Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

1 August 2022 *

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Jurisdiction, recognition and enforcement of decisions in matrimonial matters and in the matters of parental responsibility – Regulation (EC) No 2201/2003 – Articles 3, 6 to 8 and 14 – Definition of 'habitual residence' – Jurisdiction, recognition, enforcement of decisions and cooperation in matters relating to maintenance obligations – Regulation (EC) No 4/2009 – Articles 3 and 7 – Nationals of two different Member States residing in a third State as members of the contract staff working in the EU Delegation to that third State – Determination of jurisdiction – *Forum necessitatis*)

In Case C-501/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Audiencia Provincial de Barcelona (Provincial Court, Barcelona, Spain), made by decision of 15 September 2020, received at the Court on 6 October 2020, in the proceedings

MPA

v

LCDNMT,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Second Chamber, acting as President of the Third Chamber, J. Passer, F. Biltgen, L.S. Rossi (Rapporteur) and N. Wahl, Judges,

Advocate General: M. Szpunar,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 16 September 2021,

after considering the observations submitted on behalf of:

– MPA, by A. López Jiménez, abogada,

– LCDNMT, by C. Martínez Jorba and P. Tamborero Font, abogadas,

* Language of the case: Spanish.

– the Spanish Government, by L. Aguilera Ruiz, acting as Agent,

– the Czech Government, by I. Gavrilova, M. Smolek and J. Vláčil, acting as Agents,

– the Council of the European Union, by M. Balta, H. Marcos Fraile and C. Zadra, acting as Agents,

– the European Commission, by I. Galindo Martín, M. Kellerbauer, N. Ruiz García, M. Wilderspin and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 3, 7, 8 and 14 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 (OJ 2003 L 338, p. 1), Articles 3 and 7 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), and of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between MPA and LCDNMT, two members of the contract staff of the European Union working in the latter's delegation to Togo, concerning a petition for divorce accompanied by applications for the determination of the regime and arrangements for exercising custody and parental responsibility over the couple's minor children, the grant of a maintenance allowance for the children and rules for the use of the family home in Lomé (Togo).

Legal context

International law

3 Under Article 31(1) of the Vienna Convention on Diplomatic Relations, concluded in Vienna on 18 April 1961 and entered into force on 24 April 1964 (*United Nations Treaty Series*, Vol. 500, p. 95; 'the Vienna Convention'):

'A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.'

European Union law

The Protocol on Privileges and Immunities

4 Article 11 of Protocol (No 7) on the Privileges and Immunities of the European Union ('the Protocol on Privileges and Immunities'), which forms part of Chapter V thereof, entitled 'Officials and other servants of the European Union', provides:

'In the territory of each Member State and whatever their nationality, officials and other servants of the Union shall:

(a) subject to the provisions of the Treaties relating, on the one hand, to the rules on the liability of officials and other servants towards the Union and, on the other hand, to the jurisdiction of the Court of Justice of the European Union in disputes between the Union and its officials and other servants, be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written. …

…'

5 Under the first paragraph of Article 17 of that protocol, which forms part of Chapter VII thereof, entitled 'General provisions':

'Privileges, immunities and facilities shall be accorded to officials and other servants of the Union solely in the interests of the Union.'

The Staff Regulations and the CEOS

6 Under Article 1b of the Staff Regulations of Officials of the European Union ('the Staff Regulations'), the European External Action Service (EEAS) is, save as otherwise provided in the Staff Regulations, to be treated, for the purposes of the application thereof, as institutions of the European Union.

7 Article 23 of the Staff Regulations states:

'The privileges and immunities enjoyed by officials are accorded solely in the interests of the Union. Subject to the Protocol on Privileges and Immunities, officials shall not be exempt from fulfilling their private obligations or from complying with the laws and police regulations in force.

…'

8 Article 3a(1) of the Conditions of Employment of Other Servants of the European Union ('the CEOS') provides:

'For the purposes of these Conditions of Employment, "contract staff" means staff not assigned to a post included in the list of posts appended to the section of the budget relating to the institution concerned and engaged for the performance of full-time or part-time duties:

…

(d) in Representations and Delegations of Union institutions,

…'

9 The first subparagraph of Article 85(1) of the CEOS is worded as follows:

'The contracts of contract staff referred to in Article 3a may be concluded for a fixed period of at least three months and not more than five years. They may be renewed not more than once for a fixed period of not more than five years. The initial contract and the first renewal must be of a total duration of not less than six months for function group I and not less than nine months for the other function groups. Any further renewal shall be for an indefinite period.'

Regulation No 2201/2003

10 Recitals 5, 11, 12, 14 and 33 of Regulation No 2201/2003 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 (OJ 2001 L 12, p. 1)]. 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.

…

(14) This Regulation should have effect without prejudice to the application of public international law concerning diplomatic immunities. Where jurisdiction under this Regulation cannot be exercised by reason of the existence of diplomatic immunity in accordance with international law, jurisdiction should be exercised in accordance with national law in a Member State in which the person concerned does not enjoy such immunity.

…

(33) This Regulation recognises the fundamental rights and observes the principles of the [Charter]. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the [Charter].'

11 Article 1 of Regulation No 2201/2003, entitled 'Scope', 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;

…'

12 Chapter II of Regulation No 2201/2003, entitled 'Jurisdiction', consists of three sections. Section 1 of that chapter, entitled 'Divorce, legal separation and marriage annulment', comprises Articles 3 to 7 of the regulation.

13 Article 3 of that regulation, entitled 'General jurisdiction', provides, in paragraph 1 thereof:

'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.'

14 Under Article 6 of that regulation, entitled 'Exclusive nature of jurisdiction under Articles 3, 4 and 5':

'A spouse who:

(a) is habitually resident in the territory of a Member State; or

(b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States,

may be sued in another Member State only in accordance with Articles 3, 4 and 5.'

15 Article 7 of Regulation No 2201/2003, entitled 'Residual jurisdiction', states, in paragraph 1 thereof:

'Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.'

16 Section 2 of Chapter II of that regulation, relating to jurisdiction in matters of parental responsibility, contains Articles 8 to 15 of that regulation.

17 Article 8 of that regulation, entitled 'General jurisdiction', provides, in paragraph 1 thereof:

'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.'

18 Article 12 of Regulation No 2201/2003, entitled 'Prorogation of jurisdiction', provides in paragraphs 1, 3 and 4 thereof:

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

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

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

…

3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

(a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

4. Where the child has his or her habitual residence in the territory of a third State which is not a contracting party to 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, jurisdiction under this Article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third State in question.'

19 Article 14 of that regulation, entitled 'Residual jurisdiction', provides:

'Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State.'

Regulation No 4/2009

20 Recitals 8, 15 and 16 of Regulation No 4/2009 are worded as follows:

'(8) In the framework of The Hague Conference on Private International Law, the Community and its Member States took part in negotiations which led to the adoption on 23 November 2007 of the [Hague] Convention on the International Recovery of Child Support and other Forms of Family Maintenance … and the [Hague] Protocol on the Law Applicable to Maintenance Obligations[, approved on behalf of the European Community by Council Decision 2009/941/EC of 30 November 2009 (OJ 2009 L 331, p. 17)]. Both those instruments should therefore be taken into account in this Regulation.

…

(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 respondent 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.

