Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

6 July 2023 *

(Reference for a preliminary ruling – Jurisdiction, recognition and enforcement of judgments in matrimonial matters – Regulation (EC) No 2201/2003 – Sixth indent of Article 3(1)(a) – *Forum actoris* – Condition – Habitual residence of the applicant in the Member State of the court seised for the entire period immediately before the application was made)

In Case C-462/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 25 May 2022, received at the Court on 11 July 2022, in the proceedings

BM

v

LO,

THE COURT (Fourth Chamber),

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

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– LO, by B. Ackermann, Rechtsanwältin,

– the Polish Government, by B. Majczyna and S. Żyrek, acting as Agents,

– the Portuguese Government, by P. Barros da Costa, S. Duarte Afonso and J. Ramos, acting as Agents,

– the European Commission, by H. Leupold and W. Wils, acting as Agents,

* Language of the case: German.

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the sixth indent of 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 (OJ 2003 L 338, p. 1).

2 The request has been made in proceedings between BM and his wife, LO, concerning an application for dissolution of their marriage brought before the German courts.

Legal context

3 Recital 1 of Regulation No 2201/2003 is worded as follows:

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

4 Headed 'Scope', Article 1 of that regulation provides, in paragraph 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;

…'

5 Entitled 'General jurisdiction', Article 3 of that regulation states:

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

(a) in whose territory:

– the spouses are habitually resident, or

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

– the respondent is habitually resident, or

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

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

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

…'

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

6 BM, a German national, and LO, a Polish national, married in Poland in 2000. They lived there with their children until at least June 2012.

7 On 27 October 2013, BM brought divorce proceedings before the Amtsgericht Hamm (Local Court, Hamm, Germany), claiming that he had left his marital home in June 2012 and had since then settled at his parents' home in his home town in Germany.

8 LO claimed that the German courts lacked international jurisdiction, essentially on the ground that, after leaving the marital home, BM had retained a habitual residence in Poland for most of 2013.

9 Having regard to the evidence adduced by the parties to the main proceedings, the Amtsgericht Hamm (Local Court, Hamm) upheld LO's plea of lack of jurisdiction and dismissed BM's application for divorce as inadmissible.

10 That judgment was upheld on appeal by the Oberlandesgericht Hamm (Higher Regional Court, Hamm, Germany).

11 That court held, in essence, that, while BM had, admittedly, acquired habitual residence in Germany on the date on which the application for divorce was lodged, namely on 27 October 2013, he had not shown that he had established such habitual residence in that Member State throughout the six months preceding that date, namely since 27 April 2013, contrary to the requirements of the sixth indent of Article 3(1)(a) of Regulation No 2201/2003.

12 Ruling on an appeal brought by BM against the judgment of the Oberlandesgericht Hamm (Higher Regional Court, Hamm), the Bundesgerichtshof (Federal Court of Justice, Germany) considers that the outcome of that appeal depends on the interpretation to be given to the fifth and sixth indents of Article 3(1)(a) of Regulation No 2201/2003. More specifically, the referring court wonders whether the applicant must prove habitual residence in the Member State of the court seised from the starting point of the time limits laid down in that provision, or whether mere de facto residence is sufficient, provided that the latter becomes habitual at the latest on the date on which the application for the dissolution of matrimonial ties is lodged.

13 In that regard, the referring court takes the view that, despite the wording of the fifth and sixth indents of Article 3(1)(a) of Regulation No 2201/2003, the teleological and restrictive interpretation of the *forum actoris* enshrined in that provision should be preferred, so as not to compromise the rights of the defendant spouse in the case. That approach should lead to the conclusion that the applicant must demonstrate that he or she has acquired habitual residence in the Member State of the court seised from the starting point of the relevant time limit. That interpretation would also contribute to better predictability and uniform application of the

criteria for conferring jurisdiction. According to the referring court, certain contextual factors support such an interpretation. In this connection, that court refers inter alia to the Spanish and French versions of the explanatory report by Dr Borrás on the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, known as the 'Brussels II' Convention (OJ 1998 C 221, p. 27).

