Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 16 May 2017 [1]

Case C-111/17 PPU

OL
v
PQ(Request for a preliminary ruling

from the Monomeles Protodikeio Athinon (Court of First Instance (single judge) of Athens, Greece))

(Request for a preliminary ruling — Judicial cooperation in civil matters — Regulation (EC) No 2201/2003 — Jurisdiction, recognition and enforcement of decisions in matrimonial matters and in the matters of parental responsibility — Articles 8, 10 and 11 — Application for return — Concept of 'habitual residence' of an infant — Child born in a Member State other than that where her parents resided together and who, then, remained with her mother in the Member State of her birth — Wrongful removal or retention — None)

1. In the present case, the Court is called upon to interpret Article 11(1) of Regulation (EC) No 2201/2003 [2] and, more specifically, the concept of 'habitual residence' in that provision.

2. This case arises from a dispute between OL, an Italian national, and PQ, a Greek national, respectively the father and mother of an infant who was born in Greece, as agreed by both parents. The dispute relates, more specifically, to an application, brought by OL before the referring court (the Monomeles Protodikeio Athinon (Court of First Instance (single judge) of Athens, Greece)), for the return of that child to Italy, the Member State where the child's parents resided together before the birth of the child.

3. Against that background, the referring court seeks, in essence, guidance from the Court on the question whether the determination of the habitual residence of an infant in a given Member State requires the child to have been present in that Member State and whether, where the child has not been present, other factors, such as the fact that the parents previously resided together in that Member State, can be granted an importance that is determinative for the purposes of establishing the habitual residence of a child.

1 — Original language: French.

2 — 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; 'the Brussels IIa Regulation' [also known as the Brussels II bis Regulation]).

4. In that regard, in the present case the Court is called upon, first, to clarify its case-law on the concept of 'habitual residence' in the context of the Brussels IIa Regulation and, second, to provide clarification on the relevant factors to be taken into consideration in order to determine the habitual residence of an infant, with a view to assessing whether the fact that the child remained with her mother, against her father's will, in the Member State where she was born constitutes a wrongful removal or retention, within the meaning of Article 11 of that regulation.

5. As I will argue in detail below, Article 11 of the Brussels IIa Regulation is not applicable in a situation such as that at issue in the main proceedings.

Legal context

International law

6. One objective of the Convention on the Civil Aspects of International Child Abduction, concluded at the Hague on 25 October 1980 ('the 1980 Hague Convention'), as stated in its preamble, is to protect children internationally from the harmful effects of wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence. That convention has been ratified both by the Italian Republic and by the Hellenic Republic.

7. Article 3 of that convention provides :

'The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

8. Article 5(a) of that convention provides that, for the purposes of that convention, 'rights of custody' is to include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.

EU law

9. Recital 12 of the Brussels IIa Regulation states:

'The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.'

10. Recital 17 of that regulation is worded as follows:

‘In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end [the 1980 Hague Convention] would continue to apply as complemented by the provisions of this Regulation, in particular Article 11…’

11. Article 1(1) of that regulation, that article being headed ‘Scope’, provides:

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

…

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

12. Article 2 of that regulation contains the following definitions:

‘…

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

8. the term “holder of parental responsibility” shall mean any person having parental responsibility over a child;

9. the term “rights of custody” shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child’s place of residence;

…

11. the term “wrongful removal or retention” shall mean a child’s removal or retention where:

(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention;

and

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child’s place of residence without the consent of another holder of parental responsibility.’

13. Article 8 of that regulation, headed ‘General Jurisdiction’, provides:

‘1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

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

14. Article 10 of the Brussels IIa Regulation, headed ‘Jurisdiction in cases of child abduction’, provides:

‘In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.’

15. Article 11 of that regulation, headed ‘Return of the child’, provides:

‘1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of [the 1980 Hague Convention], in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

…’

16. Article 13 of the Brussels IIa Regulation, headed ‘Jurisdiction based on the child’s presence’, provides:

‘1. Where a child’s habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction.

…’

The case before the referring court and the question referred for a preliminary ruling

17. It is stated in the order for reference that OL and PQ married in Italy on 1 December 2013 and that they resided together in Italy.