(16) In order to remedy, in particular, situations of denial of justice this Regulation should provide a *forum necessitatis* allowing a court of a Member State, on an exceptional basis, to hear a case which is closely connected with a third State. Such an exceptional basis may be deemed to exist when proceedings would be impossible in the third State in question, for

example because of civil war, or when an applicant cannot reasonably be expected to initiate or conduct proceedings in that State. Jurisdiction based on the *forum necessitatis* should, however, be exercised only if the dispute has a sufficient connection with the Member State of the court seised, for instance the nationality of one of the parties.'

21 Article 3 of Regulation No 4/2009, entitled 'General provisions', 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.'

22 Article 6 of that regulation, entitled 'Subsidiary jurisdiction', states:

'Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5 and no court of a State party to the Lugano Convention which is not a Member State has jurisdiction pursuant to the provisions of that Convention, the courts of the Member State of the common nationality of the parties shall have jurisdiction.'

23 Article 7 of that regulation, which is entitled '*Forum necessitatis*', provides:

'Where no court of a Member State has jurisdiction pursuant to Articles 3, 4, 5 and 6, the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected.

The dispute must have a sufficient connection with the Member State of the court seised.'

Spanish law

24 Ley Orgánica 6/1985 del Poder Judicial (Organic Law 6/1985 on the judiciary) of 1 July 1985 (BOE No 157 of 2 July 1985, p. 20632), as amended by Ley Orgánica 7/2015 (Organic Law 7/2015) of 21 July 2015 (BOE No 174 of 22 July 2015, p. 61593), provides, in Article 22c(c) and (d) thereof:

'In the absence of the preceding criteria, the Spanish courts shall have jurisdiction:

…

(c) in matters relating to personal relationships and property regimes between spouses, annulment of marriage, separation and divorce and changes thereto, provided that no other foreign court has jurisdiction, where both spouses are habitually resident in Spain at the time of the application or were last habitually resident in Spain and one of them [still] resides there, or when Spain is the habitual residence of the respondent, or, where an application is made by mutual agreement, when one of the spouses resides in Spain, … or when the applicant is Spanish and has been habitually resident in Spain for at least six months prior to making the application, or when both spouses have Spanish nationality;

(d) in matters concerning parentage and parent-child relationships, the protection of minors and parental responsibility, where the child or minor is habitually resident in Spain at the time when the application is lodged, or the applicant is Spanish or habitually resident in Spain or, in any case, has been habitually resident in Spain for at least six months before making the application.'

25 Article 22g of that law, as amended, provides:

'1. Spanish courts do not have jurisdiction in cases where the grounds of jurisdiction laid down in Spanish law do not specify such jurisdiction.

…

3. … The Spanish courts may not forgo or decline jurisdiction where the case in question has links with Spain and the courts of the various States connected with the case have declined jurisdiction. …'

26 The Código Civil (Spanish Civil Code) specifies, in Article 40 thereof, that the domicile of diplomats resident, on account of their duties, in a State other than Spain, and who enjoy diplomatic immunity, is the last domicile that they had on Spanish territory.

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

27 MPA, the mother of the children at issue in the main proceedings, and LCDNMT, their father, married at the Spanish Embassy in Guinea-Bissau on 25 August 2010. They have two children, born on 10 October 2007 and 30 July 2012 in Spain. The mother is of Spanish nationality and the father is of Portuguese nationality. Their children have dual Spanish and Portuguese nationality.

28 The couple resided in Guinea-Bissau from August 2010 to February 2015 and then moved to Togo. The de facto separation took place in July 2018. Since then, the mother and the children have continued to reside in the matrimonial home in Togo and the father has lived in a hotel in that State.

29 Both spouses work for the European Commission and are assigned to the EU Delegation to Togo. Their professional category is that of members of the contract staff.

30 On 6 March 2019, the mother brought divorce proceedings, together with applications for the determination of the regime and the arrangements for exercising custody and parental responsibility in respect of the couple's minor children, the maintenance payments for them and

the grant of enjoyment of the family home in Togo, before the Juzgado de Primera Instancia e Instrucción No 2 de Manresa (Court of First Instance and Preliminary Investigations No 2, Manresa, Spain).

31 The father claimed that the Juzgado de Primera Instancia e Instrucción No 2 de Manresa (Court of First Instance and Preliminary Investigations No 2, Manresa) did not have international jurisdiction.

32 By order of 9 September 2019, that court declared that it lacked international jurisdiction since, in its view, the parties did not have their habitual residence in Spain.

33 The mother brought an appeal against that ruling before the referring court. She claims that both spouses enjoy diplomatic status as accredited servants of the European Union in the State of employment, and that that status is granted by the host State and extended to minor children. In that regard, she claims that she is protected by the immunity provided for in Article 31 of the Vienna Convention, and that her claims are not covered by the exceptions referred to in that article. She argues that, pursuant to Regulations No 2201/2003 and No 4/2009, jurisdiction to hear matters relating to divorce, parental responsibility and maintenance is determined on the basis of habitual residence. Thus, in accordance with Article 40 of the Civil Code, her habitual residence is not the place where she works as a member of the contract staff of the European Union, but her place of residence before acquiring that status, namely Spain.

34 The mother also relies on the *forum necessitatis* recognised by Regulation No 4/2009 and sets out the situation of the Togolese courts. To that end, she has produced reports drawn up by the United Nations Human Rights Council. She argues that one of those reports finds that there is a lack of adequate and continuous training of judges and a persistent climate of impunity for human rights violations. Another report expresses the concern of the United Nations regarding the independence of the judiciary, access to justice and impunity for human rights violations.

35 The father states, for his part, that neither of the spouses carries out diplomatic duties for their respective Member States, namely the Kingdom of Spain and the Portuguese Republic, but that they work in the EU Delegation to Togo as members of the contract staff. He states, in that regard, that the laissez-passer which they hold is not a diplomatic passport, but a safe conduct pass or travel document which is valid only in the territory of third States. Furthermore it is not the Vienna Convention which is applicable but rather the Protocol on Privileges and Immunities. However, the latter applies only to acts performed by officials and other servants of the EU institutions in their official capacity as officials and other servants, with the result that, in the present case, that protocol neither precludes the jurisdiction of the Togolese courts nor makes it necessary to apply the *forum necessitatis*.

36 According to the referring court, there is no case-law on the concept of the 'habitual residence' of the spouses, for the purposes of determining jurisdiction in divorce matters, or on that of the 'habitual residence' of minor children in the situation at issue in the main proceedings, with the result that it must determine the effect of diplomatic status or similar status such as that of persons performing duties as officials or other servants working for the European Union and who are seconded to third countries for the performance of those duties. In the context of the assessment of the habitual residence of the spouses seeking divorce, the referring court observes that members of the contract staff have, in their State of employment, the status of diplomatic servants of the European Union, but that, in the Member States, they are regarded only as servants of the European Union. Furthermore, that court states that it needs to determine the

duration, habitual nature and permanence of the spouses' residence in Togo, and that it cannot disregard the fact that the reason for and origin of their physical presence in that third State is the performance of duties on behalf of the European Union.

37 In those circumstances the Audiencia Provincial de Barcelona (Provincial Court, Barcelona, Spain) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) How is the term "habitual residence" in Article 3 of Regulation [No 2201/2003] and Article 3 of Regulation [No 4/2009] to be interpreted in the case of the nationals of a Member State who are staying in a non-Member State by reason of the duties conferred on them as members of the contract staff of the European Union and who, in the non-Member State, are recognised as members of the diplomatic staff of the European Union, when their stay in that State is linked to the performance of their duties for the European Union?

