

CJEU Rules on the interplay between Brussels IIA and Dublin III

This post was contributed by Dr. Vito Bumbaca, who is Assistant Lecturer at the University of Geneva

In a ruling of 2 August 2021 (*A v. B*, C-262/21 PPU), the Court of Justice of the European Union (CJEU) clarified that a child who is allegedly wrongfully removed, meaning without consent of the other parent, should not return to his/her habitual residence if such a removal took place as a consequence of the ordered transfer determining international responsibility based on the Dublin III Regulation. The judgment is not available in English and is the first ever emanating from this Court concerning the Brussels IIA-Dublin III interplay.

The 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 (Brussels IIA Regulation) complements the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, and is applicable to 26 EU Member States, including Finland and Sweden. The Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III), is pertinent for asylum seekers' applications commenced at least in one of the 31 Dublin Member States (EU/EFTA), comprising Finland and Sweden, bound by this Regulation.

Questions for a CJEU urgent preliminary ruling:

The CJEU was referred five questions, but only addressed the first two.

'(1) Must Article 2(11) of [Regulation No 2201/2003], relating to the wrongful removal of a child, be interpreted as meaning that a situation in which one of the parents, without the other parent's consent, removes the child from his or her place of residence to another Member State, which is the Member State

responsible under a transfer decision taken by an authority in application of Regulation [No 604/2013], must be classified as wrongful removal?

(2) If the answer to the first question is in the negative, must Article 2(11) [of Regulation No 2201/2003], relating to wrongful retention, be interpreted as meaning that a situation in which a court of the child's State of residence has annulled the decision taken by an authority to transfer examination of the file, and to take no further action since the mother and child have left the State of residence, but in which the child whose return is ordered, no longer has a currently valid residence document in his or her State of residence, or the right to enter or to remain in the State in question, must be classified as wrongful retention?'

Contents of the CJEU judgment:

In 2019, a married couple, third-State nationals (Iran), both with regard to Brussels IIA and Dublin III respective Member States, moved from Finland to settle in Sweden. Since 2016, the couple had lived in Finland for around three years. In 2019, a child was born in Sweden. The couple was exercising joint custody over the child in conformity with Swedish law. The mother was holding a family residency permit, in both Finland and Sweden, through the father's employment rights. The approved duration of the mother's residency right in Finland was around one year longer than in Sweden.

Two months after the child's birth, the latter and the mother were placed under Swedish residential care (hostel). Essentially, the Swedish administrative decision to uphold this *care protective measure* was the result of the father's violence against the mother, so to protect the child from the risks against his development and health, as well as to prevent his wrongful removal to Iran possibly envisaged by his father. Limited contact rights were granted to the father. A residency permit was requested, individually, by the father and the mother based on the *family lien* - request respectively filed on 21 November and 4 December 2019.

In August 2020, the mother submitted an asylum request, for the child and herself, before the Swedish authorities. The same month, the Finnish authorities declared themselves internationally responsible over the mother's and child's asylum request by virtue of article 12(3) of Dublin III - based on the longer duration of the residency permit previously delivered according to Finnish law. In

October 2020, the Swedish authorities dismissed the father's and rejected the mother's respective residency and asylum requests, and ordered the transfer of the child and his mother to Finland. Taking into account the father's presence as a threat against the child, the limited contacts established between them, and the father's residency right in Finland, the Swedish authorities concluded that the child's separation from his father was not against his best interests and that the transfer was not an obstacle to the exercise of the father's visitation right in Finland. In November 2020, the mother and the child moved to Finland pursuant to article 29(1) of Dublin III. In December 2020, the father filed an appeal against the Swedish court's decisions, which was upheld by the Swedish Immigration Tribunal (*'Migrationsdomstolen i Stockholm'*), although it resulted later to be dismissed by the Swedish Immigration Authorities, and then rejected by the Immigration Tribunal, due to the child's relocation to Finland (CJEU ruling, § 23-24).

