Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

8 June 2017 (*)

[Text rectified by order of 12 June 2017]

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Jurisdiction, recognition and enforcement of decisions in matrimonial matters and in the matters of parental responsibility — International child abduction — Hague Convention of 25 October 1980 — Regulation (EC) No 2201/2003 — Article 11 — Application for return — Concept of 'habitual residence' of an infant — Child born, as agreed by her parents, in a Member State other than that where they were habitually resident — Child continuing to reside for the first months of her life in the Member State of her birth — Mother's decision not to return to the Member State where the couple had been habitually resident)

In Case C-111/17 PPU,

REQUEST for a preliminary ruling under Article 267 TFEU from the Monomeles Protodikeio Athinon (Court of First Instance (single judge) of Athens, Greece), made by decision of 28 February 2017, received at the Court on 7 March 2017, in the proceedings

OL

v

PQ,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça (Rapporteur), President of the Chamber, M. Berger, A. Borg Barthet, E. Levits and F. Biltgen, Judges,

Advocate General : N. Wahl,

Registrar: L. Hewlett,

having regard to the referring court's request of 28 February 2017, received at the Court on 7 March 2017, that the reference for a preliminary ruling should

be dealt with under the urgent procedure, under Article 107 of the Court's Rules of Procedure,

having regard to the decision of 16 March 2017 of the Fifth Chamber to accede to that request,

having regard to the written procedure and further to the hearing on 4 May 2017,

after considering the observations submitted on behalf of:

– OL, by C. Athanasopoulos and A. Alexopoulou, dikigoroi,

– PQ, by S. Sfakianaki, dikigoros,

– the Greek Government, by T. Papadopoulou, G. Papadaki and A. Magrippi, acting as Agents,

– the United Kingdom Government, by E. Devereaux, acting as Agent,

– the European Commission, by M. Konstantinidis, M. Wilderspin, and A. Katsimerou, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).

2 The request has been made in proceedings involving OL and PQ concerning a request made by OL for the return of their child from Greece, the Member State where the child was born and lives with her mother, to Italy, where the couple were habitually resident before the birth of the child.

Legal context

International law

3 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.

4 Article 1 of the 1980 Hague Convention provides:

‘The objects of the present Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.’

5 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 subparagraph (a) 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’.

6 Article 5(a) of that convention provides that, for the purposes of that convention, the term ‘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.

7 Article 8 of that convention provides:

‘Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child’s habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

...’

8 The first paragraph of Article 11 of the 1980 Hague Convention provides that the judicial or administrative authorities of Contracting States are to act expeditiously in proceedings for the return of children.

EU law

9 Recitals 12 and 17 of Regulation No 2201/2003 state:

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

...

(17) 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...’

10 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.'

11 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.'

12 Article 10 of that 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.'

13 Article 11 of Regulation No 2201/2003, 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.

...

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

...'

Greek law

14 It is apparent from the information given in the order for reference that, in Greece, an application for return, under the 1980 Hague Convention, must be lodged with the Monomeles Protodikeio (Court of First Instance (single judge), Greece) with jurisdiction for the place where the child concerned is located following an abduction or where the perpetrator of that abduction is domiciled. Such an application may be made either by the Ministry of Justice — who is, in Greece, the central authority responsible for applications for return — or directly by the person, institution or body claiming rights of custody with respect to the child. The application is dealt with under interim relief

procedures, but the decision made by the court seised definitively resolves the dispute relating to the return of the child.

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

15 It is apparent from the order for reference and the written and oral observations submitted to the Court that OL, an Italian national, and PQ, a Greek national, married on 1 December 2013 in Italy, the Member State where they thereafter lived together, in Sassoferrato.

16 When PQ was eight months pregnant, the couple agreed that she should be delivered of the child in Athens (Greece), where she could have the support of her parents' family, and that, subsequently, PQ would return to the marital home in Italy with the child.

17 The couple therefore travelled to Athens where PQ gave birth, on 3 February 2016, to a daughter, who has since remained there with her mother. After the birth of the child, OL returned to Italy. According to OL, he had agreed that the child should stay in Greece until May 2016, when he expected his wife and child to return to Italy. However, in June 2016 PQ decided, unilaterally, to remain in Greece, with the child.