(2) If, for the purposes of Article 3 of Regulation No 2201/2003 and Article 3 of Regulation No 4/2009, the determination of the habitual residence of the spouses depended on their status as EU contract staff in a non-Member State, how would this affect the determination of the habitual residence of the minor children in accordance with Article 8 of Regulation No 2201/2003?

(3) In the event that the children are not regarded as habitually resident in the non-Member State, can the connecting factor of the mother's nationality, her residence in Spain prior to the marriage, the Spanish nationality of the minor children and their birth in Spain be taken into account for the purposes of determining habitual residence in accordance with Article 8 of Regulation No 2201/2003?

(4) If it is established that the parents and children are not habitually resident in a Member State, given that, under Regulation No 2201/2003 there is no other Member State with jurisdiction to decide on the applications, does the fact that the defendant is a national of a Member State preclude the application of the residual clause contained in Articles 7 and 14 of Regulation No 2201/2003?

(5) If it is established that the parents and children are not habitually resident in a Member State for the purpose of determining child maintenance, how is the *forum necessitatis* in Article 7 of Regulation No 4/2009 to be interpreted and, in particular, what are the requirements for considering that proceedings cannot reasonably be brought or conducted or would be impossible in a non-Member State with which the dispute is closely connected (in this case, Togo)? Must the party have initiated or attempted to initiate proceedings in that State with a negative result and does the nationality of one of the parties to the dispute constitute a sufficient connection with the Member State [of the court seised]?

(6) In a case like this, where the spouses have strong links with Member States (nationality, former residence), is it contrary to Article 47 of the [Charter] if no Member State is considered to have jurisdiction under the provisions of the Regulations?'

Procedure before the Court

38 The referring court requested that the present case be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court of Justice.

39 On 19 October 2020, the Court decided, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, that there was no need to grant that request, since the conditions laid down in Article 107(2) of the Rules of Procedure were not satisfied.

Consideration of the questions referred

The first question

40 By its first question, the referring court is seeking to ascertain, in essence, whether Article 3(1)(a) of Regulation No 2201/2003 and Article 3(a) and (b) of Regulation No 4/2009 must be interpreted as meaning that the capacity of the spouses concerned as members of the contract staff of the European Union, who are part of an EU delegation to a third State and who are alleged to enjoy diplomatic status in that third State, is capable of constituting a decisive factor for the purposes of determining habitual residence within the meaning of those provisions.

41 As regards, in the first place, the interpretation of Article 3 of Regulation No 2201/2003, it should be recalled that that provision lays down the general criteria for jurisdiction in matters of divorce, legal separation or marriage annulment. These criteria, which are objective, alternative and exclusive, meet the need for rules that address the specific requirements of conflicts relating to the dissolution of matrimonial ties (see, to that effect, judgment of 25 November 2021, *IB (Habitual residence of a spouse – Divorce)*, C-289/20, EU:C:2021:955, paragraph 32 and the case-law cited).

42 The concept of 'habitual residence' appears in the six grounds of competence provided for in Article 3(1)(a) of Regulation No 2201/2003. Thus, that provision confers, in a non-hierarchical manner, jurisdiction to rule on questions relating to the dissolution of matrimonial ties to the courts of the Member State within whose territory the current or former residence of the spouses – or of one of them, as the case may be – is situated.

43 In that connection, Regulation No 2201/2003 does not contain any definition of the concept of a 'habitual residence', in particular of the habitual residence of a spouse, for the purposes of Article 3(1)(a) of that regulation. In the absence of such a definition or reference to the law of the Member States for the purpose of determining the meaning and scope of that concept, that concept has to be given an autonomous and uniform interpretation, taking into account the context of the provisions referring to that concept and the objectives of that regulation (see, to that effect, judgment of 25 November 2021, *IB (Habitual residence of a spouse – Divorce)*, C-289/20, EU:C:2021:955, paragraphs 38 and 39).

44 The Court has already held that, for the purposes of interpreting Article 3(1)(a) of Regulation No 2201/2003, the view should be taken that the concept of 'habitual residence' is characterised, in principle, by two factors, namely, first, the intention of the person concerned to establish the habitual centre of his or her interests in a particular place and, second, a presence which is sufficiently stable in the Member State concerned (judgment of 25 November 2021, *IB (Habitual residence of a spouse – Divorce)*, C-289/20, EU:C:2021:955, paragraph 57), since a spouse may

have, at a given time, only one habitual residence for the purposes of that provision (see, to that effect, judgment of 25 November 2021, *IB (Habitual residence of a spouse – Divorce)*, C-289/20, EU:C:2021:955, paragraph 51).

45 As regards, in the second place, the interpretation of Article 3 of Regulation No 4/2009, it is apparent from the wording of that article, entitled 'General provisions', that that article lays down general criteria for attributing jurisdiction for the purposes of the courts of the Member States ruling on maintenance obligations. Those criteria are alternative, as is attested to by the use of the coordinating conjunction 'or' after each of them (judgment of 5 September 2019, *R (Jurisdiction for parental responsibility and maintenance)*, C-468/18, EU:C:2019:666, paragraph 29 and the case-law cited).

46 Article 3 of Regulation No 4/2009 offers the possibility of bringing a claim relating to a maintenance obligation under various bases of jurisdiction which include, inter alia, before the court for the place where the defendant is habitually resident, in accordance with point (a) of Article 3, and before the court for the place where the creditor is habitually resident, in accordance with point (b) of that article (see, to that effect, judgment of 17 September 2020, *Landkreis Harburg (Subrogation of a public body to a maintenance creditor)*, C-540/19, EU:C:2020:732, paragraph 30 and the case-law cited).

47 Since Regulation No 4/2009 does not provide any definition of the concept of 'habitual residence' within the meaning of Article 3(a) and (b) thereof, it is necessary to seek out an independent and uniform interpretation of that article, in accordance with the principles set out in paragraph 43 above.

48 In that regard, it must be borne in mind, first, that the rules of jurisdiction laid down by Regulation No 4/2009 are intended not only to ensure proximity between the maintenance creditor, who is generally regarded as the weaker party, and the court having jurisdiction, but also to ensure the proper administration of justice, both from the point of view of optimising the organisation of the courts and from that of the interests of the litigant, whether claimant or defendant, to benefit, inter alia, from easier access to justice and predictable rules on jurisdiction (see, to that effect, judgment of 4 June 2020, *FX (Opposing enforcement of a maintenance claim)*, C-41/19, EU:C:2020:425, paragraph 40 and the case-law cited).

49 Second, as is apparent in particular from recital 8 of Regulation No 4/2009 and as the Court has already held, that regulation has close links with the provisions of the Hague Protocol on the Law Applicable to Maintenance Obligations (judgment of 5 September 2019, *R (Jurisdiction for parental responsibility and maintenance)*, C-468/18, EU:C:2019:666, paragraph 46 and the case-law cited). By virtue of Article 3 of that protocol, it is, in principle, the law of the maintenance creditor's habitual residence that governs maintenance obligations, since such residence implies a sufficient degree of stability, to the exclusion of a temporary or occasional presence (see, to that effect, judgment of 12 May 2022, *W. J. (Change in the habitual residence of the maintenance creditor)*, C-644/20, EU:C:2022:371, paragraph 63).

50 That provision reflects the system of connecting rules on which that protocol is based, since such a system is intended to ensure that the law applicable is predictable, by ensuring that the designated law is not devoid of sufficient connection with the family situation at issue, it being understood that the law of the maintenance creditor's habitual residence appears, in principle, to be that which is the most closely connected with the creditor's situation and therefore to be the

best adapted to govern the specific problems which the maintenance creditor may encounter (judgment of 12 May 2022, *W. J. (Change in the habitual residence of the maintenance creditor)*, C-644/20, EU:C:2022:371, paragraph 64 and the case-law cited).

