Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

12 May 2022 *

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Jurisdiction, applicable law, recognition and enforcement of decisions in matters relating to maintenance obligations – Determination of the applicable law – Hague Protocol on the Law Applicable to Maintenance Obligations – Article 3 – Habitual residence of the creditor – Point in time when habitual residence is to be determined – Wrongful retention of a child)

In Case C-644/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Okręgowy w Poznaniu (Regional Court, Poznań, Poland), made by decision of 10 November 2020, received at the Court on 26 November 2020, in the proceedings

**W. J.**

v

**L. J. and J. J**., legally represented by A. P.,

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, S. Rodin, J.-C. Bonichot, L.S. Rossi (Rapporteur) and O. Spineanu-Matei, Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Polish Government, by B. Majczyna, acting as Agent,

– the French Government, by A. Daniel and A.-L. Desjonquères, acting as Agents,

– the European Commission, by D. Milanowska, M. Wilderspin and W. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: Polish.

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3 of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, approved on behalf of the European Community by Council Decision 2009/941/EC of 30 November 2009 (OJ 2009 L 331, p. 17) ('the Hague Protocol').

2 The request has been made in proceedings between W. J., on the one hand, and L. J. and J. J., his two minor children, legally represented by A. P., their mother, on the other, concerning the payment by W. J. of a maintenance claim.

## Legal context

### *The 1980 Hague Convention*

3 The first and second paragraphs of Article 12 of the Convention on the Civil Aspects of International Child Abduction, concluded at the Hague on 25 October 1980 ('the 1980 Hague Convention'), provide:

'Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.'

4 Article 13 of the 1980 Hague Convention provides:

'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

*(a)* the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

*(b)* there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

## *European Union law*

### *Regulation (EC) No 4/2009*

5 Article 5 of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009 L 7, p. 1), entitled 'Jurisdiction based on the appearance of the defendant', provides:

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

6 Article 15 of that regulation provides:

'The law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol … in the Member States bound by that instrument.'

### *Decision 2009/941/EC*

7 Recitals 3 and 11 of Council Decision 2009/941/EC of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (OJ 2009 L 331, p. 17) state:

'(3) The [Hague] Protocol makes a valuable contribution to ensuring greater legal certainty and predictability to maintenance creditors and debtors. Application of uniform rules to determine the applicable law will allow free circulation of decisions on maintenance obligations in the Community, without any form of control in the Member State where enforcement is sought.

…

(11) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland [in respect of the area of freedom, security and justice], annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom [of Great Britain and Northern Ireland] is not taking part in the adoption of this Decision and is not bound by it or subject to its application.'

### *The Hague Protocol*

8 Article 1(1) of the Hague Protocol provides:

'This Protocol shall determine the law applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child regardless of the marital status of the parents.'

9 Article 2 of that protocol, entitled 'Universal application', provides:

'This Protocol applies even if the applicable law is that of a non-Contracting State.'

10 Article 3 of that protocol, entitled 'General rule on applicable law', states:

'(1) Maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor, save where this Protocol provides otherwise.

(2) In the case of a change in the habitual residence of the creditor, the law of the State of the new habitual residence shall apply as from the moment when the change occurs.'

11 Under Article 4 of the Hague Protocol, entitled 'Special rules favouring certain creditors':

'(1) The following provisions shall apply in the case of maintenance obligations of:

(a) parents towards their children;

…

(2) If the creditor is unable, by virtue of the law referred to in Article 3, to obtain maintenance from the debtor, the law of the forum shall apply.

…

(4) If the creditor is unable, by virtue of the laws referred to in Article 3 and paragraphs 2 and 3 of this Article, to obtain maintenance from the debtor, the law of the State of their common nationality, if there is one, shall apply.'

*Regulation (EC) No 2201/2003*

12 Article 1(3)(e) 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), states that that regulation does not apply to maintenance obligations.

13 Section 2, entitled 'Parental responsibility', of Chapter II, entitled 'Jurisdiction', of that regulation includes Articles 8 to 15.

14 Article 8 of that regulation, entitled '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.'

15 Article 10 of Regulation No 2201/2003 states:

'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.'