18 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 Greece. She also claims that they agreed to spend the summer holidays together in Greece.

19 On 20 July 2016, OL initiated divorce proceedings before the Tribunale ordinario di Ancona (court of Ancona, Italy). In that context, he claimed, inter alia, that he should be awarded exclusive custody with respect to the child, that the mother should have rights of access, that the return of the child to Italy should be ordered and that he should be granted a maintenance allowance for the support of the child. By a judgment of 7 November 2016, that court held that it had no jurisdiction to hear the claims relating to parental responsibility with respect to the child, on the ground that the child has been resident, since her birth, in a Member State other than Italy. An appeal having been brought by OL, that judgment was upheld on 20 January 2017 by the Corte d'appello di Ancona (Ancona court of appeal, Italy). Further, by a judgment of 23 January 2017, the Tribunale ordinario di Ancona (court of Ancona) declined to hear the maintenance allowance application, again on the ground that the child was not habitually resident in Italy. Finally, on 23 February 2017, that court ordered the divorce of OL and PQ, but made no ruling on parental responsibility with respect to the child.

20 In parallel with the procedure before the Italian courts, on 20 October 2016 OL brought before the Monomeles Protodikeio Athinon (Court of First Instance (single judge) of Athens, Greece) an application for the return of the child.

21 In that regard, that court is of the opinion that while the child has admittedly not been 'removed', within the meaning of Article 11(1) of Regulation No 2201/2003 or Article 3 of the 1980 Hague Convention, from one Member State to another, the child has nonetheless been wrongfully retained by her mother in Greece, when the father has not agreed to the child becoming habitually resident there, although the parents share parental responsibility with respect to the child.

22 That court considers that situations in which a child is born in a place unconnected to the place where the child's parents are habitually resident — for example, fortuitously or due to force majeure, when the child's parents are travelling abroad — and is thereafter wrongfully removed or retained by one of them, give rise to blatant infringements of parental rights and in fact the separation of the child from the place where, in the normal course of events, the child would have been habitually resident. Such situations should, for those reasons, fall within the scope of the return procedure laid down by the 1980 Hague Convention and Regulation No 2201/2003.

23 The referring court considers that a child's physical presence in a given place should not therefore be a prerequisite for the child being assessed as 'habitually resident' there, for the purposes of Article 11 of Regulation No 2201/2003. As regards quite specifically newborn children and infants, the factors which ordinarily facilitate determination of habitual residence are, in the view of the referring court, of no relevance because young children are absolutely dependant on those who look after them. The Court has itself held that the condition as to the physical presence of a child is of less importance with respect to infants, since the Court held, in the judgment of 22 December 2010, *Mercredi* (C-497/10 PPU, EU:C:2010:829), that if such an infant was resident for a few days in a given place, that, allied to other factors, was sufficient ground to establish that the child was habitually resident there.

24 According to the referring court, in order to determine the habitual residence of a newborn child or an infant, it would be more appropriate to use as the essential factor the joint intention of the responsible parents, which can be inferred from preparations made by them to welcome the child, such as registering the child's birth at the registry of the place where they are habitually resident, the purchase of essential clothing or furnishings for the child, the preparation of the child's room or even the renting of a larger house.

25 In those circumstances, the Monomeles Protodikeio Athinon (Court of First Instance (single judge) of Athens) 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 [Regulation No 2201/2003], 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 newborn child?’

The urgent preliminary ruling procedure

26 The referring court requested that this reference 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.

27 In support of that request, that court stated that the dispute in the main proceedings concerns a child who is barely one year old, who has been separated from her father for more than nine months, when the father has no opportunity to communicate with the child, and that such a situation is likely to cause significant harm to their future relationship.

28 In that regard, it must be observed, first, that, that this reference for a preliminary ruling concerns the interpretation of Regulation No 2201/2003, which was adopted on the basis of, inter alia, Article 61(c) EC, now Article 67 TFEU, which is within Title V of Part Three of the FEU Treaty, on the area of freedom, security and justice. Consequently, it may be dealt with under the urgent preliminary ruling procedure.