51 That connection has the principal advantage of determining the existence and amount of the maintenance obligation with regard to the legal and factual conditions of the social environment in the State where the creditor lives and engages in most of his or her activities. In so far as the maintenance creditor will use his or her maintenance payments in order to live, it is appropriate to assess the concrete problem which arises in relation to a specific society, namely that in which the maintenance creditor lives and will live (see, to that effect, judgment of 12 May 2022, *W. J. (Change in the habitual residence of the maintenance creditor)*, C-644/20, EU:C:2022:371, paragraph 65).

52 It is, therefore, justified to consider that, having regard to that objective, the maintenance creditor's habitual residence is that of the place where the creditor's life is, in fact, centred, taking into account his or her family and social environment, in particular where a minor child is involved (see, to that effect, judgment of 12 May 2022, *W. J. (Change in the habitual residence of the maintenance creditor)*, C-644/20, EU:C:2022:371, paragraph 66).

53 In the light of those considerations and having regard to the fact that Article 3(a) and (b) of Regulation No 4/2009 and Article 3 of the Hague Protocol are based on a common connecting factor – namely the habitual residence of the person concerned – and have close links, it is justified that the definition of that factor be guided by the same principles and characterised by the same elements in both instruments. Thus, although the specific assessment of the habitual residence of the maintenance applicant, creditor or, as the case may be, debtor depends on circumstances which are specific to each individual case and liable to vary, in particular, depending on the age and environment of the person concerned, it is logical that the concept of 'habitual residence', within the meaning of Article 3(a) and (b) of Regulation No 4/2009, should be characterised, first, by the intention of the person concerned to establish the usual centre of his or her life in a particular place and, second, by a sufficiently stable presence in the territory of the Member State concerned.

54 In the present case, it is apparent from the request for a preliminary ruling that the spouses in the main proceedings were married at the Spanish Embassy in Guinea-Bissau in August 2010 and that they resided in that State from August 2010 to February 2015, at which point they moved to Togo, a State in which, despite their de facto separation since July 2018, they and their two children continue to reside.

55 However, it is in no way apparent from the information provided by the referring court that the father of the children at issue in the main proceedings, who has Portuguese nationality, was habitually resident in the Member State of that court, namely the Kingdom of Spain, alone or with the mother of their joint children. The latter parent, who is a Spanish national and who made the application for dissolution of matrimonial ties before the courts of that Member State, claims that she has retained her own habitual residence in the territory of that Member State, notwithstanding the fact that she has worked as a member of the contract staff of the European Union in the territory of third States since, at the very least, August 2010, and more specifically in Togo since February 2015, and that she has lived in that third State with her children since that time.

56 Having regard to those circumstances and to the two factors that characterise the concept of 'habitual residence' within the meaning of Article 3(1)(a) of Regulation No 2201/2003, as those factors have been recalled in paragraph 44 of the present judgment, it is apparent that, subject to more extensive checks to be made by the referring court on the basis of all the factual circumstances specific to the present case (see, to that effect, judgment of 25 November 2021, *IB (Habitual residence of a spouse – Divorce)*, C-289/20, EU:C:2021:955, paragraph 52), the spouses at issue in the main proceedings are not habitually resident on the territory of the Member State of the court seised of the application for the dissolution of matrimonial ties.

57 First, with the exception, where appropriate, of periods of leave or the birth of children, which correspond, as a general rule, to occasional and temporary interruptions in their everyday lives (see, by analogy, judgment of 28 June 2018, *HR*, C-512/17, EU:C:2018:513, paragraph 51), the spouses at issue in the main proceedings have been physically absent permanently from the territory of the Kingdom of Spain since, at the very least, August 2010. It is common ground that, following the separation of those spouses, the wife at issue in the main proceedings did not move to the territory of the Member State of the court seised of the application for the dissolution of matrimonial ties. In particular, there is nothing in the information before the Court to suggest that that spouse resided in the territory of that Member State, of which she is a national, in the six months immediately preceding her application for the dissolution of matrimonial ties, as provided for in the sixth indent of Article 3(1)(a) of Regulation No 2201/2003.

58 In those circumstances, it does not appear that the requirement, referred to in paragraph 44 of the present judgment, relating to a sufficiently stable presence in the territory of the Member State of the referring court can be satisfied in the present case. As to the circumstance that, in the main proceedings, the spouses' stay in Togo, as members of the contract staff of the European Union who are employed under a contract of indefinite duration and work in the latter's delegation to that third State, in accordance with the provisions of Article 85(1) of the CEOS which apply to members of the contract staff referred to in Article 3a of the CEOS, and who are not subject to rotation to headquarters in Brussels, has, as a result, a direct connection with the exercise of their duties, it must be pointed out that that circumstance is not, in itself, of such a nature either to prevent that stay from presenting such a degree of stability (see, by analogy, judgment of 28 June 2018, *HR*, C-512/17, EU:C:2018:513, paragraphs 12 and 47) or to allow it to be considered that the physical absence of the persons concerned from the territory of the Member State of the court seised of the application for the dissolution of matrimonial ties is, in the present case, purely temporary or occasional.

59 Second, there is nothing in the information before the Court to suggest that the spouses at issue in the main proceedings, or at the very least the wife, have decided, despite their constant physical distance from the territory of the Kingdom of Spain for several years, to establish the permanent or habitual centre of their interests in that Member State. Even if one of those spouses had expressed the intention to settle in Spain in the future, the fact remains that, as has been stated in paragraph 57 of the present judgment, it is apparent from the request for a preliminary ruling that, despite their de facto separation since July 2018, neither of the spouses at issue in the main proceedings has left Togo. Moreover, as the Advocate General observes, in essence, in point 50 of his Opinion, since posts in the delegations of the European Union, such as that to Togo, are deliberately requested by officials and other servants who so wish, it appears doubtful that those spouses did in fact intend, after their de facto separation, to leave Togo in order to transfer their habitual residence to the territory of the Kingdom of Spain.

60 An essentially similar assessment appears to be necessary, in the present case, with regard to the habitual residence of the defendant or the maintenance creditor, within the meaning of Article 3(a) and of Article 3(b) of Regulation No 4/2009 respectively, in so far as, subject to further checks to be carried out by the referring court, there appears to be nothing to suggest that the persons concerned have transferred their habitual residence to the territory of the Kingdom of Spain.

61 Those considerations are not called into question by the argument put forward by the Spanish Government – which, moreover, relates solely to the interpretation of Regulation No 2201/2003 – that the spouses at issue in the main proceedings, on account of their status as members of the contract staff posted to the EU Delegation to Togo, enjoy diplomatic status in that third State and therefore benefit, under Article 31(1) of the Vienna Convention, from immunity before the civil courts in the receiving State, which, according to the Spanish Government, should lead to the recognition, pursuant to Article 40 of the Civil Code, of the jurisdiction of the courts of the Member State in which those members of the contract staff do not enjoy that diplomatic status, namely, in the present case, the Kingdom of Spain.

62 Although that assertion is correct, it has no bearing on the interpretation of the concept of 'habitual residence' within the meaning of Article 3(1)(a) of Regulation No 2201/2003 and of Article 3(a) and (b) of Regulation No 4/2009, since, under those provisions, the court seised can recognise its jurisdiction only if the spouses, jointly or separately, and/or their children – the latter being maintenance creditors for the purposes of the application of Article 3(b) of Regulation No 4/2009 – have a habitual residence in the territory of the Member State of that court, since such habitual residence satisfies the requirements referred to in paragraphs 44 and 53 of the present judgment.