14 However, the referring court notes that the interpretation which it proposes to adopt of the fifth and sixth indents of Article 3(1)(a) of Regulation No 2201/2003 is a matter of dispute, in particular in German-language legal literature, and, in any event, has not been settled by the case-law of the Court and cannot be clearly deduced therefrom.

15 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does the waiting period of one year or six months under the fifth and sixth indents, respectively, of Article 3(1)(a) of Regulation [No 2201/2003] begin to run with respect to the applicant only upon establishment of [the latter's] habitual residence in the Member State of the court seised, or is it sufficient if, at the beginning of the relevant waiting period, the applicant initially has mere de facto residence in the Member State of the court seised, and his or her residence becomes established as habitual residence only subsequently, in the period before the application for divorce was made?'

Consideration of the question referred

16 As a preliminary point, it is important to observe that it is apparent from the reference for a preliminary ruling that the international jurisdiction of the German courts to hear the case in the main proceedings was examined in the light of the sixth indent of Article 3(1)(a) of Regulation No 2201/2003 and that the referring court considered that the finding that BM had not acquired habitual residence in Germany on 27 April 2013 was not vitiated by any error. Accordingly, the question referred must be understood as referring solely to that provision.

17 By its question, the referring court asks, in essence, whether the sixth indent of Article 3(1)(a) of Regulation No 2201/2003 must be interpreted as meaning that that provision makes the jurisdiction of the court of a Member State to hear an application for the dissolution of matrimonial ties subject to the condition that the applicant, who is a national of that Member State, provides evidence that he or she has acquired a habitual residence in that Member State for at least six months immediately prior to the submission of his or her application, or to the condition that he or she shows that the residence which he or she acquired in that same Member State has become a habitual residence during the minimum period of six months immediately preceding the lodging of his or her application.

18 It must be borne in mind that Article 3 of Regulation No 2201/2003 lays down the general criteria for jurisdiction with respect to divorce, legal separation and marriage annulment. Those 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 (judgment of 10 February 2022, *OE (Habitual residence of a spouse – Nationality criteria)*, C-522/20, EU:C:2022:87, paragraph 25 and the case-law cited).

19 In that regard, while the first to fourth indents of Article 3(1)(a) of Regulation No 2201/2003 expressly refer to the habitual residence of the spouses and of the respondent as criteria, the sixth indent of Article 3(1)(a) permits the application of the jurisdiction rules of the *forum actoris* (judgment of 10 February 2022, *OE (Habitual residence of a spouse – Nationality criteria)*, C-522/20, EU:C:2022:87, paragraph 26 and the case-law cited).

20 That rule on jurisdiction seeks to ensure a balance between, on the one hand, the mobility of individuals within the European Union, in particular by protecting the rights of the spouse who, after the marriage has broken down, has left the Member State where the couple had their shared habitual residence and, on the other hand, legal certainty, in particular legal certainty for the other spouse, by ensuring that there is a real link between the applicant and the Member State whose courts have jurisdiction to give a ruling on the dissolution of the matrimonial ties concerned (see, to that effect, judgment of 10 February 2022, *OE (Habitual residence of a spouse – Nationality criteria)*, C-522/20, EU:C:2022:87, paragraph 29 and the case-law cited).

21 The sixth indent of Article 3(1)(a) of Regulation No 2201/2003 recognises the courts of the Member State of the territory in which the applicant is habitually resident as having jurisdiction to rule on the dissolution of matrimonial ties in question if, under that provision, the applicant 'resided' in the territory of that Member State 'for at least six months immediately before [his or her] application was made' and where, as in the case in the main proceedings, he or she is a national of that Member State (see, to that effect, judgment of 10 February 2022, *OE (Habitual residence of a spouse – Nationality criteria)*, C-522/20, EU:C:2022:87, paragraphs 26 to 28 and the case-law cited).