18. When PQ was eight months pregnant, the couple travelled together to Greece so that PQ could give birth there.

19. On 3 February 2016 PQ gave birth, in Greece, to a daughter, who has remained since her birth in that Member State with her mother.

20. After the birth of the child, OL returned to Italy. According to OL, he had agreed that PQ should stay in Greece with their child until May 2016, when he expected his wife and child to return to Italy. However, in June 2016 PQ decided to remain in Greece, with the child.

21. According to PQ, the couple had not decided the exact date of a return to Italy. PQ asserts, in particular, that in May 2016 and, again, in June 2016, OL visited PQ and the child in Athens, Greece. They also agreed to spend together the summer holidays, in August, in Greece.

22. In July 2016, OL initiated divorce proceedings before the Italian courts. By an application of 18 July 2016, OL brought proceedings before the tribunale di Ancona (Court of Ancona, Italy) seeking, first, a divorce and, second, sole custody of his daughter. He also requested that the necessary measures be taken to ensure the return of the child to Italy.

23. Following a letter from the Italian authorities on 12 July 2016, PQ sent by post on 22 July 2016 a statement to the civil registry office of the province of Ancona stating that she intended to return to Italy and that her place of habitual residence was still Italy.

24. By order of 7 November 2016, the President of the tribunale di Ancona (Court of Ancona) decided, with respect to the application for return of the child to Italy, that he had no jurisdiction with respect to that application, since the child has always resided and continues to reside in a Member State other than the Italian Republic.

25. OL brought an appeal, on 2 December 2016, against the decision on lack of jurisdiction before the Corte d'appello d'Ancona (Court of Appeal of Ancona, Italy). By a decision of 20 January 2017, now final, that court upheld the decision on lack of jurisdiction of the President of the tribunale di Ancona (Court of Ancona).

26. On 20 October 2016, OL brought proceedings before the referring court claiming that it should order the return of his daughter to Italy.

27. On the information available to the Court, it appears that OL has been able to visit his child on a number of occasions since the child's birth, not least after OL had initiated divorce proceedings.

28. It is apparent from the couple's email correspondence that, on 19 January 2017, PQ gave OL permission to visit his child at the house of PQ's parents when he wished to do so, but subject to the condition that he should not take the child out of that house. By an email of 20 January 2017, OL replied that he considered that PQ was preventing him from seeing his child and that she was thereby infringing his rights of custody.

29. The referring court was uncertain whether it had jurisdiction to give a ruling on the application for return submitted by OL, and decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'What is the appropriate interpretation of the concept of "habitual residence", within the meaning of Article 11(1) of [the Brussels IIa Regulation], in the case of an infant who fortuitously or due to *force majeure* has been born in a place other than that which her parents with joint parental responsibility for the child intended to be the place of her habitual residence, and was then unlawfully retained by one parent in the State where she was born, or removed to a third State. More specifically, is physical presence a necessary and self-evident prerequisite, in all circumstances, for establishing the habitual residence of a person, and in particular a new-born child?'

30. Written observations were submitted by OL, PQ, the Greek Government and the European Commission.

31. Oral argument was presented at the hearing on 4 May 2017 by OL, PQ, the Greek Government, the United Kingdom Government and the Commission.

The urgent procedure

32. The referring court requested that this request for a preliminary ruling should be dealt with under the urgent procedure provided for in Article 107 of the Rules of Procedure of the Court.

33. The reasons stated by that court for that request are that the case relates to a child who is barely one year old, who has been separated from her father for more than nine months, the father having no possibility of communicating with the child. According to the referring court, a continuation of the existing situation might seriously harm that child's future relationship with her father.

34. On the view that the conditions for triggering the urgent procedure were satisfied, the Fifth Chamber of the Court, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decided on 16 March 2017 to accede to the referring court's request that this reference for a preliminary ruling be dealt with under the urgent procedure.

Analysis

Introductory remarks

35. At the outset, it must be noted that the peculiarity of the present case resides in the fact that, geographically, no removal of the child concerned from one place to another has ever occurred. Nonetheless, OL has brought before the referring court an application for the return of the child to Italy, the Member State where OL and PQ resided together before the birth of their child.