63 The fact that there is no such habitual residence in the Member State of the court seised is sufficient for it to be held that that court does not have jurisdiction, under Article 3(1)(a) of Regulation No 2201/2003 and Article 3(a) and (b) of Regulation No 4/2009, irrespective of whether the spouses at issue in the main proceedings and their children enjoy, in Togo, any immunity before the civil courts of that third State.

64 No argument to the contrary can be inferred from recital 14 of Regulation No 2201/2003, on which the Spanish Government also relies, from which it follows that, where jurisdiction under that regulation cannot be exercised by reason of the existence of diplomatic immunity in accordance with international law, jurisdiction should be exercised in accordance with national law in a Member State in which the person concerned does not enjoy such immunity.

65 As the Commission has rightly pointed out, that recital concerns the situation in which the court of a Member State, despite having jurisdiction under the provisions of Regulation No 2201/2003, cannot exercise that jurisdiction by reason of the existence of diplomatic immunity. It is common ground that, in the dispute in the main proceedings, neither the spouses nor their children enjoy diplomatic immunity in any Member State. In particular, it follows from Article 11(a) of the Protocol on Privileges and Immunities that officials and other servants of the European Union enjoy immunity from legal proceedings only in respect of acts performed 'in an official capacity', that is to say, within the framework of the task entrusted to the European Union (judgment of 30 November 2021, *LR Ģenerālprokuratūra*, C-3/20, EU:C:2021:969, paragraph 56 and the case-law cited). It follows, as is confirmed by Article 23 of the Staff Regulations, that such immunity from jurisdiction does not cover legal proceedings the subject matter of which concerns relationships of a private nature, such as applications between spouses in matrimonial

matters, parental responsibility or maintenance obligations in respect of their children, which, by their nature, do not concern the participation of the beneficiary of immunity in the performance of the tasks of the EU institution to which he or she belongs (see, to that effect, judgment of 11 July 1968, *Sayag and Zurich*, 5/68, EU:C:1968:42, p. 402).

66 In the light of all the foregoing considerations, the answer to the first question is that Article 3(1)(a) of Regulation No 2201/2003 and Article 3(a) and (b) of Regulation No 4/2009 must be interpreted as meaning that the status of the spouses concerned as members of the contract staff of the European Union, working in the latter's delegation to a third country and in respect of whom it is claimed that they enjoy diplomatic status in that third State, is not capable of constituting a decisive factor for the purposes of determining habitual residence, within the meaning of those provisions.

The second question

67 By its second question, the referring court is asking, in the event that the determination of the spouses' habitual residence were to depend on their status as members of the contract staff of the European Union serving in the latter's delegation to a third country, what the effect of that situation would have on the determination of the habitual residence of the minor children, within the meaning of Article 8 of Regulation No 2201/2003.

68 In the light of the answer given to the first question, there is no need to answer the second question.

The third question

69 By its third question, the referring court is asking, in essence, whether Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that, for the purposes of determining the habitual residence of a child, it is necessary to take into consideration the connecting factor of the mother's nationality and her residence, prior to the marriage, in the Member State of the court seised of an application relating to parental responsibility, or the fact that the minor children were born in that Member State and hold the nationality of that Member State.

70 According to Article 8(1) of Regulation No 2201/2003, the jurisdiction of the court of a Member State in matters of parental responsibility over a child is to be determined on the basis of the criterion of that child's habitual residence at the time that court is seised.

71 In that regard, the Court has repeatedly held that the child's habitual residence is an autonomous concept 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 that which is apparent from recital 12 thereof, according to which the grounds of jurisdiction which it establishes are shaped in the light of the best interests of the child, in particular on the criterion of proximity (judgment of 28 June 2018, *HR*, C-512/17, EU:C:2018:513, paragraph 40 and the case-law cited).

72 In accordance with the case-law of the Court, the child's place of habitual residence must be established on the basis of all the circumstances specific to each individual case. In addition to the physical presence of the child in the territory of a Member State, other factors must be chosen which are capable of showing that that presence is not in any way temporary or

intermittent and that it reflects some degree of integration of the child into a social and family environment (judgment of 28 June 2018, *HR*, C-512/17, EU:C:2018:513, paragraph 41 and the case-law cited), which is the place which, in practice, is the centre of that child's life (judgment of 28 June 2018, *HR*, C-512/17, EU:C:2018:513, paragraph 42).

73 Such factors include the duration, regularity, conditions and reasons for the child's stay on the territory of the Member State concerned and the child's nationality, with the relevant factors varying according to the age of the child concerned (judgment of 8 June 2017, *OL*, C-111/17 PPU, EU:C:2017:436, paragraph 44 and the case-law cited). They also include the place and conditions of the child's attendance at school, and the family and social relationships of the child in the Member State (see, to that effect, judgment of 28 June 2018, *HR*, C-512/17, EU:C:2018:513, paragraph 43).

74 As regards the intention of the parents to settle with the child in a given Member State, the Court has recognised that this may also be taken into account where that intention is manifested by tangible steps, such as the purchase or lease of a residence in the Member State concerned (see, to that effect, judgment of 28 June 2018, *HR*, C-512/17, EU:C:2018:513, paragraph 46 and the case-law cited).

75 It follows that, as the Advocate General observes, in essence, in point 72 of his Opinion, the determination of the child's habitual residence in a given Member State, within the meaning of Article 8(1) of Regulation No 2201/2003, requires, at the very least, that the child concerned has been physically present in that Member State and that the additional factors which may be taken into account show that that presence is not in any way temporary or occasional and that it reflects some degree of integration of that child in a social and family environment.

76 Consequently, in the case in the main proceedings, for the purposes of determining the habitual residence of the minor children, within the meaning of Article 8(1) of Regulation No 2201/2003, the connecting factor of their mother's nationality and her residence in Spain prior to the marriage and the birth of the children – which are irrelevant for those purposes – cannot be taken into consideration.

77 By contrast, the Spanish nationality of the minor children at issue in the main proceedings, and the fact that they were born in Spain, may constitute relevant factors, although they are not decisive. The fact that the child is born in a Member State and shares the culture of that State with one of his or her parents is not decisive for the purposes of identifying that child's place of habitual residence (see, to that effect, judgment of 28 June 2018, *HR*, C-512/17, EU:C:2018:513, paragraph 52). That finding is all the more compelling where, as in the case in the main proceedings, there is nothing to show that the children concerned are physically present, on a non-occasional basis, in the territory of the Member State of the court seised and, in view of their age, enjoy a certain degree of integration there, in particular, in an educational, social and family environment.

78 The answer to the third question is therefore that Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that, for the purposes of determining a child's habitual residence, the connecting factor of the mother's nationality and her residence, prior to the marriage, in the Member State of the court seised of an application relating to parental responsibility is irrelevant, whereas the fact that the minor children were born in that Member State and hold the nationality of that Member State is insufficient.

The fourth question

79 By its fourth question, the referring court is seeking to ascertain, in essence, whether, where no court of a Member State has jurisdiction to rule on an application for the dissolution of matrimonial ties pursuant to Articles 3 to 5 of Regulation No 2201/2003 and on an application in matters of parental responsibility pursuant to Articles 8 to 13 of that regulation, respectively, Articles 7 and 14 of that regulation must be interpreted as meaning that the fact that the defendant in the main proceedings is a national of a Member State other than that of the court seised prevents the application of the clauses relating to residual jurisdiction laid down in Articles 7 and 14 in order to establish the jurisdiction of that court.