29 Second, it is clear from the order for reference that the child concerned has been separated from her father at a developmentally sensitive age and that the continuation of the current situation might seriously harm the child’s future relationship with her father.

30 In those circumstances, on 16 March 2017 the Fifth Chamber of the Court, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decided to accede to the referring court’s request that the present reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure.

Consideration of the question referred

31 First, it must be observed that the circumstances of the main proceedings differ in some respects from those contemplated in the question referred for a preliminary ruling.

32 It is apparent from the order for reference that the child of OL and PQ was born in Greece not 'fortuitously or due to force majeure', but in accordance with the joint wishes of her parents, so that PQ could have the benefit of the assistance of her parents' family before delivery of the child and in the child's first months of life. It is also plain that the child was not, thereafter, 'removed to a third State'. Further, although the referring court refers, in its question, both to 'newborn children' and 'infants', it has to be said that, given that immediately before the alleged retention, namely in June 2016, the child was already five months old, this case concerns an infant.

33 In accordance with settled case-law, it is not the Court's task to deliver advisory opinions on general or hypothetical questions (see judgment of 16 July 1992, *Meilicke*, C-83/91, EU:C:1992:332, EU:C:1992:332, paragraph 25, and order of 11 January 2017, *Boudjellal*, C-508/16, not published, EU:C:2017:6, paragraph 32).

34 Nonetheless, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. With this in mind, the Court may, where necessary, have to reformulate the questions referred to it (see, inter alia, judgment of 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 16 and the case-law cited).

35 The question referred should therefore be understood in the sense that the referring court is seeking, in essence, to ascertain how the concept of 'habitual residence', within the meaning of Article 11(1) of Regulation No 2201/2003, is to be interpreted, in order to determine whether there is a 'wrongful retention', in a situation, such as that in the main proceedings, where a child has been born and has for several months resided continuously with her mother, in accordance with the joint wishes of her parents, in a Member State other than that where the parents had been habitually resident before the child's birth. Against that background, the referring court asks whether, in such a situation, the initial intention of the parents that the mother would return with the child to the latter Member State is a factor of crucial importance for the decision whether that child was 'habitually resident' there, within the meaning of that regulation, irrespective of the fact that the child has never been physically present in that Member State.

36 In that regard, it must be observed that, according to the definition given in Article 2(11) of Regulation No 2201/2003, in wording very similar to that of Article 3 of the 1980 Hague Convention, the concept of 'wrongful removal or retention' of a child relates to the removal or retention of a child that has taken place 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'.

37 Further, Article 11(1) of Regulation No 2201/2003 provides that the provisions of that article are to apply where the holder of rights of custody applies to the competent authorities of 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 to or retained in 'a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention'.

38 It is clear from those provisions that the concept of 'habitual residence' constitutes a key element in assessing whether an application for return is well founded. Such an application can succeed only if a child was, immediately before the alleged removal or retention, habitually resident in the Member State to which return is sought.

39 As regards how the expression 'habitual residence' of a child is to be understood, it must be noted that neither Regulation No 2201/2003 nor the 1980 Hague Convention defines that concept. Nor do the articles of that regulation that refer to it contain any express reference to the law of the Member States for the purpose of defining its meaning and scope.

40 Accordingly, the Court has repeatedly held that the concept is an autonomous one of EU law, which has to be interpreted in the light of the context of the provisions referring to that concept and the objectives of Regulation No 2201/2003, in particular that which is apparent from recital 12 thereof, according to which the grounds of jurisdiction which it establishes are shaped in the light of the best interests of the child, in particular on the criterion of proximity (see judgments of 2 April 2009, *A*, C-523/07, EU:C:2009:225, paragraphs 34 and 35, and of 22 December 2010, *Mercredi*, C-497/10 PPU, EU:C:2010:829, paragraphs 44 to 46).