22 In the view of the referring court, there is no doubt that, according to that provision, on the date on which the application for dissolution of matrimonial ties was made, the applicant must have 'habitual residence' in the Member State of the court seised, which, in the case in the main proceedings, was demonstrated by BM before the Oberlandesgericht Hamm (Higher Regional Court, Hamm).

23 In that regard, it should be borne in mind that the international jurisdiction deriving from Article 3(1)(a) of Regulation No 2201/2003, in so far as it is determined by the criterion of 'habitual residence', precludes it from being dependent on a criterion based on the mere de facto residence of one or other of the spouses (see, to that effect, judgment of 25 November 2021, *IB (Habitual residence of a spouse – Divorce)*, C-289/20, EU:C:2021:955, paragraph 46).

24 It follows that a spouse who wishes to rely on the ground of jurisdiction provided for in the sixth indent of Article 3(1)(a) of Regulation No 2201/2003 must necessarily show that he or she has his or her habitual residence in the territory of the Member State of which he or she is a national at the time of lodging his or her application for the dissolution of matrimonial ties, an aspect which is not disputed in the present case.

25 By contrast, the referring court considers that there is doubt as to whether the condition that the applicant must have 'resided … for at least six months immediately before [his or her] application was made' in the Member State concerned, referred to in the sixth indent of Article 3(1)(a) of Regulation No 2201/2003, means that the applicant must simply show that he or she has established his or her residence in the territory of that Member State, provided that, during the minimum period of six months immediately preceding the application for the dissolution of

matrimonial ties, that residence has become a habitual residence or, on the contrary, that the applicant must prove habitual residence from the beginning and throughout that minimum period of six months immediately preceding his or her application.

26 Given that Regulation No 2201/2003 does not provide any definition of the concept of 'habitual residence' and, in particular, that of 'residence', and makes no reference to the law of the Member States for the purpose of determining the meaning and scope of those concepts, those concepts have to be given an autonomous and uniform interpretation, taking into account the wording and the context of the provisions referring to those concepts 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, paragraph 39 and the case-law cited).

27 In that regard, it is true that it is apparent from the wording of the sixth indent of Article 3(1)(a) of Regulation No 2201/2003 that the jurisdiction of the court of the Member State in which the applicant must have habitual residence is subject to the condition that 'he or she resided there' at least six months immediately before the application for the dissolution of matrimonial ties was made. As the Polish Government and the European Commission acknowledge, the reference to mere de facto residence does not necessarily mean that the applicant must prove habitual residence for the entire minimum period of six months immediately preceding his or her application.

28 However, in view of the context of the sixth indent of Article 3(1)(a) of Regulation No 2201/2003 and the objectives pursued by that regulation, the requirement that the applicant must reside in the Member State of which he or she is a national for at least six months immediately before the application is made cannot be interpreted independently of the criterion of 'habitual residence' also set out in that provision.

29 Thus, in the first place, it should be noted that Article 3(1)(a) of that regulation seeks to standardise, within the European Union, the criteria for attributing international jurisdiction in matrimonial matters, all of which are based, as has been recalled in paragraph 23 of the present judgment, on the concept of 'habitual residence'. In the general scheme of that provision, the concept of 'residence' cannot be of a different nature depending on whether it is used in the second or sixth indent, irrespective of the fact that, unlike the other versions of that second indent drawn up in the official languages of the European Union at the time of the adoption of that regulation, the German-language version does not use that concept in isolation.

30 Under the second indent of Article 3(1)(a) of that regulation, the court of the Member State in which 'the spouses were last habitually resident, in so far as one of them still resides there' has jurisdiction. In that regard, the use of the expression 'still resides there', which appears in the versions of that provision drawn up in the official languages of the European Union at the time of the adoption of that regulation, with the exception of the German-language version, implies a temporal continuity between that residence and the place where 'the spouses were last habitually resident', with the result that the spouse who remained in the territory of the Member State concerned retains his or her own habitual residence there, without that being invalidated by the German-language version of that provision.