80 It should be noted at the outset that, while Article 7 of Regulation No 2201/2003, entitled 'Residual jurisdiction', comes under Section 1 of Chapter II of that regulation, entitled 'Divorce, legal separation and marriage annulment', Article 14 of that regulation, also entitled 'Residual jurisdiction', is among the provisions of Section 2 of that chapter, which relate to 'Parental responsibility'. It follows that, in so far as Articles 7 and 14 of Regulation No 2201/2003 concern residual jurisdiction relating to the dissolution of matrimonial ties and that relating to the parental responsibility for children, respectively, those two jurisdiction regimes must be examined in turn.

81 As regards, in the first place, residual jurisdiction relating to the dissolution of matrimonial ties, it is clear from the wording of Article 7(1) of Regulation No 2201/2003 that it is only where no court of a Member State has jurisdiction under Articles 3 to 5 of that regulation that jurisdiction is to be determined, in each Member State, by national law.

82 Although, as the Advocate General observes, in essence, in point 81 of his Opinion, that provision, taken in isolation, appears to allow spouses who are not habitually resident in a Member State and have different nationalities to have a subsidiary place of jurisdiction on the basis of national rules on jurisdiction, the scope of that provision must, however, be interpreted in the light of Article 6 of Regulation No 2201/2003.

83 Article 6 of that regulation, entitled 'Exclusive nature of jurisdiction under Articles 3, 4 and 5', provides that 'a spouse who … is habitually resident in the territory of a Member State or who … is a national of a Member State … may be sued in another Member State only in accordance with Articles 3, 4 and 5'.

84 Thus, according to Article 6, a respondent who has his or her habitual residence in a Member State or is a national of a Member State may, having regard to the exclusive nature of the jurisdiction laid down in Articles 3 to 5 of Regulation No 2201/2003, be sued in the courts of another Member State only pursuant those provisions, and consequently not pursuant to the rules of jurisdiction laid down by national law (judgment of 29 November 2007, *Sundelind Lopez*, C-68/07, EU:C:2007:740, paragraph 22).

85 It follows that, where a court of a Member State does not have jurisdiction to rule on an application for the dissolution of matrimonial ties under Articles 3 to 5 of Regulation No 2201/2003, Article 6 of that regulation prevents that court from declaring that it has jurisdiction under the rules on residual jurisdiction laid down by national law, in accordance with Article 7(1) of that regulation, where the respondent is a national of a Member State other than that of that court.

86 In the present case, the spouse, who is the defendant in the action for the dissolution of matrimonial ties before the Spanish courts, is of Portuguese nationality, with the result that, in the light of the information provided by the referring court and subject to further checks to be made by that court, the spouses at issue in the main proceedings do not habitually reside in the territory of a Member State, in particular the Member State of that court. Consequently, although the referring court cannot find that it has jurisdiction to rule on such an action under Articles 3 to 5 of Regulation No 2201/2003, Article 7(1) of that regulation does not authorise it to base its jurisdiction on the rules on residual jurisdiction laid down by national law, in so far as Article 6(b) of that regulation prevents the defendant in the main proceedings, who is a national of a Member State other than the one to which that court belongs, from being sued before the latter.

87 It should be added that, as the Commission has stated in its written observations, that interpretation does not mean that the spouse seeking the dissolution of matrimonial ties is deprived of the possibility of bringing his or her action before the courts of the Member State of which the respondent is a national, if Articles 3 to 5 of Regulation No 2201/2003 do not designate another place of jurisdiction. In such a case, Article 6(b) of that regulation does not preclude the courts of the Member State of which the respondent is a national from having jurisdiction to hear the application for the dissolution of matrimonial ties, in accordance with the national rules on jurisdiction of that Member State.

88 In the second place, as regards residual jurisdiction in matters of parental responsibility, it must be recalled that, under Article 14 of Regulation No 2201/2003, where no court of a Member State has jurisdiction pursuant to Articles 8 to 13 of that regulation, jurisdiction is to be determined, in each Member State, by the law of that State.

89 In that connection, it should be noted that the fact that a dispute brought before a court of a Member State may not fall within the scope of Article 8(1) of Regulation No 2201/2003 in the absence of the child's habitual residence in that Member State does not necessarily preclude that court from otherwise having jurisdiction to hear that dispute.

90 In the present case, in the event that the interpretation set out in paragraphs 70 to 78 of the present judgment, according to which, in essence, the physical presence of the child in a Member State is a prerequisite for establishing that the child is habitually resident there, has the consequence that it would not be possible to designate a court of a Member State as having jurisdiction under the provisions of Regulation No 2201/2003 relating to parental responsibility, the fact remains that it is open to every Member State, in accordance with Article 14 of that regulation, to confer jurisdiction on its own courts on the basis of rules of national law, departing from the criterion of proximity on which the provisions of that regulation are founded (see, to that effect, judgment of 17 October 2018, *UD*, C-393/18 PPU, EU:C:2018:835, paragraph 57).

91 Consequently, Article 14 of Regulation No 2201/2003 does not preclude the court seised from applying rules of national law in order to establish its own jurisdiction, including, as the case may be, that based on the nationality of the child concerned, even where the father of that child, the respondent, is a national of a Member State other than that of the court seised.

92 In the light of those considerations, in a situation such as that at issue in the main proceedings, it cannot be ruled out, as the Advocate General notes, in essence, in point 95 of his Opinion, that international jurisdiction in matters relating to the dissolution of marital ties, on the one hand, and that in parental responsibility matters, on the other, may be conferred on courts of different

Member States. That finding could lead to the question whether the best interests of the child, respect for which must, in accordance with recitals 12 and 33 of Regulation No 2201/2003, particularly be ensured by the rules on jurisdiction in matters of parental responsibility, might be compromised by that fragmentation.

93 In that regard, it must be borne in mind that, as recital 5 of Regulation No 2201/2003 states, in order to ensure equality for all children, that regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.

94 Although, as the Advocate General also observes in point 96 of his Opinion, Regulation No 2201/2003 allows spouses, in particular under Article 12(3) thereof, to avoid a fragmentation of jurisdiction, such as that referred to in paragraph 92 of the present judgment, by the court which has jurisdiction in divorce matters accepting jurisdiction for the purposes of an application relating to parental responsibility, where that jurisdiction is in the best interests of the child, the fact remains that such a fragmentation, the existence of which is inherent in the scheme of that regulation, is not necessarily incompatible with those interests. The parent concerned may, in the best interests of the child, wish to make such an application before other courts, including those of the Member State of which he or she is a national, since the latter choice may be based, in particular, on the ability to express himself or herself in his or her native language and the possibility of lower costs in the proceedings (see, by analogy, judgment of 5 September 2019, *R (Jurisdiction for parental responsibility and maintenance obligations)*, C-468/18, EU:C:2019:666, paragraphs 50 and 51).

95 It should be added that, in accordance with Article 12(4) of Regulation No 2201/2003, where the child is habitually resident in the territory of a third State, which is not a contracting party to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, concluded in The Hague on 19 October 1996, jurisdiction based, in particular, on Article 12(3) is presumed to be in the interests of the child, in particular where proceedings prove to be impossible in the third State concerned.