41 Further, in accordance with the Court's case-law, the meaning of the concept of 'habitual residence' in Regulation No 2201/2003 must be uniform. Accordingly, the interpretation given of that concept in the context of Articles 8 and 10 of that regulation, relating to the international jurisdiction of courts in matters of parental responsibility, can be transposed to Article 11(1) of that

regulation (see, to that effect, judgment of 9 October 2014, *C*, C-376/14 PPU, EU:C:2014:2268, paragraph 54).

42 According to that case-law, the 'habitual residence' of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment. That place must be established by the national courts, taking account of all the circumstances of fact specific to each individual case (judgments of 2 April 2009, *A*, C-523/07, EU:C:2009:225, paragraphs 42 and 44, and of 22 December 2010, *Mercredi*, C-497/10 PPU, EU:C:2010:829, paragraph 47).

43 To that end, in addition to the physical presence of a child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent and that the child's residence corresponds to the place which reflects such integration in a social and family environment (judgment of 2 April 2009, *A*, C-523/07, EU:C:2009:225, paragraph 38).

44 Such factors include the duration, regularity, conditions and reasons for the child's stay on the territory of a Member State and the child's nationality (see, to that effect, judgment of 2 April 2009, *A*, C-523/07, EU:C:2009:225, paragraph 39). In addition, the relevant factors vary according to the age of the child concerned (judgment of 22 December 2010, *Mercredi*, C-497/10 PPU, EU:C:2010:829, paragraph 53).

45 Where the child in question is an infant, the Court has stated that 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, and that an infant necessarily shares the social and family environment of that person or those persons. Consequently, where, as in the main proceedings, an infant is in fact taken care of by her mother, in a Member State other than that where the father habitually resides, the factors to be taken into consideration include, first, the duration, regularity, conditions and reasons for the mother's stay in the territory of the former Member State and, second, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State (see judgment of 22 December 2010, *Mercredi*, C-497/10 PPU, EU:C:2010:829, paragraphs 54 to 56).

46 As regards the intention of the parents to settle permanently with the child in a Member State, the Court has recognised that that can also be taken into account, where that intention is manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State (see, to that effect, judgment of 2 April 2009, *A*, C-523/07, EU:C:2009:225, paragraph 40).

47 [As rectified by order of 12 June 2017] Thus, according to the Court's case-law, the intention of the parents cannot as a general rule by itself be crucial to the determination of the habitual residence of a child, within the meaning of Regulation No 2201/2003, but constitutes an 'indicator' capable of complementing a body of other consistent evidence.

48 Admittedly, the weight to be given to that factor, for the purposes of determining where a child is habitually resident, depends on the circumstances specific to each individual case (see, to that effect, judgment of 22 December 2010, *Mercredi*, C-497/10 PPU, EU:C:2010:829, paragraphs 50 and 51).

49 That said, it must be noted that, in the main proceedings, as stated in paragraph 32 of the present judgment, the child was born in a specific Member State in accordance with the joint wishes of her parents, and that, immediately before the alleged retention, the child had thereafter lived there for five months with her mother, within the family of her mother's parents, and never left the territory of that State.

50 In such circumstances, if the intention initially expressed by the parents, that the mother should return together with the child to a second Member State, which was where the parents were habitually resident before the birth of the child, were to be regarded as a consideration of crucial importance, establishing in fact a general and abstract rule that the habitual residence of an infant is necessarily that of the child's parents, that would transcend the concept of 'habitual residence', within the meaning of Regulation No 2201/2003, and would be contrary to the structure, effectiveness and the objectives of the return procedure. Last, the best interests of the child do not call for an interpretation such as that proposed by the referring court.

51 In that regard, first, it must be stated that the concept of 'habitual residence', within the meaning of Regulation No 2201/2003, reflects essentially a question of fact. Consequently, to take the position that the initial intention of the parents that a child should reside in one given place should take precedence over the fact that the child has continuously resided since birth in another State would be difficult to reconcile with that concept.

52 Second, having regard to the structure of the 1980 Hague Convention and of Article 11(1) of Regulation No 2201/2003, the argument that the parents jointly exercise rights of custody and that the mother could not, therefore, decide alone on the child's place of residence cannot be determinative for the purposes of establishing where the child is 'habitually resident', within the meaning of the regulation.

