Ruling no 462 of 12 June 2020 (19-24.108) – Cour de cassation (*Court of cassation*) - First Civil Chamber - ECLI:FR:CCASS:2020:C100462

International child abduction (The Hague Convention of 25 October 1980) and determination of the habitual residence of the child: evolution of national law under the influence of EUCJ case law.

Only the french version is authentic

International agreements

Quashing

Summary

Established case law from the Court of Justice of the European Union relating to the habitual residence of the child, in keeping with Regulation (EC) No 2201/2003 of the Council of 27 November 2003, sets down such residence as being the place where, in actuality, the child's centre of life is located.

Also, it follows that when a child is an infant, its environment is essentially a family one, defined by the contact person(s) with whom it lives, who effectively look after it and take care of it. Consequently, the intention initially expressed by the parents as to the child's return to another Member State, which was that of their habitual residence before the child's birth, cannot be the deciding factor in and of itself when determining the child's habitual residence, since that intention is merely one indication that should be regarded together with a set of other concordant elements. This initial intention cannot be the predominant factor, applying a general and abstract rule whereby an infant's habitual residence would necessarily be that of its parents. Similarly, in the exercise of his or her custodial rights, a parent's consent or lack of consent to the child's settlement in a location cannot be a deciding factor when determining that child's habitual residence.

Consequently, the decision is deprived of a legal basis with regard to Articles 3 and 4 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 2, 11), and 11, paragraph 1, of the aforementioned Regulation (EC) No 2201/2003. The ruling had found that the infant's habitual residence is that of the parents and therefore is established in Greece. The cour d'appel (*Court of Appeal*) did not pursue its responsibility to seek to determine whether the child's social and family environment and, therefore its centre of life, was not in Greece, due to its young age and the circumstances of its arrival in France at the age of one month, subsequently staying with its mother without interruption. The decision was made without having researched the parents' initial intention that the child return with the mother to Greece after her stay in France.

Appellant(s): Ms A... X..., spouse of Y...

Respondent(s): Mr B... Y... ; and others

Facts and Procedure

According to the ruling under appeal (Colmar, 29 October 2019), C... Y... X… was born within the marriage of Ms X..., of Swiss nationality, and Mr Y..., of Greek nationality, on [...] in Palaio Faliro (Greece). On 4 November 2018, Ms X..., accompanied by her husband, travelled to France with the child to rest at her parents' home. Claiming that she refused to return to Greece with C... at the end of her stay, as initially agreed, Mr Y... summoned her, on 26 June 2019, before the family judge of the tribunal de grande instance of Strasbourg (*Strasbourg Tribunal of First Instance*) to order the immediate return of the child.

Reviewing pleas

On the second part of the first plea

Statement of plea

Ms X… objects to the ruling wherein the non-return of the child, C..., is deemed unlawful, ordering her to immediately return to Greece, and to pay the sum of 5,000 euros in costs as expenses set out under Article 26 of the Hague Convention of 25 October 1980, whereas "*it relied exclusively on an assessment of the infant and the parents' situation in Greece to conclude that "the habitual residence of Mr Y... and Ms X..., and subsequently that of C... (ruling p. 6, section 4) was established in Greece. The conclusion did not include an assessment of the integration of the child and its mother in their home in France, when established case law from the Court of Justice of the European Union (EUCJ ruling, 8 June 2017, case C-111/17, PPU, OL c/PQ) states that when an infant is actually kept by its mother in a Member State other than that in which the father habitually resides, account must be taken, in particular, of the duration, regularity, conditions and reasons for the mother's residence in the territory of the first Member State. In addition, account must be taken of the mother's geographical and family origins and the family and social relations maintained by her and the child in the same Member State. The decision of the cour d'appel (Court of Appeal) was deprived of a legal basis with regard to Articles 3 and 4 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, together with Articles 2, 11) and 11, paragraph 1 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility."*

Court's response

In view of Articles 3 and 4 of the Hague Convention of 5 October 1980 on the Civil Aspects of International Child Abduction, 2, 11), and 11, paragraph 1 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility:

Under these texts, any removal or retention of a child in violation of effectively exercised custodial rights and ascribed to a person by law or by a judge of the State in which the child had its habitual residence prior to its removal or retention is unlawful.