96 In the light of the foregoing considerations, the answer to the fourth question is:

– Where no court of a Member State has jurisdiction to rule on an application for the dissolution of matrimonial ties pursuant to Articles 3 to 5 of Regulation No 2201/2003, Article 7 of that regulation, read in conjunction with Article 6 thereof, must be interpreted as meaning that the fact that the respondent in the main proceedings is a national of a Member State other than that of the court seised prevents the application of the clause relating to residual jurisdiction laid down in Article 7 to establish the jurisdiction of that court without, however, preventing the courts of the Member State of which the respondent is a national from having jurisdiction to hear such an application pursuant to the latter Member State's national rules on jurisdiction.

– Where no court of a Member State has jurisdiction to rule on an application relating to parental responsibility pursuant to Articles 8 to 13 of Regulation No 2201/2003, Article 14 of that regulation must be interpreted as meaning that the fact that the respondent in the main proceedings is a national of a Member State other than that of the court seised does not preclude the application of the clause relating to residual jurisdiction laid down in Article 14 of that regulation.

The fifth question

97 By its fifth question, the referring court is seeking to ascertain, in essence, in the event that the habitual residence of all the parties to the dispute in matters relating to maintenance obligations is not in a Member State, the circumstances in which jurisdiction based, in exceptional cases, on the *forum necessitatis*, referred to in Article 7 of Regulation No 4/2009, could be established. In particular, the referring court is seeking to ascertain, first, the conditions necessary for it to be held that proceedings cannot reasonably be brought or conducted, or would be impossible in a third State with which the dispute is closely connected, and whether the party relying on Article 7 is required to demonstrate that he or she has been unsuccessful in bringing or has attempted to bring those proceedings before the courts of that third State and, second, whether, in order to find that a dispute must have a sufficient connection with the Member State of the court seised, it is possible to base such a finding on the nationality of one of the parties.

98 Under the first paragraph of Article 7 of Regulation No 4/2009, where no court of a Member State has jurisdiction pursuant to Articles 3 to 6 of that regulation, the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected. Pursuant to the second paragraph of that article, the dispute must have a sufficient connection with the Member State of the court seised.

99 Article 7 of Regulation No 4/2009 thus lays down four cumulative conditions to be satisfied in order for a court of a Member State seised of an application relating to maintenance obligations to be able, on an exceptional basis, to establish that it has jurisdiction by reason of the state of necessity (*forum necessitatis*). First, that court must find that no court of a Member State has jurisdiction under Articles 3 to 6 of Regulation No 4/2009. Second, the dispute before that court must be closely connected with a third State. Third, the proceedings in question cannot reasonably be brought or conducted or would be impossible in that third State. Fourth and lastly, the dispute must have a sufficient connection with the Member State of the court seised.

100 While it is for the referring court to ascertain whether all of those conditions are satisfied in order for it to be able, if appropriate, to rely on the jurisdiction conferred by Article 7 of Regulation No 4/2009, it is necessary, in respect of each of those conditions, and in the light of the information provided by that court, to provide the following clarification.

101 In the first place, as to the satisfaction of the first condition referred to in paragraph 99 of the present judgment, it must be observed that it is not sufficient for the court seised to establish that it has no jurisdiction under Articles 3 to 6 of Regulation No 4/2009, but rather that court should also ensure that where, in particular, more than one court is seised, no court of a Member State has jurisdiction under those articles. The fact, to which the referring court refers as the premiss for the fifth question, that the defendant or the creditor(s) habitually reside in a third State – that is to say, that they do not meet the criteria set out in Article 3(a) and (b) of Regulation No 4/2009 respectively – is therefore not sufficient for it to be found that no court of a Member State has jurisdiction under Articles 3 to 6 of that regulation, for the purposes of Article 7 thereof. Consequently, it is still for the referring court to ascertain whether it and the courts of the other Member States have no jurisdiction to rule on that application by virtue of the grounds of jurisdiction set out Article 3(c) or (d) or in Articles 4 to 6 of that regulation.

102 First, as regards Article 3(c) and (d) of Regulation No 4/2009, that provision confers jurisdiction either on the court which, under its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, or on 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 jurisdiction is, in either instance, based solely on the nationality of one of the parties.

103 In the present case, if, as is apparent from paragraphs 86 to 92 of the present judgment, the referring court did not have jurisdiction to rule on the application for the dissolution of matrimonial ties, but could, under the residual jurisdiction clause laid down in Article 14 of Regulation No 2201/2003, rule on the application relating to parental responsibility under provisions of national law based on the nationality of the applicant in the main proceedings, the referring court would have to determine whether, owing to that fact and having regard to Article 3(d) of Regulation No 4/2009, it would not have jurisdiction to hear the claim for the children's maintenance.

104 Second, as regards the grounds of jurisdiction set out in Articles 4 and 5 of Regulation No 4/2009, although there is nothing in the information before the Court to suggest that these are applicable in the case in the main proceedings, it must be stated, in particular, that (i) the choice of court provided for in Article 4 of that regulation is, by virtue of paragraph 3 thereof, excluded in any event for disputes concerning a maintenance obligation in respect of a child under the age of 18, and (ii) as to jurisdiction under Article 5 of that regulation, it is not apparent from that information that the defendant in the main proceedings entered an appearance voluntarily for any reason other than to challenge the jurisdiction of a court of a Member State. However, it does not appear to be precluded that the courts of the Portuguese Republic may, where appropriate, base their jurisdiction on Article 6 of that regulation, on the basis of the Portuguese nationality shared by the father and his children, if the latter are parties to the proceedings relating to the maintenance claim as creditors of such maintenance, which matter is, however, for the referring court to verify.

105 In the second place, as regards the condition laid down in Article 7 of Regulation No 4/2009 that the dispute before the court be closely connected with a third State, it should be noted that that regulation does not give any indication as to the circumstances enabling such a close connection to be established. However, in view of the criteria of jurisdiction on which that regulation is based, specifically that of habitual residence, the court seised must be able to establish the existence of such a close connection where it is apparent from the circumstances of the case, which it is for that court to ascertain, that all the parties to the dispute habitually reside in the third State concerned. Irrespective of the criteria on which jurisdiction in matters relating to maintenance obligations is based in that third State, in particular in the case of a State which is not a contracting party to the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, it is, in principle, reasonable to consider, in the light of the criterion of proximity, that the courts of the State in whose territory the minor child, a maintenance creditor, and the person responsible for maintenance are habitually resident are best placed to assess the needs of that child, having regard, inter alia, to the social and family environment in which the child lives and will live.

106 In the third place, in order for the court of a Member State to be able, on an exceptional basis, to exercise the jurisdiction conferred by Article 7 of Regulation No 4/2009, it is also important that the proceedings in question cannot reasonably be brought or conducted or would be impossible before the courts of the third State concerned.

107 In that connection, although recital 16 of that regulation refers to civil war as an example in which proceedings in the third State in question would be impossible, thus illustrating the exceptional nature of the cases in which jurisdiction based on the *forum necessitatis* may be exercised, it is clear that that regulation does not give any indication as to the circumstances in which the court of a Member State might find that proceedings relating to maintenance obligations cannot reasonably be brought or conducted before the courts of the third State concerned. However, it is apparent from recital 16 that it was 'to remedy, in particular, situations of denial of justice' that the *forum necessitatis* was established allowing a court of a Member State, on an exceptional basis, to hear a case which is closely connected with a third State 'when an applicant cannot reasonably be expected to initiate or conduct proceedings' in that State.