53 According to the definition of 'wrongful removal or retention of a child', in Article 2(11) of that Regulation and in Article 3 of the 1980 Hague Convention,

noted in paragraph 36 of the present judgment, a decision on the legality or illegality of a removal or a retention is to be based on the rights of custody awarded under the law of the Member State where the child was habitually resident before his or her removal or retention. Accordingly, in the framework of assessing an application for return, the determination of the place where the child was habitually resident precedes the identification of the rights of custody that may have been infringed.

54 Consequently, the consent of the father or the absence of that consent, in the exercise of his rights of custody, to the child settling permanently in a place cannot be a consideration that is decisive for the determination of the 'habitual residence' of that child, within the meaning of Regulation No 2201/2003, which is consistent, it may be added, with the idea that that concept reflects essentially a question of fact.

55 That interpretation is, moreover, confirmed by Article 10 of that regulation, which envisages precisely the situation in which a child acquires a new habitual residence following a wrongful removal or retention.

56 Third, in a case such as that in the main proceedings, to consider that the initial intention of the parents is a factor of crucial importance in determining the habitual residence of a child would be detrimental to the effectiveness of the return procedure and to legal certainty.

57 In that regard, it must be recalled that a return procedure is, inherently, an expedited procedure, since its aim is to ensure, as stated in the preamble of the 1980 Hague Convention and in recital 17 of Regulation No 2201/2003, the prompt return of the child. The EU legislature has moreover given concrete expression to that imperative, in Article 11(3) of Regulation No 2201/2003, by requiring courts seised of applications for return to issue their judgments, save in exceptional circumstances, no later than six weeks after the application is lodged.

58 An application for return must therefore be based on information that is quickly and readily verifiable and, so far as possible, unequivocal. Yet, in a case such as that in the main proceedings, it may be difficult, if not impossible, to establish beyond all reasonable doubt, for example, the date initially envisaged by the parents for the mother's return to the Member State where they were habitually resident, and whether the mother's decision to remain in the Member State where the child has been born is the cause or, on the contrary, the consequence of the divorce proceedings brought by the father before the courts of the former Member State.

59 In brief, to interpret, in such a context, the concept of the 'habitual residence' of a child, within the meaning of Regulation No 2201/2003, in such a way that

the initial intention of the parents as to the place which 'ought to have been' the place of that residence would constitute the fundamental factor, would be likely to compel the national courts either to gather a substantial quantity of evidence and testimony in order to determine with certainty that intention, which would be difficult to reconcile with the requirement that a return procedure should be expeditious, or to issue their judgments while not in possession of all the relevant information, which would result in legal uncertainty.

60 Fourth, in a case such as that in the main proceedings, such an interpretation of the concept of 'habitual residence' as is suggested by the referring court would be contrary to the objectives of the return procedure.

61 It is clear from the explanatory report on the 1980 Hague Convention that one of the objectives of that convention and, by extension, of Article 11 of Regulation No 2201/2003, is the restoration of the *status quo ante*, that is, the situation that existed prior to the wrongful removal or retention of the child. The aim of the return procedure is accordingly to put the child back in the environment with which the child is most familiar and, thereby, to restore the continuity of the child's living conditions and the conditions in which the child can develop.

62 However, in a situation such as that in the main proceedings, in accordance with that objective, the alleged wrongful conduct of one of the parents cannot in itself justify the granting of an application for return and the removal of the child from the Member State where the child has been born and has lawfully and continuously lived to a Member State with which the child is not familiar.

63 Admittedly, it is also an objective of the return procedure envisaged by the 1980 Hague Convention and Regulation No 2201/2003 that one of the parents cannot strengthen his or her position on the issue of custody with respect to the child by evading, by a wrongful act, the jurisdiction of the courts that are as a matter of principle designated, according to the rules laid down in particular by that regulation, to give a ruling on parental responsibility with respect to that child (see, to that effect, judgments of 23 December 2009, *Detiček*, C-403/09 PPU, EU:C:2009:810, paragraph 49, and of 9 October 2014, *C*, C-376/14 PPU, EU:C:2014:2268, paragraph 67).