36. That is the specific background to the request by the referring court that the Court should provide clarification of the interpretation of the concept of 'habitual residence', a concept which is of key importance in the Brussels IIa Regulation. It is apparent from the order for reference that the referring court is uncertain what importance should be attached to the physical presence of the child in Greece and whether it is possible to determine the child to be habitually resident in Italy, where the parents had resided together.

37. According to the referring court, the criteria set out in the Court's case-law governing the determination of the place where the child is habitually resident are not relevant in the main proceedings because a new-born child or an infant is wholly dependent on those who take care of the child.

38. The referring court considers, in that regard, that, in the case of an infant, it would be more appropriate to use, as the determining criterion, the intention made known by the parents before the birth of the child. That approach would make it possible, in its view, to extend the protective framework of the Brussels IIa Regulation and the 1980 Hague Convention to circumstances such as those of the present case.

39. In other words, the referring court asks the Court to declare that, with respect to the determination of where an infant is habitually resident in the context of an application for return under Article 11 of the Brussels IIa Regulation, there is no requirement that the child whose return is requested has been physically present in the Member State to which the child is to be returned.

40. Consequently, to my mind, the question referred for a preliminary ruling raises, first, the issue of interpretation of the concept of 'habitual residence' for the purposes of Article 11(1) of the Brussels IIa Regulation and, second, the question whether the referring court has jurisdiction to order the return of a child — when the child was born, as intended by the parents, who jointly have parental responsibility over the child, in a Member State other than that where the parents resided together, and when the child then remained with her mother in the Member State of her birth — to the Member State where the parents had previously resided together.

41. While, ultimately, it is for the referring court to determine the habitual residence of the child whose return has been sought before it, the Court can nonetheless provide guidance to the referring court.

42. In order to answer the question referred for a preliminary ruling, it is necessary, initially, to consider the role played by the concept of 'habitual residence' in the Brussels IIa Regulation and, thereafter, the Court's case-law relating to that concept with respect to the determination of the court that has jurisdiction in matters of parental responsibility.

The concept of 'habitual residence' in the Brussels IIa Regulation

43. The Brussels IIa Regulation is largely modelled on the 1980 Hague Convention as regards, for example, the procedure governing applications for return in cases of wrongful removal or retention of a child. However, rather than seeking to replace that convention, the regulation is designed to complement and clarify the rules contained in that convention relating to applications for return. [3] As the Court has stated, the provisions of the Brussels IIa Regulation form a unitary body of rules which applies to the procedures for returning children who have been wrongfully removed within the European Union. [4]

44. Within the system established by the Brussels IIa Regulation, the concept of 'habitual residence' constitutes a general jurisdiction criterion.

3 — Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014 (EU:C:2014:2303, paragraph 77), and recital 17 of the Brussels IIa Regulation.

4 — Opinion 1/13 (Accession of third States to the Hague Convention), of 14 October 2014 (EU:C:2014:2303, paragraph 78).

45. In accordance with Article 8 of that regulation, the courts that are to have jurisdiction in matters of parental responsibility over a child are those of the Member State where the child is habitually resident. In the event of wrongful removal or retention of a child, Article 10 of that regulation provides that the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention are to retain their jurisdiction to rule on the substance of the case.

46. As stated in Article 11 of the regulation, the provision which governs applications for the return of the child and on which the referring court seeks a ruling from the Court, that provision is applicable to a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the child's wrongful removal or retention.

47. Last, Article 13(1) of the Brussels IIa Regulation provides an alternative criterion [5] in order to establish the jurisdiction of a court. Under that provision, where the habitual residence of a child cannot be established and jurisdiction cannot be determined on the basis of Article 12 in relation to prorogation of jurisdiction, [6] the courts of the Member State where the child is present are to have jurisdiction.

48. In other words, as a criterion for the attribution of court jurisdiction, the concept of 'habitual residence' ensures the attainment of the primary objective of the Brussels IIa Regulation, namely to determine jurisdiction in matters of parental responsibility on the basis of the criterion of proximity. [7]

49. As regards, in particular, Articles 10 and 11 of that regulation, the twofold role of the concept of 'habitual residence' needs to be highlighted.

50. First, the habitual residence of the child serves to determine the court that has jurisdiction to deal with issues relating to parental responsibility over the child. As was observed above, in a case of wrongful removal or retention, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention are to retain their jurisdiction under Article 10 of the Brussels IIa Regulation.