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

16 A. P. and W. J., Polish nationals who were resident in the United Kingdom and carried on a professional activity there as of at least 2012, gave birth to L. J. and J. J., who were born in the United Kingdom in June 2015 and May 2017 respectively. Both children have Polish and British nationality.

17 In the autumn of 2017, A. P. and her daughter L. J. travelled to Poland, where they were to stay until 7 October 2017, because the validity period of A. P.'s identity card had expired. During that stay, A. P. informed W. J. of her intention to extend the length of her stay in Poland, to which W. J. agreed. A. P. returned to the United Kingdom on 7 October 2017; she departed from there again the following day, taking her son J. J. with her. A few days later, A. P. informed W. J. of her intention to remain in Poland with L. J. and J. J. ('the children') on a permanent basis, to which W. J. did not agree.

18 It is apparent from the information provided by the referring court that, in April 2019, the children resided in a Polish locality with A. P., together with their grandparents, their uncle and a cousin (also a minor), and that L. J. attended nursery school, while J. J. remained in the care of A. P. and under the supervision of medical facilities because of his state of health, which required periodic hospitalisation. The referring court also notes that A. P. received welfare benefits in Poland for taking care of her children.

19 W. J. lodged an application, under the 1980 Hague Convention, with the British central authority for the return of the children.

20 On 3 January 2018, the application was forwarded to the Sąd Rejonowy (District Court, Poland) having jurisdiction; by order of 26 February 2018, that court dismissed that application.

21 On 7 November 2018 the children, represented by A. P., brought an action before the Sąd Rejonowy w Pile (District Court, Piła, Poland) for monthly maintenance payments against W. J., who was a party to the proceedings and did not raise an objection of lack of national jurisdiction.

22 By judgment of 11 April 2019, that court ordered W. J. to make monthly maintenance payments to each of the children from 7 November 2018, pursuant to Polish law.

23 W. J. brought an appeal against both the order of 26 February 2018, referred to in paragraph 20 of the present judgment, and the judgment of 11 April 2019, cited in the preceding paragraph of the present judgment.

24 By order of 24 May 2019, the Sąd Okręgowy (Regional Court, Poland) having jurisdiction, hearing the appeal against the order of 26 February 2018, ordered A. P. to surrender the children to W. J. by 26 June 2019 at the latest, on the grounds that (i) the children were being wrongfully retained in Poland, (ii) their habitual residence immediately before being so retained was in the United Kingdom, and (iii) there was not a grave risk that their return to that State would expose them to physical or psychological harm or otherwise place them in an intolerable situation within the meaning of point (b) of the first paragraph of Article 13 of the 1980 Hague Convention.

25 In support of the appeal brought before the referring court, the Sąd Okręgowy w Poznaniu (Regional Court, Poznań, Poland), against the judgment of 11 April 2019 referred to in paragraph 22 of the present judgment, W. J. has put forward a ground of appeal alleging an error of assessment of fact – inasmuch as account was not taken of the order of 24 May 2019 referred to in the preceding paragraph of the present judgment and requiring A. P. to surrender the children to their father by 26 June 2019 at the latest – which means imposing a maintenance obligation on him is unjustified.

26 In its request for a preliminary ruling, the referring court notes, in the first place, that the order of 24 May 2019 is final and that its enforcement means that the children must be returned to the United Kingdom, since the habitual residence of W. J. is still on the territory of that State. A. P. did not, however, return the children to W. J. within the prescribed period, [and] attempts to locate them had not been successful as at the date on which the reference for a preliminary ruling was lodged.

27 The referring court emphasises, in the second place, that the Polish courts have jurisdiction under Article 5 of Regulation No 4/2009 – a fact which is not disputed by W. J., who has not raised an objection of lack of national jurisdiction.

28 In the third place, the referring court states that it is the court which must determine the law applicable to the maintenance obligation at issue.

29 In that regard, the referring court emphasises that the Polish law – on the basis of which the Sąd Rejonowy w Pile (District Court, Piła) delivered its judgment – can be applied only if the children, despite their wrongful retention in Poland and the judicial decision ordering their return to the United Kingdom, acquired, after their arrival in 2017, a habitual residence in Poland, which would justify the applicable law being determined on the basis of Article 3(2) of the Hague Protocol, other factors connecting the case to Polish law, according to the referring court, being ruled out.