108 It thus follows from those clarifications that, first, in order, where necessary, to establish its jurisdiction under Article 7 of Regulation No 4/2009, the court of a Member State cannot require the maintenance applicant to show that he or she has been unsuccessful in bringing or has attempted to bring the proceedings in question before the courts of the third State concerned. It is therefore sufficient that the court of a Member State, in the light of all the matters of fact and of law in the case, be able to satisfy itself that the obstacles in the third State concerned are such that it would be unreasonable to require the applicant to apply for maintenance before the courts of that third State.

109 As the Advocate General observes, in essence, in point 126 of his Opinion, requiring such an applicant to attempt to bring proceedings before the courts of the third State solely for the purposes of demonstrating the state of necessity in order to apply the *forum necessitatis* is contrary to the objective of Regulation No 4/2009 which aims, in particular, in accordance with the case-law recalled in paragraph 48 of the present judgment, to protect the maintenance creditor and to promote the proper administration of justice. That finding is all the more compelling where the maintenance creditor is a child whose best interests must guide the interpretation and implementation of Regulation No 4/2009 and constitutes, according to Article 24(2) of the Charter, a primary consideration in all actions relating to children, whether taken by public authorities or private institutions (see, to that effect, judgment of 16 July 2015, *A*, C-184/14, EU:C:2015:479, paragraph 46).

110 Second, to the extent that, as stated in recital 16 of Regulation No 4/2009, the objective of the jurisdiction based on the *forum necessitatis* is to remedy 'in particular' situations of denial of justice, it is, in principle, justified for the court of a Member State to rely thereon, on an exceptional basis and subject to a detailed analysis of the procedural conditions of the third State concerned, where access to the fundamental legal order in that third State is, in law or in fact, hindered, in particular by the application of procedural conditions that are discriminatory or contrary to the fundamental guarantees of a fair trial.

111 In the fourth place, the dispute in question must have 'a sufficient connection with the Member State of the court seised.' In that respect, in order to address the referring court's doubts, suffice it to note that recital 16 of Regulation No 4/2009 states that such a connection may consist, inter alia, of the nationality of one of the parties.

112 In the light of those clarifications, as well as the factors put forward by the mother of the minor children at issue in the main proceedings, it is for the referring court to determine whether that court may rely on the provisions of Article 7 of Regulation No 4/2009 in order to hear the application for maintenance made by MPA for her children. In that connection, the referring court may declare that it has jurisdiction in order to mitigate a risk of denial of justice, but cannot rely solely on general circumstances relating to deficiencies in the judicial system of the third State, without analysing the consequences that those circumstances might have for the individual case.

113 In the light of the foregoing, the answer to the fifth question is that Article 7 of Directive 4/2009 must be interpreted as meaning that:

– where the habitual residence of all the parties to the dispute in matters relating to maintenance obligations is not in a Member State, jurisdiction founded, on an exceptional basis, on the *forum necessitatis* referred to in Article 7 may be established if no court of a Member State has jurisdiction under Articles 3 to 6 of that regulation, if the proceedings cannot reasonably be brought or conducted in the third State with which the dispute is closely connected, or proves to be impossible, and there is a sufficient connection between the dispute and the court seised;

– in order to find, on an exceptional basis, that proceedings cannot reasonably be brought or conducted in a third State, it is important that, following an analysis of the evidence put forward in each individual case, access to justice in that third State is, in law or in fact, hindered, in particular by the application of procedural conditions that are discriminatory or contrary to the fundamental guarantees of a fair trial, without there being any requirement that the party relying on Article 7 demonstrate that he or she has been unsuccessful in bringing or has attempted to bring the proceedings in question before the courts of the third State concerned; and

– in order to consider that a dispute must have a sufficient connection with the Member State of the court seised, it is possible to rely on the nationality of one of the parties.

The sixth question

114 By its sixth question, the referring court is asking, in essence, whether Article 47 of the Charter must be interpreted as precluding the application of the provisions of Regulations No 2201/2003 and No 4/2009 if no Member State is considered to have jurisdiction, even in a case where the spouses concerned have close connections with Member States on account of their nationalities and previous residence.

115 As is apparent, in particular, from paragraphs 87 to 92 and 98 to 113 of the present judgment, and as the Commission has noted, in essence, in its written observations, it appears that, pursuant to the provisions of Regulation No 2201/2003 and Regulation No 4/2009, in particular Articles 7 and 14 of Regulation No 2201/2003 and Article 7 of Regulation No 4/2009, which establish mechanisms for designating a court having jurisdiction where no court of a Member State has jurisdiction under the other provisions of those regulations, the courts of at least one Member State should have jurisdiction in matters relating to the dissolution of matrimonial ties, parental responsibility and maintenance obligations, respectively.

116 Consequently, as the Commission has observed, since the sixth question is hypothetical, there is no need to answer it.

Costs

117 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **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, and Article 3(a) and (b) 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 status of the spouses concerned as members of the contract staff of the European Union, working in the latter's delegation to a third country and in respect of whom it is claimed that they enjoy diplomatic status in that third State, is not capable of constituting a decisive factor for the purposes of determining habitual residence, within the meaning of those provisions.**

2. **Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that, for the purposes of determining a child's habitual residence, the connecting factor of the mother's nationality and her residence, prior to the marriage, in the Member State of the court seised of an application relating to parental responsibility is irrelevant, whereas the fact that the minor children were born in that Member State and hold the nationality of that Member State is insufficient.**

3. **Where no court of a Member State has jurisdiction to rule on an application for the dissolution of matrimonial ties pursuant to Articles 3 to 5 of Regulation No 2201/2003, Article 7 of that regulation, read in conjunction with Article 6 thereof, must be interpreted as meaning that the fact that the respondent in the main proceedings is a national of a Member State other than that of the court seised prevents the application of the clause relating to residual jurisdiction laid down in Article 7 to establish the jurisdiction of that court without, however, preventing the courts of the Member State of which the respondent is a national from having jurisdiction to hear such an application pursuant to the latter Member State's national rules on jurisdiction.**

   Where no court of a Member State has jurisdiction to rule on an application relating to parental responsibility pursuant to Articles 8 to 13 of Regulation No 2201/2003, Article 14 of that regulation must be interpreted as meaning that the fact that the respondent in the main proceedings is a national of a Member State other than that of the court seised does not preclude the application of the clause relating to residual jurisdiction laid down in Article 14 of that regulation.

4. **Article 7 of Regulation No 4/2009 must be interpreted as meaning that:**

   – **where the habitual residence of all the parties to the dispute in matters relating to maintenance obligations is not in a Member State, jurisdiction founded, on an exceptional basis, on the *forum necessitatis* referred to in Article 7 may be established if no court of a Member State has jurisdiction under Articles 3 to 6 of that regulation, if**

the proceedings cannot reasonably be brought or conducted in the third State with which the dispute is closely connected, or proves to be impossible, and there is a sufficient connection between the dispute and the court seised;

– **in order to find, on an exceptional basis, that proceedings cannot reasonably be brought or conducted in a third State, it is important that, following an analysis of the evidence put forward in each individual case, access to justice in that third State is, in law or in fact, hindered, in particular by the application of procedural conditions that are discriminatory or contrary to the fundamental guarantees of a fair trial, without there being any requirement that the party relying on Article 7 demonstrate that he or she has been unsuccessful in bringing or has attempted to bring the proceedings in question before the courts of the third State concerned; and**

– **in order to consider that a dispute must have a sufficient connection with the Member State of the court seised, it is possible to rely on the nationality of one of the parties.**

[Signatures]