51. Second, the concept of 'habitual residence' constitutes a factor of key importance in determining whether a wrongful removal or retention of a child within the meaning of Article 11 of that regulation has taken place. Accordingly, an application for return can be successful only if it is shown that the child whose return is sought was wrongfully removed to or retained in a Member State other than the Member State where the child was habitually resident immediately before the child's wrongful removal or retention.

52. Notwithstanding its undeniable importance for the proper operation of the system of court jurisdiction established by the Brussels IIa Regulation, that regulation contains no definition of the concept of 'habitual residence'.

5 — See, to that effect, judgment of 9 October 2014, *C* (C-376/14 PPU, EU:C:2014:2268, paragraph 51).

6 — That provision states inter alia, that courts of the Member State exercising jurisdiction by virtue of Article 3 of the Brussels IIa Regulation on an application for divorce, legal separation or marriage annulment are to have jurisdiction in any matter relating to that application where at least one of the spouses has parental responsibility in relation to the child and the jurisdiction of those 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 best interests of the child.

7 — Recital 12 of the Brussels IIa Regulation.

53. In accordance with an approach endorsed by the Court's case-law,[8] the determination of where a child is habitually resident involves an examination of the facts specific to each particular case.[9]

54. Albeit that that assessment essentially concerns questions of fact, and must be undertaken by the referring court, the Court has provided some significant guidance regarding the criteria in the light of which the place where a child is habitually resident can be established.

The criteria in the case-law governing the habitual residence of a child

55. In accordance with now settled case-law, the scope and meaning of the concept of 'habitual residence' of a child must be determined according to the best interests of the child and, in particular, the criterion of proximity. That concept corresponds to the place which reflects some degree of integration of the child in a social and family environment, which must be established by the national court, taking account of all the circumstances specific to each individual case. Of particular relevance are the conditions and reasons for the child staying in the territory of a Member State and the child's nationality.[10]

56. Of all the criteria to establish where a child is habitually resident, the child's physical presence in the Member State concerned is of particular importance.[11]

57. As stated by the Court, the determination of a child's habitual residence in a given Member State requires *at least* that the child has been physically present in that Member State. Consequently, the mere fact that a child is a national of one Member State cannot be a sufficient ground to hold that that child is habitually resident in that Member State.[12]

58. As regards the transfer of habitual residence from one country to another, the Court has also stated that, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent.[13]

59. In that regard, again in relation to the transfer of habitual residence, the duration of the stay is not in itself a determining criterion. Certainly, habitual residence must be distinguished from presence that is merely temporary or fortuitous. As a general rule, the stay must have a certain duration which reflects an adequate degree of permanence. In that sense, a transfer of habitual residence to the host Member State is primarily indicated by the intention of the person concerned to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Further, the Court has stated that the duration of a stay can serve only as an indicator in the assessment of the permanence of residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case. The Court has stated that the intention

8 — See, below, point 55 et seq.

9 — See the Explanatory Report by Elisa Pérez-Vera, Madrid, April 1981, point 66, accessible at http://www.hcch.net/upload/expl28.pdf. See also the *Practical Guide for the application of the Brussels IIa Regulation*, p. 12, accessible at http://ec.europa.eu/civiljustice/parental_resp/parental_resp_ec_vdm_fr.pdf.

10 — Judgments of 2 April 2009, *A* (C-523/07, EU:C:2009:225, paragraphs 35, 37 and 39), of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829, paragraphs 46 and 47), of 9 October 2014, *C* (C-376/14 PPU, EU:C:2014:2268, paragraphs 51 and 52), and of 15 February 2017, *W and V* (C-499/15, EU:C:2017:118, paragraph 60).

11 — Judgments of 2 April 2009, *A* (C-523/07, EU:C:2009:225, paragraph 38), of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829, paragraph 49), and of 15 February 2017, *W and V* (C-499/15, EU:C:2017:118, paragraph 61).

12 — Judgment of 15 February 2017, *W and V* (C-499/15, EU:C:2017:118, paragraphs 61 and 62).

