The concept of ‘right of access’ under Brussels II bis encompasses grandparents

In the judgment C-335/17 of 31 May 2018, the CJEU confirms that the autonomous concept of ‘right of access’ under Brussels II bis Regulation encompasses the rights of access of grandparents to their grandchildren.

Facts

Ms Valcheva is the grandmother of a child born from the marriage between Ms Valcheva’s daughter and the father of the child. That marriage was dissolved. Ms Valcheva lives in Bulgaria. The child lives in Greece with his father, holding full custody of the child. Ms Valcheva found that she could not maintain quality contact with her grandson. She seised a court in Bulgaria with a request to establish arrangements so that she could see her grandson more frequently.

The Bulgarian court of first instance held that Bulgarian courts had no jurisdiction. According to the court, the scope of Brussels II bis covers a wide family circle including the child’s grandparents and, therefore, applied to Ms Valcheva’s claim. Based on Article 8 Brussels II bis it is, in principle, the court of the Member State where the child’s habitual residence at the time the court is seised that has jurisdiction in matters of parental responsibility (in this case, Greek courts). The decision was upheld on appeal. Ms Valcheva has subsequently seised the Supreme Court of Cassation, Bulgaria, which referred the following question to the CJEU.

Question referred for preliminary ruling

Is the concept of “rights of access” used in Article 1(2)(a) and Article 2.10 of Regulation No 2201/2003 to be interpreted as encompassing not only access between the parents and the child but also the child’s access to relatives other than the parents, that is to say the grandparents?

Consideration by the CJEU

The CJEU answers the question in the positive. The Court notes that the concept

‘right of access’ must ‘be interpreted autonomously taking account of the wording, scheme and objectives of Regulation No 2201/2003, in the light, in particular, of the *travaux préparatoires* for that regulation, as well as of other acts of EU and international law’ (at [19]). The CJEU elaborates on these references in three main considerations.

First, the wording of the Regulation imposes no limitation in regard to the person who may benefit from the right of access (at [21]).

Second, the Regulation aims to create ‘a judicial area based on the principle of mutual recognition of judicial decisions through the establishment of rules governing jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility’ (at [28]). Not only does the objective cover all decisions on parental responsibility, according to recital 5 (at [29]), but the ‘decisions on visiting rights are also identified as a priority’, according to recital 2. The CJEU bases the interpretation of the recitals on the Commission working document on mutual recognition of decisions on parental responsibility COM(2001) 166 final of 27 March 2001. There, the EU legislature made an explicit choice not to impose restrictions on the persons who may exercise parental responsibility (at [31]).

Third, the CJEU notes the risk of irreconcilable decisions (or conflicting measures relating to parental responsibility) from various Member States, pointed out by the Advocate General. If the right of access of grandparents falls outside the scope of Brussel II bis, the questions relating to those rights could be determined not only by the court designated in accordance with Brussel II bis, but also by other courts which might consider themselves competent on the basis of their own national rules of private international law (at [35]). ‘As observed by the Advocate General in point 56 of his Opinion, the granting of rights of access to a person other than the parents could interfere with the rights and duties of those parents, namely, in the present case, the father’s rights of custody and the mother’s rights of access. Consequently, it is important, in order to avoid the adoption of conflicting measures and in the best interests of the child, that the same court — that is to say, as a rule, the court of the child’s habitual residence — should rule on rights of access’ (at [57]).