30 That being so, the referring court questions whether that provision is to be interpreted on the basis of Article 10 of Regulation No 2201/2003, which precludes, in principle, jurisdiction in matters of parental responsibility being transferred to the Member State in which the child would have his or her new habitual residence in the event of that child's wrongful removal to, or retention in, that Member State.

31 If it were to be accepted that children cannot acquire a new habitual residence in the State in which they are wrongfully retained, the law applicable to the maintenance obligation, at issue in the main proceedings, would be – on the basis of Article 3(1) of the Hague Protocol – the law of the United Kingdom, as the law of the State in which those children have retained their habitual residence.

32 Nevertheless, the referring court observes that, unlike Regulation No 2201/2003, neither Regulation No 4/2009 nor the Hague Protocol contains specific rules determining the links between habitual residence, on the one hand, and, respectively, jurisdiction in matters relating to maintenance obligations and the law applicable to such matters, on the other, where the maintenance creditor is a child wrongfully retained in a Member State. That finding could lead to the conclusion that, under Article 3(2) of the Hague Protocol, the wrongful retention of a child on the territory of a Member State has no effect on the acquisition by that child of its habitual residence in that Member State, so that the law of that Member State may, as the law of the new habitual residence, become applicable to the maintenance obligation as soon as such a change of residence occurs.

33 In those circumstances, the Sąd Okręgowy w Poznaniu (Regional Court, Poznań) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 3(1) and (2) of the Hague Protocol … be interpreted as meaning that a [maintenance] creditor who is a child may acquire a new habitual residence in the State in which he or she was wrongfully retained if a court orders the return of the [maintenance] creditor to the State in which he or she habitually resided immediately prior to the wrongful retention?'

## Procedure before the Court

34 By letter of 4 November 2021, received at the Court on 19 November 2021, the referring court informed the Court of Justice that, by order of 6 October 2021, the Sąd Najwyższy, Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Supreme Court, Chamber for Extraordinary Review and Public Affairs, Poland), hearing an extraordinary appeal (*skarga nadzwyczajna*) brought by the Rzecznik Praw Dziecka (Children's Ombudsman, Poland) against the order of 24 May 2019 referred to in paragraph 24 of the present judgment, set aside that order in part. It follows, according to the referring court, that the decision of 24 May 2019 ordering the return of the children to the United Kingdom is no longer applicable.

35 On 23 November 2021, the President of the Fourth Chamber of the Court decided to notify that letter to the parties to the main proceedings and interested parties, within the meaning of Article 23 of the Statute of the Court of Justice of the European Union, who were requested to submit any observations they might have before 15 December 2021.

36 Only the European Commission responded to that request, stating that it was waiving its right to submit observations in addition to those submitted to the Court in relation to the question referred for a preliminary ruling.

37 By a further letter of 20 December 2021, received at the Court on 31 December 2021, the referring court, taking into account the judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931), informed the Court of Justice that a member of the panel of judges who had made the present request for a preliminary ruling was, by way of the delegation procedure, appointed by the Polish Minister for Justice to perform, within the referring court, the duties of a judge for an indefinite period. In that letter, the referring court also recalled that the extraordinary appeal procedure referred to in paragraph 34 of the present judgment was the subject of a request for a preliminary ruling pending before the Court in Case C-720/21.

38 On 11 January 2022, the President of the Fourth Chamber of the Court decided to notify that further letter from the referring court to the parties to the main proceedings and interested parties, within the meaning of Article 23 of the Statute of the Court of Justice of the European Union, who were requested to submit any observations they might have before 31 January 2022.

39 L. J. and J. J., the Polish Government and the Commission responded to that request.

40 In their observations, L. J and J. J., legally represented by A. P., in essence, (i) requested that the Children's Ombudsman be invited to 'take a view' in the present case and (ii) argued that if the extraordinary appeal procedure were to be regarded as vitiated by irregularity, they should not bear any potential consequences thereof.

41 The Polish Government submits that the information communicated by the referring court in that further letter is irrelevant as regards both the assessment of the admissibility of the request for a preliminary ruling and the examination of the question referred.