64 In that regard, it must, however, be stressed that, in the present case, no evidence has been provided to suggest an intention by the mother to circumvent the grounds of jurisdiction laid down by that regulation in matters of parental responsibility.

65 Moreover, it must be made clear that a decision on the return or the non-return of the child does not settle the issue of rights of custody with respect to that child. Accordingly, a failure to succeed in a return procedure in the main

proceedings is without prejudice to the father's option of asserting his rights with respect to the child by means of proceedings on the substance of parental responsibility, brought before the courts with the relevant jurisdiction under the provisions of Regulation No 2201/2003, in the course of which a thorough examination of all the circumstances, including the conduct of the parents, may be carried out (see, by analogy, judgment of 5 October 2010, *McB.*, C-400/10 PPU, EU:C:2010:582, paragraph 58).

66 Last, and given that, as stated in paragraph 40 of the present judgment, the concept of 'habitual residence', within the meaning of Regulation No 2201/2003, must be interpreted according to the best interests of the child, it must be stated that that fundamental consideration does not, in this case, call for an interpretation such as that proposed by the referring court. In particular, the right of the child to maintain a personal relationship and direct contact with both parents, enshrined in Article 24(3) of the Charter of Fundamental Rights of the European Union, does not require that the child should travel to the Member State where the parents were resident before the child's birth. It will be possible to safeguard that fundamental right within the framework of proceedings on the substance of rights of custody, as envisaged in the preceding paragraph, in the course of which the question of custody may be reassessed and, if necessary, possible rights of access established.

67 Moreover, it is more consistent with the criterion of proximity, prioritised by the EU legislature within Regulation No 2201/2003 precisely in order to ensure that the best interests of the child are taken into account, that any decisions concerning the child are taken by courts of the Member State in which the child has lived continuously since her birth (see, to that effect, judgments of 23 December 2009, *Detiček*, C-403/09 PPU, EU:C:2009:810, paragraph 36, and of 15 July 2010, *Purrucker*, C-256/09, EU:C:2010:437, paragraph 91).

68 In any event, the Court has no information before it to suggest that, in the specific circumstances of the main proceedings, the best interests of the child are affected.

69 For those reasons, in a case such as that in the main proceedings, Article 11(1) of Regulation No 2201/2003 cannot be interpreted as meaning that, immediately before the retention claimed by the father, the child was 'habitually resident', within the meaning of that provision, in the Member State where her parents were habitually resident before her birth. Consequently, the refusal of the mother to return together with the child to that Member State cannot constitute a 'wrongful removal or retention' of the child, within the meaning of that provision.

70 In the light of all the foregoing, the answer to the question referred is that Article 11(1) of Regulation No 2201/2003 must be interpreted as meaning that,

in a situation such as that in the main proceedings, where a child has been born and has lived continuously with her mother for several months, in accordance with the joint wishes of her parents, in a Member State other than that where those parents were habitually resident before her birth, the initial intention of the parents with respect to the return of the mother, together with the child, to the latter Member State cannot allow the conclusion that that child was 'habitually resident' there, within the meaning of that regulation.

Consequently, in such a situation, the refusal of the mother to return to the latter Member State together with the child cannot be considered to be a 'wrongful removal or retention' of the child, within the meaning of that Article 11(1).

Costs

71 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 (Fifth Chamber) hereby rules:

Article 11(1) of 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, in a situation, such as that in the main proceedings, where a child has been born and has lived continuously with her mother for several months, in accordance with the joint wishes of her parents, in a Member State other than that where those parents were habitually resident before her birth, the initial intention of the parents with respect to the return of the mother, together with the child, to the latter Member State cannot allow the conclusion that that child was 'habitually resident' there, within the meaning of that regulation.

Consequently, in such a situation, the refusal of the mother to return to the latter Member State together with the child cannot be considered to be a 'wrongful removal or retention' of the child, within the meaning of Article 11(1).

[Signatures]

* Language of the case: Greek.