13 — Judgment of 2 April 2009, *A* (C-523/07, EU:C:2009:225, paragraph 38).

of the parents, or, as the case may be, the person with sole parental responsibility, to settle permanently with the child in another Member State, or the taking of certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute a relevant indicator.[14]

60. As regards more specifically an infant, the Court has stated in the case that gave rise to the judgment in *Mercredi* that the social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. Since an infant is wholly dependent on the family circle, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.[15]

61. Consequently, it is clearly apparent from the case-law that a prerequisite of habitual residence in a given Member State is that the child should at least have been present in that Member State,[16] while the other factors to be taken into account may vary according to the specific features of each individual case.

62. Accordingly, it is necessary to decide whether that case-law is applicable in circumstances such as those at issue in the present case, where there has been no physical removal of a child from one Member State to another. More particularly, it is necessary to decide whether, under Article 11 of the Brussels IIa Regulation, the criterion of presence can be dispensed with where the child has remained with her mother in the Member State where she was born.

63. I will deal with that issue next.

Determination of the habitual residence of an infant for the purposes of Article 11 of the Brussels IIa Regulation in circumstances such as those of the present case

64. First, I must observe that the abovementioned case-law concerns Articles 8 and 10 of the Brussels IIa Regulation. It could accordingly be argued that that case-law is not determinative for the outcome of the present case, a case that relates to Article 11 of that regulation. However, on that point, it must be stated that the Court has expressly held that the concept of the child's 'habitual residence' in Article 11 of the Brussels IIa Regulation cannot differ in content from that concept in Articles 8 and 10 of that regulation.[17]

65. Accordingly, I find it inconceivable that that case-law should be disregarded for no other reason than that the request for a preliminary ruling relates to Article 11 of that regulation, and not Article 10 thereof. In any event, as will be argued in greater detail below, a 'nuanced' interpretation of the concept of 'habitual residence', suggested by the referring court, would be contrary to the objective of Article 11 of the Brussels IIa Regulation, namely to re-establish the *status quo ante* that existed before wrongful removal or retention of the child.

66. In this case, the child whose return has been sought before the referring court has resided in Greece since her birth and has never left that country.

14 — Judgments of 2 April 2009, *A* (C-523/07, EU:C:2009:225, paragraph 40) and of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829, paragraph 50).

15 — Judgment of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829, paragraphs 53 and 54).

16 — On physical presence as a condition *sine qua non* of habitual residence, see also the judgments of the Supreme Court of the United Kingdom of 9 September 2013 in the case of *A (Children)* ([2013] UKSC 60) and of the High Court of Justice (England and Wales) of 25 August 2006, in the case *F (Abduction: Unborn Child)* [2006] EWHC 2199 (Fam), as well as those of the Corte di Cassazione (Court of Appeal, Italy) of 17 January — 13 February 2012, no 1984 and 18 March 2016, no 5418.

17 — Judgment of 9 October 2014, *C* (C-376/14 PPU, EU:C:2014:2268, paragraph 54).

67. As stated by the Greek Government, in the course of the child's stay in Greece, she has necessarily established ties not only with her mother PQ, who looks after her and cares for her on a daily basis, but also and more broadly with the one and only family environment that she has known since she was born, namely that of PQ's parents. In accordance with the case-law derived from, inter alia, the judgment in *Mercredi*,[18] a young child is necessarily and primarily settled in the social and family environment of the circle of persons on whom that child is dependent.

68. I must concur with the view of the Commission that if the child, whose return to Italy has been sought before the referring court, has never been physically present in that country, it is unlikely that the centre of the child's interests could be in Italy.

69. It follows that, prima facie, it seems difficult to envisage that, by applying the criteria outlined in the Court's case-law, the child whose return has been sought in this case might be habitually resident in a country other than Greece. That is particularly evident if one takes into account the fact that physical presence constitutes, to follow the approach adopted in the case-law, a prerequisite of there being any assessment of other factors relevant to establishing where a child is habitually resident.

70. The referring court seems to be aware of that dilemma, in that there is nothing to suggest the creation of any connection with Italy that could outweigh the connection that exists between the child and Greece. Accordingly, faced with that difficulty, the referring court asks, with respect to the determination of the habitual residence of an infant, what importance should be attached to the fact that the parents were previously resident together in Italy and, more specifically, to the fact that, before their separation, the parents had envisaged Italy as being the place where the child would be habitually resident, and, last, to the fact that PQ remained, until she was eight months pregnant, in that country.