42 While stating that it was waiving its right to submit observations, the Commission emphasised that the referring court had not specified (i) the extent to which it would be necessary to take account of the delegation by the Minister for Justice of a judge forming part of the panel of judges responsible for the present request for a preliminary ruling, (ii) any potential consequences of that delegation for, inter alia, the independence of that panel of judges, or (iii) the impact of the judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931), on the present case. In addition, the Commission argued that the referring court did not provide any information enabling a ruling to be given as to whether the delegation of the judge concerned to that court constitutes a breach of the court's independence.

43 On 4 February 2022, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, the President of the Fourth Chamber of the Court decided to reject L. J and J. J.'s request for the Children's Ombudsman to be invited to 'take a view' in the present case, in so far as (i) he is not a party to the main proceedings and (ii) the grant of such a request at a very late stage of the proceedings would be likely to lead to a significant delay in the conduct of those proceedings and would therefore be contrary to the requirements of the proper administration of justice.

**Admissibility of the request for a preliminary ruling**

44 In the first place, it should be noted that in its letter of 20 December 2021, referred to in paragraph 37 of the present judgment, the referring court informed the Court of Justice that a member of the panel of judges who had made the present request for a preliminary ruling was delegated by the Polish Minister for Justice to perform, within the referring court, the role of judge for an indefinite period. As has been observed by the Commission, the referring court does not specify the conclusions which, in its view, are to be drawn from such a situation, in particular as regards the independence of that court. It seems however that, in highlighting that situation, the referring court appears to have doubts as to its own status as a 'court or tribunal' within the meaning of Article 267 TFEU, which is a condition for the admissibility of the request for a preliminary ruling.

45 In that regard it should be borne in mind that, according to settled case-law, in order to determine whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, and therefore to determine whether the request for a preliminary ruling is admissible, the Court takes account of a number of factors such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, to that effect, judgments of 9 July 2020, *Land Hessen*, C-272/19, EU:C:2020:535, paragraph 43, and of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 66).

46 The independence of the judges of the Member States is of fundamental importance for the EU legal order in various respects. In particular, that independence is essential to the proper working of the system of judicial cooperation embodied by the preliminary ruling mechanism provided for in Article 267 TFEU, inasmuch as that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence (see, to that effect, judgment of 9 July 2020, *Land Hessen*, C-272/19, EU:C:2020:535, paragraph 45 and the case-law cited).

47 The guarantees of independence and impartiality required under EU law require rules, particularly as regards the composition of the body and the appointment and length of service of its members, and as regards the grounds for withdrawal by, objection to, and dismissal of its members, in order to dispel any reasonable doubt in the minds of litigants as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgments of 9 July 2020, *Land Hessen*, C-272/19, EU:C:2020:535, paragraph 52, and of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraphs 67 and 71).

48 In the present case, there is no doubt that, as such, the Sąd Okręgowy w Poznaniu (Regional Court, Poznań) is one of the Polish ordinary courts.

49 In so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed that that court or tribunal meets the requirements referred to in paragraph 45 of the present judgment, irrespective of its actual composition (see, to that effect, judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 69).

50 That presumption applies, however, solely for the purpose of assessing the admissibility of requests for a preliminary ruling made under Article 267 TFEU. It cannot therefore be inferred from that presumption that the conditions for appointment of the judges that make up the

referring court necessarily satisfy the guarantees of access to an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 74).

51 In addition, that presumption may be rebutted where a judicial decision that has become final handed down by a national or international court or tribunal leads to the conclusion that the judge or judges constituting the referring court is or are not an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter of Fundamental Rights. The same would apply if there were, beyond the personal situation of the judge or judges formally making a request under Article 267 TFEU, other factors which would have repercussions on the functioning of the referring court to which that judge belongs – or those judges belong – and thus contribute to undermining the independence and impartiality of that court (see, to that effect, judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraphs 72 and 75).

52 In the present case, the referring court has not submitted any specific and precise evidence capable of rebutting, in the circumstances recalled in the preceding paragraph of the present judgment, the presumption that the present request for a preliminary ruling emanates from a body which satisfies the requirements recalled in paragraph 45 of the present judgment.