In January 2021, the father filed a new request before the Swedish authorities for family residency permit on behalf of the child, which was *still ongoing at the time of this judgment* (CJEU ruling, § 25). During the same month, the mother deposited an asylum application before the Finnish authorities, which was *still ongoing at the time of this judgment* – *the mother's and child's residency permits were withdrawn by the Finnish authorities* (CJEU ruling, § 26). In April 2021, the Swedish Court (*'Västmanlands tingsrätt'*), notwithstanding the mother's objection to their jurisdiction, granted divorce, sole custody to the mother and refused visitation right to the father – upheld in appeal (*'Svea hovrätt'*). Prior to it, the father filed an application for child return before the Helsinki Court of Appeal (*'Helsingin hovioikeus'*), arguing that the mother had wrongfully removed the child to Finland, on the grounds of the 1980 Hague Convention. The return application was rejected. On the father's appeal, the Finnish authorities stayed proceedings and requested an urgent preliminary ruling from the CJEU, in line with article 107 of the Luxembourg Court's rules of procedure.

CJEU reasoning:

The Court reiterated that a removal or retention shall be wrongful when a child holds his habitual residence in the requesting State and that a custody right is attributed to, and effectively exercised by, the left-behind parent consistently with the law of that State (§ 45). The primary objectives of the Brussels IIA Regulation, particularly within its common judicial space aimed to ensure mutual recognition

of judgments, and the 1980 Hague Convention are strictly related for abduction prevention and immediate obtainment of effective child return orders (§ 46).

The Court stated that, pursuant to articles 2 § 11 and 11 of the Brussels IIA Regulation, the child removal to a Member State other than the child's habitual residence, essentially performed by virtue of the mother's right of custody and effective care while executing a transfer decision based on article 29 § 1 of the Dublin III Regulation, should not be contemplated as wrongful (§ 48). In addition, the absence of 'take charge' request following the annulment of a transfer decision, namely for the purposes of article 29 § 3 of Dublin III, which was not implemented by the Swedish authorities, would lead the retention not to being regarded as unlawful (§ 50). Consequently, as maintained by the Court, the child's relocation was just a consequence of his *administrative situation* in Sweden (§ 51). A conclusion opposing the Court reasoning would be to the detriment of the Dublin III Regulation objectives.

Some insights from national precedents:

In the case ATF 5A_121/2018, involving a similar scenario (cf. FamPra.ch 1/2019), the Swiss Federal Court maintained that a child born in Greece, who had lived for more than a year with his mother in Switzerland, had to be returned to Greece (place of the left-behind parent's residence) based on the established child's habitual residence prior to the wrongful removal to Switzerland, notwithstanding his pending asylum application in the latter State. Indeed, the Greek authorities had been internationally responsible over the child's asylum request on the basis of his father's residence document. However also in that case it was alleged that the father had been violent against the mother and that a judgment ordering the child's return to Greece, *alone or without his mother* (§ 5.3), would not have caused harm to the child under the 1980 Hague Convention, art. 13.

In the case G v. G [2021] UKSC 9, involving a slightly different scenario in that no multiple asylum requests were submitted, the UKSC judged that a child, of eight years old born in South Africa, should not be returned – *stay of proceedings* – until an asylum decision, based on an asylum application filed in England, had been taken by the UK authorities. The UKSC considered that, although an asylum claim might be tactically submitted to frustrate child return to his/ her country of habitual residence prior to wrongful removal or retention, it is vital that an asylum claim over an applicant child, accompanied or not by his/ her primary

carer, is brought forward while awaiting a final decision – in conformity with the ‘non-refoulement’ principle pursuant to article 33 of the 1951 Geneva Convention relating to the Status of Refugees.