71. Admittedly, in order to establish the habitual residence of a child, account must be taken of all the specific factual circumstances of each individual case. Accordingly, it is for the referring court to examine all those circumstances in order to establish where the child's centre of interests is located. In that regard, to follow the global approach endorsed by the Court, in addition to the physical presence of the child, one of the factors to be taken into consideration is undeniably the intentions of the parents who have rights of custody with respect to the child and the place where they are habitually resident.[19]

72. However, given that the child has not previously been physically present in Italy, the circumstances alluded to by the referring court cannot, in my opinion, be granted an importance that is determinative for the purposes of establishing the habitual residence of the child whose return has been sought before the referring court.

73. A number of arguments call for that conclusion.

74. First, it is undisputed that the intention of the parents was that the child should be born in Greece and should remain there for a period of time with her mother.[20]

75. Consequently, contrary to what appears to be suggested in the question referred for a preliminary ruling, as worded by the referring court, there is nothing fortuitous in the presence of the child in Greece.

18 — Judgment of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829, paragraph 54).

19 — Judgments of 2 April 2009, *A* (C-523/07, EU:C:2009:225, paragraphs 39 and 40) and of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829, paragraphs 50 and 51).

20 — As regards the intention of PQ to return to Italy and the question whether or not she continues to be habitually resident in that country, it would appear that, while there might have been such an intention before divorce proceedings were initiated, there is no longer any such intention.

76. Second, it must be observed that habitual residence, as an autonomous concept of EU law,[21] is a factual concept. As stated by Advocate General Szpunar, the concept of 'habitual residence' is independent of any question of whether or not residence is lawfully established. Otherwise, Article 10 of the Brussels IIa Regulation would be devoid of purpose, as this provision allows for habitual residence to be acquired, notwithstanding that a removal or retention is wrongful.[22]

77. In this case, even if it were held that the fact that PQ remained in Greece with the child, without the agreement of OL, prevented OL from exercising his rights of custody, it remains the position that that alone can have no effect on the question of where, de facto, the child is habitually resident.

78. In addition, contrary to what may have been held by some national courts[23] — which appear to adopt a legal approach to the concept of 'habitual residence', emphasising the habitual residence of those who have rights of custody with respect to the child or, more generally, the habitual residence of the family unit[24] — the habitual residence of the parents in a given Member State cannot, when the child has not previously been physically present in that Member State, be determinative.

79. Last, in that context, the approach suggested by the referring court that the criterion of physical presence be dispensed with would make it possible, certainly, to extend the scope of Article 11 of the Brussels IIa Regulation and the 1980 Hague Convention to circumstances such as those of the present case. However, it needs to be emphasised that the Brussels IIa Regulation governs, primarily, the attribution of jurisdiction to courts. Even though Article 11 of that regulation is not applicable in a situation such as that of the present case, there is nothing to prevent OL from asserting his rights before the courts that have jurisdiction under Article 8 of that regulation, with respect to issues of substance in relation to parental responsibility over his child.

80. Third, to take that argument one step further, I note that Article 11 of the Brussels IIa Regulation refers to the 'return' of the child and not to the child's removal for the first time to a place where the child has never resided. In that regard, it is clearly the objective of that provision, as it is of Article 3 of the 1980 Hague Convention, to re-establish the *status quo ante*. On the other hand, it is not at all the objective of those instruments to create a situation that never existed, as in the present case, namely a family life in Italy as envisaged before the separation of the parents.[25]

81. That said, it is not inconceivable that there may be wholly exceptional circumstances in which it might be appropriate to disregard the criterion of physical presence. However, the present case, dealt with under the urgent procedure, does not lend itself to an in-depth examination of that question of principle. Given the circumstances of this case, an answer to such a question is not needed in order to provide a helpful answer to the question submitted by the referring court.

82. However, it seems timely to observe that, in such circumstances, and taking into consideration, in particular, that habitual residence is a question of fact, it is necessary that a tangible connection be established with a country other than that where the child is in fact living.

21 — See, inter alia, judgment of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829, paragraphs 45 and 46).

22 — See the View of Advocate General Szpunar in *C* (C-376/14 PPU, EU:C:2014:2275, point 80).

23 — See, inter alia, judgment delivered by the Cour de cassation (France) (Court of Appeal, France) on 26 October 2011 (Cass. civ. 1ère, n° 10-19.905).