53 In the second place, in its letter of 4 November 2021, referred to in paragraph 34 of the present judgment, the referring court informed the Court of Justice that the order of 24 May 2019 requiring A. P. to surrender the children to W. J. by 26 June 2019 at the latest had ceased to have effect, as the extraordinary appeal brought by the Children's Ombudsman against that order had been upheld by the Sąd Najwyższy, Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Supreme Court, Chamber for Extraordinary Review and Public Affairs).

54 While it is true that the question referred for a preliminary ruling by the referring court is essentially based on the conclusions to be drawn, for the interpretation of Article 3 of the Hague Protocol, from the finding, made in the order of 24 May 2019, that the children of W. J. and A. P. were wrongfully retained by A. P. in Poland and that they had to be surrendered to W. J. (residing in the United Kingdom), it cannot however be inferred from the decision of the Sąd Najwyższy, Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Supreme Court, Chamber for Extraordinary Review and Public Affairs) that such a question is no longer relevant to the assessment of the dispute in the main proceedings.

55 It is not certain, in the light of the explanations provided by the referring court, that, under such a decision of the Sąd Najwyższy, Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Supreme Court, Chamber for Extraordinary Review and Public Affairs), the order of 24 May 2019 requiring the surrender of the children to W. J. must be regarded as never having produced effects in the Polish legal order, with the result that the presumption of relevance enjoyed by the question put by the referring court has not been rebutted.

56 Accordingly, the request for a preliminary ruling is admissible.

## Consideration of the question referred

57 By its question, the referring court asks, in essence, whether Article 3 of the Hague Protocol is to be interpreted as meaning that, for the purpose of determining the law applicable to the maintenance claim of a minor child removed by one of his or her parents to the territory of a Member State, the fact that a court of that Member State has ordered, in separate proceedings, the return of that child to the State where he or she was habitually resident with his or her parents immediately before his or her removal is sufficient to prevent that child from acquiring a habitual residence on the territory of that Member State.

58 As a preliminary point, it should be borne in mind that, as the Hague Protocol has, via Decision 2009/941, been approved by the Council of the European Union, the Court has jurisdiction to interpret its provisions (see, to that effect, judgment of 20 September 2018, *Mölk*, C-214/17, EU:C:2018:744, paragraph 23 and the case-law cited). Furthermore, the fact that the United Kingdom (on whose territory W. J. resides) is not bound by that protocol has no bearing on the present case, since – in accordance with Article 2 thereof – the Hague Protocol applies even if the applicable law is that of a non-Contracting State.

59 Under Article 3(1) of the Hague Protocol, the law applicable to maintenance obligations is – save where that protocol provides otherwise – that of the State of the maintenance creditor's habitual residence. Under Article 3(2) of that protocol, in the case of a change in the habitual residence of the maintenance creditor, the law of the State of the new habitual residence applies as from the moment when the change occurs.

60 The referring court seeks to ascertain whether, for the purpose of determining the law applicable to the maintenance claim, account may be taken of the change of habitual residence provided for in Article 3(2) of the Hague Protocol where the maintenance creditor is wrongfully retained on the territory of the State in which he or she is physically present. More specifically, it asks, in essence, whether the wrongful retention of that creditor on the territory of a Member State may alter the stability of his or her stay as a criterion for determining his or her habitual residence.

61 The question referred therefore makes it necessary to interpret the concept of the 'habitual residence' of the maintenance creditor as referred to in Article 3 of the Hague Protocol and to verify that that creditor's wrongful retention on the territory of a Member State does not preclude the transfer of his or her habitual residence to the territory of that State.

62 In the first place, as regards the concept of the 'habitual residence' of the maintenance creditor, it should be noted that the Hague Protocol does not define that concept; nor does it make any express reference to the law of the contracting parties for the purpose of defining its meaning and scope. In such circumstances, the need for a uniform application of EU law and the principle of equality require that the meaning and scope of that concept must normally be given an autonomous and uniform interpretation which takes into account the context of those provisions and the objectives pursued by the legislation in question (see, by analogy, judgments of 13 October 2016, *Mikołajczyk*, C-294/15, EU:C:2016:772, paragraph 44, and of 25 November 2021, *IB (Habitual residence of a spouse – Divorce)*, C-289/20, EU:C:2021:955, paragraph 39).