The following resulting elements are derived from the case law of the Court of Justice of the European Union (ruling of 2 April 2009, A, C-523/07, ruling of 22 December 2010, C-497/10 PPU, ruling of 9 October 2014, C, C-376/14 PPU, ruling of 8 June 2017, OL, C-111/17 PPU, ruling of 28 June 2018, HR, C-512/17).

First, the child's habitual residence, as defined in Regulation No 2201/2003, corresponds in fact to the place where its centre of life is located. It is up to the national court to determine where this centre is located, basing its decision on a number of concordant factual elements (aforementioned ruling of 28 June 2018).

Second, habitual residence must be interpreted with regard to the objectives of Regulation No 2201/2003. In particular, recital 12 sets out that the defined rules of jurisdiction are designed to take the best interests of the child into account, especially the criterion of proximity (aforementioned rulings of 2 April 2009, points 34 and 35, of 22 December 2010, points 44 and 46, and of 8 June 2017, point 40).

Third, when a child is an infant, its environment is essentially a family one, defined by the contact person(s) with whom it lives, who effectively look after it and take care of it, and with whom it necessarily shares a social and familial environment. Consequently, as in the present case, where a child is actually looked after by its mother in a Member State other than that in which the father habitually resides, account must be taken in particular, first, of the duration, lawfulness, conditions and reasons for the mother's stay in the territory of the first Member State and, second, of the mother's geographical and family origins and the family and social relations maintained by her and the child in the same Member State (aforementioned ruling of 8 June 2017, point 45).

Fourth, when a child in the same situation is effectively looked after by its mother, the parents' initially expressed intention for the mother to return with the child to another Member State that was their habitual residence before the child's birth, in itself cannot be the deciding factor in determining the child's habitual residence, according to Regulation No 2201/2003. The intention is merely one indication that should be taken into consideration together with a set of other concordant elements. This initial intention cannot be the predominant factor, applying a general and abstract rule whereby a child's habitual residence would necessarily be that of its parents (same ruling, points 47 and 50). Similarly, in the exercise of his custodial rights, the father's consent or lack of consent to the child's settlement in a location cannot be a deciding factor when determining that child's habitual residence, as defined in Regulation No 2201/2003 (same ruling, point 54).

In this case, in order to determine that the child's habitual residence is in Greece, the ruling holds that, since the child is an infant, it is necessary to take into consideration the couple's residence and the joint intention of the parents. In the case of temporary stays abroad, a change of residence can only be taken into consideration in the event of a firm intention, expressed by both parents, to leave their habitual residence in order to acquire a new one, irrespective of the place where the child has spent the most time since birth. It is noted that Mr Y... and Ms X... were married on 30 July 2015 in Greece where they have been permanently residing for four years. This is where Mr Y... primarily carries out his professional activity,

Ms X... having ceased her professional activity to settle in Greece with her husband. It is established that C... is of Greek nationality. He was born in Greece where he lived for four weeks in an accommodation fitted out for his birth. He has a Greek passport, a mutual insurance policy and is registered with the Greek health insurance system. It is also noted that both parents had given a shared address in Greece on their son's birth certificate and that the family's residence is registered with the city hall of Piraeus. It concluded that the habitual residence of Mr Y... and Ms X... and, subsequently, that of C... was established in Greece. Even if the removal of the child to France was not unlawful, as both parents entered the national territory together, by mutual agreement, with the child, Ms X... could not decide unilaterally to change the child's habitual residence without the father's consent and prevent the child's return.

Having reached its ruling in such a way, the decision of the cour d'appel (*Court of Appeal*) departed from the legal basis of the aforementioned texts. It did so without pursuing its responsibility to seek to determine that the child's social and family environment and, thus his centre of life, was not in France, due to his young age and the circumstances of his arrival in France as a one-month-old, subsequently staying with his mother without interruption. The ruling was made without having researched the parents' initial intention that the child return with the mother to Greece after her stay in France.

ON THESE GROUNDS, and without it being necessary to rule on the first part of the first plea and the second plea, the Court:

QUASHES AND SETS ASIDE all provisions of the 29 October 2019 ruling between the parties set out by the cour d'appel of Colmar (*Colmar Court of Appeal*);

Returns the case and the parties to the status existing prior to the said ruling and refers them to the cour d'appel of Nancy (*Nancy Court of Appeal*);

President: Ms Batut
Reporting judge: Ms Champs, Judge Referee
Advocate-General: Mr Sudre
Lawyer(s): SCP L. Poulet-Odent - SCP Buk Lament-Robillot