24 — See, as regards the various approaches that are possible, P. Beaumont and J. Holliday, 'Recent developments on the meaning of "habitual residence" in alleged child abduction cases', p. 3, accessible at: https://www.abdn.ac.uk/law/documents/Recent_Developments_on_the_Meaning_of_Habitual_Residence_in_Alleged_Child_Abduction_Cases_.pdf.

25 — See the Explanatory Report by Elisa Pérez-Vera, Madrid, April 1981, point 16, accessible at: http://www.hcch.net/upload/expl28.pdf.

83. Such a connection would have to be based, in the best interests of the child, on concrete and substantial evidence that could thus take precedence over the physical presence of the child. Plainly, there would not be a sufficient connection if there were some prospect that a particular Member State might become, on an indefinite future date, the place where the child would be habitually resident, unless that prospect were reinforced by other tangible links of such a kind that the prerequisite of the child's physical presence could be set aside.

84. Moreover, in that context, it should not be forgotten that, as regards issues in matters of parental responsibility, the general structure of the Brussels IIa Regulation is based on the criterion of proximity, which is reflected, principally, in the physical presence of the child. That is why, where a child's habitual residence cannot be established, the alternative ground of jurisdiction referred to in Article 13 of the Brussels IIa Regulation provides that the courts of the Member State where the child is present are to have jurisdiction.

85. Fourth, I cannot but note that, if the reasoning set out by the referring court with respect to the presence of PQ, when she was pregnant, in Italy, were adopted, that would amount to accepting that a child as yet unborn could fall within the scope of the Brussels IIa Regulation.

86. It is true that that regulation is silent on that point. In my opinion, however, an interpretation of that regulation as being applicable before the very birth of a child would not be appropriate.

87. Such an interpretation of the scope of Article 11 of the Brussels IIa Regulation would have significant consequences, undoubtedly not intended by the legislature. In particular, such an interpretation would make it possible to identify as a wrongful removal or retention, within the meaning of Article 11 of the Brussels IIa Regulation, the choice of a pregnant woman to settle in a country other than that of the father of the future child.

88. Fifth and last, I recall that the habitual residence of the child must, as has been observed above, be determined taking account of the best interests of the child.

89. As noted by the Commission, the use of criteria such as whether the parents intended to establish the child's habitual residence in a given Member State or whether the parents previously resided together in a Member State, even though the child was never physically present there, would be likely to jeopardise the best interests of the child, since, in cases relating to the child, jurisdiction would be conferred on a court of a Member State which had no link of geographical proximity to the child. That seems to me blatantly to contradict the primary objective of the Brussels IIa Regulation, which is to determine jurisdiction in matters of parental responsibility on the basis of proximity. [26]

90. In this case, it is legitimate to wonder what circumstances might support a finding that the child was habitually resident in Italy, if the best interests of the child were the fundamental consideration. I repeat that the only family environment that the child has known since birth and in which the child has settled is in Greece.

91. Consequently, it is my opinion that the habitual residence of a child for the purposes of Article 11(1) of the Brussels IIa Regulation presupposes that the child has been physically present in the Member State to which return is sought. Consequently, in circumstances such as those at issue in the main proceedings, the fact that a child, born in a Member State other than that where the child's parents resided together, has remained with her mother in the Member State of her birth cannot constitute wrongful removal or retention within the meaning of that provision.

26 — The court which is geographically close to the place where a child is habitually resident is considered by the EU legislature to be best placed to assess the measures to be adopted in the child's interests (see judgment of 15 July 2010, *Purrucker*, C-256/09, EU:C:2010:437, paragraph 91).

Conclusion

92. In the light of the foregoing, I propose that the Court should answer the question referred for a preliminary ruling by the Monomeles Protodikeio Athinon (Court of First Instance (single judge) of Athens, Greece) as follows:

Article 11(1) 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 must be interpreted as meaning that the habitual residence of a child for the purposes of that provision presupposes that the child has been physically present in the Member State to which return is sought. Consequently, in circumstances such as those at issue in the main proceedings, the fact that a child, born in a Member State other than that where the child's parents resided together, has remained with her mother in the Member State of her birth cannot constitute wrongful removal or retention within the meaning of that provision.