Comment:

The CJEU ruling is momentous dictum in that it holds the *not any longer uncommon intersection* of private international law and vulnerable migration, especially with regard to children in need of international protection in accordance with both Brussels IIA and Dublin III Regulations (cf. Brussels IIA, § 9, and Dublin III, article 2 lit. b). The Luxembourg Court clarifies that a child who is allegedly wrongfully removed, meaning without consent of the other parent, should not return to his/ her habitual residence if such a removal took place as a consequence of the ordered transfer determining international responsibility based on the Dublin III Regulation. It is emphasised that, contrary to the Swiss judgment, the child in the instant case did not have any personal attachments with Finland at the time of the relocation – *neither by birth nor by entourage* – country of destination for the purposes of the Dublin III transfer. Moreover, the ‘transfer of responsibility’ for the purposes of Dublin III should be contemplated as an *administrative decision only*, regardless of the child’s habitual residence.

It is observed as a preamble that, according to a well-known CJEU practice, a child should not be regarded as to establish a habitual residence in a Member State in which he or she has never been physically present (CJEU, *OL v. PQ*, 8 June 2017, C-111/17 PPU; CJEU, *UD v. XB*, 17 October 2018, C-393/18 PPU). Hence, it appears procedurally just that the Swedish courts retained international jurisdiction over custody, perhaps with the aim of Brussels IIA, article 8 – the child’s habitual residence at the time of the seisin, which occurred *prior to the transfer to Finland*. On that procedural departure, the Swedish courts custody judgment is *substantially fair* in that the father’s abuse against the mother is indeed an element that should be retained for parental responsibility, including abduction, merits (CJEU ruling, § 48; UKSC judgment, § 62).

However, it is argued here that, particularly given that at the relevant time Sweden was the child’s place of birth where he lived for around 14 months with his primary carer, the Swedish and the Finnish authorities might have ‘*concentrated*’ jurisdiction and responsibility in one Member State, namely Sweden, ultimately to *avoid further length and costs related to the asylum*

procedures in line with the same Dublin III objectives evoked by the CJEU – namely “*guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection*” (§ 5, Dublin III). Conversely, provided that the *child’s relocation was not wrongful* as indicated by the Finnish authorities, and confirmed by the CJEU ruling, the Swedish authorities may have opted for the ‘transfer of jurisdiction’ towards the Finnish authorities on the basis of Brussels IIA, article 15(1) lit. b, indicating the *child’s new habitual residence* (cf. Advocate General’s opinion, § 41) following the lawful relocation (cf. article 15.3., lit. a).

Importantly, concentration of jurisdiction-responsibility over a child seeking international protection in one Member State, in light of the Brussels IIA-Dublin III interplay, would essentially determine a coordinated interpretation of the child’s best interests (cf. Brussels II, § 12, and Dublin III, § 13), avoiding two parallel administrative-judicial proceedings in two Member States whose authorities may not always come to similar views, as opposed to the present case, over such interests (AG’s opinion, § 48). This is particularly true, if the child (non-)return to his/ her habitual residence might likely be influenced, as stated in the CJEU ruling, by his/ her administrative situation, which would potentially have an impact on the international custody jurisdiction determination. An example of controversial outcome, dealing with child abduction-asylum proceedings, is the profoundly divergent opinion arising from the UK and Swiss respective rulings, to the extent of child return in a situation where the mother, primary carer, *is or could* be subject to domestic violence in the requesting State.

Similarly, the UKSC guidance, in ‘*G v. G*’, affirmed: “Due to the time taken by the in-country appeal process this bar is likely to have a devastating impact on 1980 Hague Convention proceedings. I would suggest that this impact should urgently be addressed by consideration being given as to a *legislative solution* [...] However, whilst the court does not determine the request for international protection *it does determine the 1980 Hague Convention proceedings so that where issues overlap the court can come to factual conclusions on the overlapping issues* so long as the prohibition on determining the claim for international protection is not infringed [...] First, as soon as it is appreciated that there are related 1980 Hague Convention proceedings and asylum proceedings *it will generally be desirable that the Secretary of State be requested to intervene in*

the 1980 Hague Convention proceedings” (UKSC judgment, § 152-157). Clearly, the *legislative solution* on a more efficient coordination of child abduction-asylum proceedings, invoked by the UK courts, may also be raised with the EU [and Swiss] legislator, considering their effects on related custody orders.

- *Cross posted at the* EAPIL blog.