spouse, where none of these could be identified as the place where that spouse is habitually resident within the meaning of Article 3(1)(a) of Regulation No 2201/2003.

[71] The likelihood that two situations *equally* satisfy the typical criteria for habitual residence is low. In order to comply with Regulation No 2201/2003, national courts must endeavour to identify one habitual residence, as I observed in point 71 et seq. of this Opinion.

[72] Paragraph 33 and 34 of its written observations and proposed form of order.

[73] Using the information available to me, I believe that, in the case before the Court, Mr IB could lodge his application in Ireland as the last place of habitual residence of the spouses where one of them still resides, and as the place where the respondent is habitually resident.

[74] Contrary to what Ireland suggests (paragraph 10 of its written observations in lieu of a hearing), not all the Member States lay down residual rules of jurisdiction. It is also possible that, even if they do, those rules cannot be relied on in a particular case as a result of the restriction in Article 6 of Regulation No 2201/2003.

V. Conclusion

101. In the light of the foregoing considerations, I suggest that the question referred for a preliminary ruling by the cour d'appel de Paris (Court of Appeal, Paris, France) should be answered as follows:

Article 3(1)(a) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 must be interpreted as meaning that, for the purposes of allocating jurisdiction, only one place of habitual residence may be recognised for each spouse.

Where a spouse divides his time between two or more Member States, such that it is absolutely impossible to identify one of these as the Member State where he is habitually resident for the purposes of Article 3(1)(a) of Regulation No 2201/2003, international jurisdiction must be determined in line with other rules laid down in that regulation and, where necessary, with the residual rules in force in the Member States.

In that same situation, it would be possible, on an exceptional basis, to allocate jurisdiction to the courts of Member States where a spouse is not habitually resident if, under Regulation No 2201/2003 and the residual rules of jurisdiction, no Member State has international jurisdiction.