31 Consequently, in the specific context of the determination of international jurisdiction in matters relating to the dissolution of matrimonial ties provided for in Article 3(1)(a) of Regulation No 2201/2003, there is no need to draw a distinction between the concept of 'residence' and that of 'habitual residence', a distinction which would have the effect of weakening the criterion for determining that jurisdiction.

32 In the second place, as the Polish and Portuguese Governments submit, in essence, to require the applicant for the dissolution of matrimonial ties to show that he or she has acquired a habitual residence in the Member State of the court seised from the point at which the minimum period of six months, laid down in the sixth indent of Article 3(1)(a) of Regulation No 2201/2003, starts to run ensures legal certainty, while preserving the mobility of persons within the European Union and the possibility of obtaining the dissolution of matrimonial ties, without unduly favouring that applicant, even though the *forum actoris* constitutes a rule of jurisdiction which is already favourable to him or her, which the more flexible alternative interpretation of that provision advocated by BM before the referring court cannot guarantee.

33 Thus, first of all, that requirement helps to compensate for the fact that, unlike the other grounds of jurisdiction listed in the first four indents of Article 3(1)(a) of Regulation No 2201/2003, the criterion referred to in its sixth indent is not subject either to the agreement of the spouses or to the existence of a particular connection with the place where they lived together, past or present. Accordingly, requiring the applicant to demonstrate that he or she has been habitually resident in the territory of the Member State of the court seised for at least six months immediately preceding the lodging of his or her application is based on the need for that applicant to be able to establish, for the entire period concerned, that he or she has a real link with that Member State within the meaning of the case-law cited in paragraph 20 of this judgment.

34 Next, the objectives of predictability and uniform interpretation and application in the European Union, which govern the setting of the criteria for attributing jurisdiction in matrimonial matters, listed in Article 3(1)(a) of Regulation No 2201/2003, could not be achieved if the applicant were merely required to prove that he or she was habitually resident in the Member State of the court seised for a more or less brief period during the minimum six-month period immediately preceding his or her application for the dissolution of matrimonial ties. In such a case, the sufficiency of the period of habitual residence required of the applicant in the territory of the Member State of the court seised would, by definition, vary from case to case and according to the casuistic assessment of each national court seised.

35 By contrast, the objectives referred to in the preceding paragraph of the present judgment are achieved by the requirement that the applicant show that he or she has acquired habitual residence in the Member State of the court seised from the point at which the minimum period of six months laid down in the sixth indent of Article 3(1)(a) of Regulation No 2201/2003 starts to run.

36 Lastly, it should be emphasised that, in the light of the objective of balance between (i) the mobility of persons within the European Union and (ii) the requirement of legal certainty, an objective pursued by Regulation No 2201/2003 and recalled in paragraph 20 of the present judgment, the requirement referred to in the preceding paragraph of the present judgment does not impose on the applicant a disproportionate burden such as to deter him or her from relying on the ground of jurisdiction provided for in the sixth indent of Article 3(1)(a) of that regulation.

37 It follows that, in accordance with the criterion of jurisdiction, on the basis of which the sixth indent of Article 3(1)(a) of Regulation No 2201/2003 is founded, the spouse who intends to rely on that provision must necessarily prove that he or she has been habitually resident in the Member State of the court seised from the beginning of the minimum period of six months referred to in that provision.

38 In the light of all the foregoing considerations, the answer to the question referred is that the sixth indent of Article 3(1)(a) of Regulation No 2201/2003 must be interpreted as meaning that that provision makes the jurisdiction of the court of a Member State to hear an application for the dissolution of matrimonial ties subject to the condition that the applicant, who is a national of that Member State, provides evidence that he or she has acquired a habitual residence in that Member State for at least six months immediately prior to the submission of his or her application.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

The sixth indent of Article 3(1)(a) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000,

must be interpreted as meaning that that provision makes the jurisdiction of the court of a Member State to hear an application for the dissolution of matrimonial ties subject to the condition that the applicant, who is a national of that Member State, provides evidence that he or she has acquired a habitual residence in that Member State for at least six months immediately prior to the submission of his or her application.

[Signatures]