63 In that regard, it should first of all be pointed out that the use of the adjective 'habitual' makes it possible to infer that the residence must display a sufficient degree of stability, to the exclusion of a temporary or occasional presence. That finding is supported by the consideration, set out in

paragraph 42 of the Explanatory Report on the Hague Protocol drawn up by Mr Andrea Bonomi (Text adopted by the Twenty-First Session of the Hague Conference on Private International Law), according to which the criterion of 'habitual' residence implies a measure of stability, which means that 'mere residence of a temporary nature is not sufficient to determine the law applicable to the maintenance obligation'.

64 Next, it must be emphasised that Article 3 of the Hague Protocol reflects the system of connecting rules on which that protocol is based since such a system is intended to ensure the foreseeability of the applicable law by ensuring that the law designated is not devoid of a sufficient connection with the family situation at issue, it being understood that the law of the habitual residence of the maintenance creditor appears in principle to be the law most closely connected with that creditor's situation and to be the best adapted to govern the specific problems which he or she may encounter (see, to that effect, judgments of 7 June 2018, *KP*, C-83/17, EU:C:2018:408, paragraphs 41 to 43, and of 20 September 2018, *Mölk*, C-214/17, EU:C:2018:744, paragraph 28).

65 It should be noted, as is stated in paragraph 37 of the report referred to in paragraph 63 of the present judgment, that that connection offers the main advantage of determining the existence and amount of the maintenance obligation by taking account of the 'legal and factual conditions of the social environment in the country where the creditor lives and engages in most of his or her activities'. Given that, as is emphasised in the same paragraph of that report, the maintenance creditor will use his or her maintenance in order to live, it is necessary 'to appreciate the concrete problem arising in connection with a concrete society: that in which the [maintenance creditor] lives and will live'.

66 It is therefore justified to take the view that, in the light of that objective, the habitual residence of the maintenance creditor is that of the place where, in reality, the habitual centre of his or her life is located, taking into account his or her family and social environment. This is especially true where that creditor is a child of a young age, in view of the need, in accordance with Article 24(2) of the Charter of Fundamental Rights, to take due account of the best interests of that child, which requires in particular, as the Polish Government has, in essence, emphasised, that he or she be provided with sufficient resources, having regard to the family and social environment in which he or she lives.

67 Given that, as can be seen from the preceding paragraph of the present judgment, the task of establishing in a specific situation whether the maintenance creditor is habitually resident in one State or in another constitutes an assessment of fact, it is for the national court to which the matter has been referred to establish the place of habitual residence of the person concerned on the basis of all the factual circumstances peculiar to the individual case (see, by analogy, in particular, judgments of 2 April 2009, *A*, C-523/07, EU:C:2009:225, paragraph 42, and of 28 June 2018, *HR*, C-512/17, EU:C:2018:513, paragraph 40).

68 In the second place, it should be noted that the Hague Protocol does not provide for any qualification in Article 3(2) thereof, establishing the connection to the law of the State of the maintenance creditor's new habitual residence as from the moment when the change of habitual residence occurs, even if a judicial decision has required that the maintenance creditor who is a minor be surrendered to one of his or her parents residing in another State.

69 Moreover, the rule contained in that provision makes it possible to preserve the maintenance creditor's connection with the place where he or she actually lives (see, to that effect, judgment of 7 June 2018, *KP*, C-83/17, EU:C:2018:408, paragraph 43) and therefore, where that creditor is a

minor, to take fully into consideration the best interests of the child, inasmuch as it allows the court to which the matter has been referred to determine the resources that that child needs, taking into account as much as possible the family and social environment in which his or her development normally takes place.

70 It follows that it would be contrary to the objective of Article 3(2) of the Hague Protocol and to taking into account the best interests of the child to consider that the existence of a judicial decision of a Member State finding the wrongful removal or retention of a minor child and ordering that that child be surrendered to one of his or her parents residing in another State precludes, as a matter of principle, the conclusion that that child is habitually resident on the territory of that Member State for the purpose of determining the law applicable to his or her maintenance claim.

