# Case C-572/21: The Court of Justice of the EU on the interrelationship between the Brussels II bis Regulation and the 1996 Child Protection Convention – The perpetuatio fori principle

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On 14 July 2022 the Court of Justice of the European Union (CJEU) ruled on the interrelationship between 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 II bis Regulation) and the HCCH 1996 Child Protection Convention. This case concerns proceedings in Sweden and the Russian Federation and deals in particular with the applicability of the *perpetuatio fori* principle contemplated in Article 8(1) of the Brussels II bis Regulation. The judgment is available here.

**Facts**

Mother (CC) gave birth to child (M) in Sweden. CC was granted sole custody of the child from birth.

Until October 2019 child resided in Sweden.

From October 2019 child began to attend a boarding school on the territory of the Russian Federation.

Father (VO) brought an application before the District Court of Sweden and several proceedings ensued in Sweden, holding *inter alia* that Swedish courts have jurisdiction under Article 8(1) of the Brussels II bis Regulation. CC brought an application before the Supreme Court of Sweden asking the court to grant leave to appeal and to refer a question to the CJEU for a preliminary ruling.

**Question referred for preliminary ruling**

'Does the court of a Member State retain jurisdiction under Article 8(1) of [Regulation No 2201/2003] if the child concerned by the case changes his or her habitual residence during the proceedings from a Member State to a third country which is a party to the 1996 Hague Convention (see Article 61 of the regulation)?'

**Main ruling**

Article 8(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, read in conjunction with Article 61(a) of that regulation, must be interpreted as meaning that ***a court of a Member State that is hearing a dispute relating to parental responsibility does not retain jurisdiction to rule on that dispute under Article 8(1) of that regulation where the habitual residence of the child in question has been lawfully transferred, during the proceedings, to the territory of a third State that is a party to the Convention*** on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, signed at The Hague on 19 October 1996 (our emphasis).

**Analysis**

This is a very welcome judgment as it allows for the proper application of the 1996 Child Protection Convention to a case involving an EU Member State (Sweden) and a Contracting Party to the 1996 Child Protection Convention (the Russian Federation).

At the outset, it should be emphasised that this case deals with the *lawful* transfer of habitual residence and not with the *unlawful* transfer (removal or retention) such as in the case of international child abduction. In the latter case both the Brussels II bis Regulation and the 1996 Child Protection Convention provide for the retention of the jurisdiction in the EU Member State / Contracting State in which the child was habitually resident immediately before the removal or retention.

It is also important to clarify that contrary to the Brussels II bis Regulation, the 1996 Child Protection Convention does not adopt the principle of *perpetuatio fori* when dealing with general basis of jurisdiction (Article 5 of the Convention; see also para. 40 of the judgment). The 1996 Child Protection Convention reflects the view that the concept of habitual residence is predominantly factual and as such, it can change even during the proceedings.

As to the principle of *perpetuatio fori*, the CJEU indicates:

> *"By referring to the time* ***when the court of the Member State is seised****, Article 8(1) of Regulation No 2201/2003 is an expression of the principle of perpetuatio fori, according to which that court does not lose jurisdiction even if there is a change in the place of habitual residence of the child concerned during the proceedings" (para. 28, our emphasis).*

With regard to the interrelationship between these two instruments, the CJEU says:

> *"In that regard, it should be noted that Article 61(a) of Regulation No 2201/2003 provides that, as concerns the relation with the 1996 Hague Convention, Regulation No 2201/2003 is to apply 'where the child concerned has his or her habitual residence on the territory of a Member State'" (para. 32).*
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> *"It follows from the wording of that provision that it governs relations between the Member States, which have all ratified or acceded to the 1996 Hague Convention, and third States which are also parties to that convention, in the sense that the general rule of jurisdiction laid down in Article 8(1) of Regulation No 2201/2003* ***ceases to apply where the habitual residence of a child has been transferred, during the proceedings, from the territory of a Member State to that of a third State which is a party to that convention****" (para. 33, our emphasis).*

In my view, this judgment interprets correctly Article 52 of the 1996 Child Protection Convention, which was heatedly debated during the negotiations, as well as the relevant provisions of the Brussels II bis Regulation. In particular, the formulation in both Article 61(a) of the Brussels II bis Regulation "where the child

concerned has his or her habitual residence on the territory of a Member State" and Article 52(2) of the 1996 Child Protection Convention "[This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain] in respect of children habitually resident in any of the States Parties to such agreements [provisions on matters governed by this Convention]" has been properly considered by the CJEU as the habitual residence of the child is the Russian Federation.

To rule otherwise would have reduced significantly the applicability of the 1996 Child Protection Convention and would have run counter Articles 5(2) and 52(3) of the referred Convention (see para. 42 of the judgment).

As this judgment only deals with Contracting Parties to the 1996 Child Protection Convention, it only makes us wonder what would happen in the case of bilateral treaties or in the absence of any applicable treaty (but see para. 29 of the judgment).

For background information regarding the negotiations of Article 52 of the 1996 Child Protection Convention see:

– Explanatory Report of Paul Lagarde (pp. 601-603)

– Article by Hans van Loon, "*Allegro sostenuto con Brio*, or: Alegría Borrás' Twenty-five Years of Dedicated Work at the Hague Conference." In J. Forner Delaygua, C. González Beilfuss & R. Viñas Farré (Eds.), Entre Bruselas y La Haya: Estudios sobre la unificación internacional y regional del derecho internacional privado: *Liber amicorum* Alegría Borrás (pp. 575-586). Madrid: Marcial Pons, pp. 582-583.