71 In that regard, there is no reason, given the silence of the legislation, for interpreting Article 3 of the Hague Protocol in the light or on the basis of the provisions of Article 10 of Regulation No 2201/2003, which defeat the transfer, in principle, of jurisdiction in matters of parental responsibility to the Member State in which the child may have acquired his or her new habitual residence following his or her wrongful removal or retention, in favour of the Member State where that child was habitually resident before that removal or retention.

72 After all, the Court has held that the special jurisdiction provided for in Article 10 of Regulation No 2201/2003 must be interpreted restrictively and therefore does not permit an interpretation that goes beyond the situations explicitly envisaged by that regulation (see, to that effect, judgment of 24 March 2021, *MCP*, C-603/20 PPU, EU:C:2021:231, paragraphs 45 and 47 and the case-law cited).

73 It follows that, for the purpose of identifying the applicable law pursuant to Article 3 of the Hague Protocol, it is only in the context of the assessment of all the circumstances of the case at hand, in order to determine whether the change in the habitual residence of the child, a maintenance creditor, has actually materialised, that, while taking into due consideration the best interests of the child, the national court hearing the case may find it necessary to take into account the potentially wrongful nature of the removal or retention of that child, in conjunction with the other factors that are capable of proving or disproving that the presence of that child in the State to which he or she has been removed displays a sufficient degree of stability, having regard to his or her family and social environment.

74 In that regard, where a court of a Member State receives, as in the case in the main proceedings, an application for payment of a maintenance claim in respect of a period subsequent to the removal of the maintenance creditor to that Member State, it must be held that, in principle, the time at which that court is actually required to take a decision in order to assess the place where that creditor is habitually resident, for the purpose of identifying the law applicable to the maintenance obligations concerned, is the time at which it is necessary to rule on the application for maintenance – as has indeed been contended by the Commission in its written observations. Such an interpretation makes it possible to maintain, in accordance with the objective of Article 3(2) of the Hague Protocol, the connecting factor between a maintenance creditor and the place where the maintenance claim to which he or she is entitled must enable him or her to support him- or herself.

75 In the present case, it should be noted, first, that the decision of the Sąd Rejonowy w Pile (District Court, Piła) to grant, pursuant to Polish law, the maintenance claim to the children, was delivered on 11 April 2019, that is to say, at a time when (i) the children had been staying in Poland with their mother, in her family, for a little over 17 months and (ii) the Sąd Rejonowy (District Court) having jurisdiction, hearing W. J.'s application for the return of the children, had dismissed that application.

76 The Sąd Rejonowy w Pile (District Court, Piła) cannot therefore be criticised for not taking into account, when it issued its judgment of 11 April 2019, the order of 24 May 2019 referred to in paragraph 24 of the present judgment which ordered the return of the children to the United Kingdom.

77 Secondly, in so far as the referring court has jurisdiction to carry out an entirely new assessment of the facts compared to that carried out by the Sąd Rejonowy w Pile (District Court, Piła), it will be for the referring court, in order to determine the law applicable to the maintenance claim sought, to determine, in the light of all the existing circumstances characterising the situation of the children and having regard to their family and social environment, whether their presence in the Member State to which they were removed is of a lasting character.

78 In the light of all the foregoing considerations, the answer to the question referred is that Article 3 of the Hague Protocol must be interpreted as meaning that, for the purpose of determining the law applicable to the maintenance claim of a minor child removed by one of his or her parents to the territory of a Member State, the fact that a court of that Member State has ordered, in separate proceedings, the return of that child to the State where he or she was habitually resident with his or her parents immediately before his or her removal is not sufficient to prevent that child from acquiring a habitual residence on the territory of that Member State.

## Costs

79 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 (Fourth Chamber) hereby rules:

**Article 3 of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, approved on behalf of the European Community by Council Decision 2009/941/EC of 30 November 2009, must be interpreted as meaning that, for the purpose of determining the law applicable to the maintenance claim of a minor child removed by one of his or her parents to the territory of a Member State, the fact that a court of that Member State has ordered, in separate proceedings, the return of that child to the State where he or she was habitually resident with his or her parents immediately before his or her removal is not sufficient to prevent that child from acquiring a habitual residence on the territory of that Member State.**

[Signatures]