Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 23 February 2021 [1]

Case C-603/20 PPU

SS
v
MCP

(Request for a preliminary ruling from the High Court of Justice (England & Wales), Family Division (United Kingdom))

(Reference for a preliminary ruling – Urgent preliminary ruling procedure – Area of freedom, security and justice – Judicial cooperation in civil matters – Regulation (EC) No 2201/2003 – Jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility – Article 10 – Jurisdiction in cases of child abduction – Child wrongfully removed to a non-Member State in which it has acquired its habitual residence – Best interests of the child – Retention of jurisdiction, for an unlimited period of time, by the courts of the Member State in which the child was habitually resident immediately before its wrongful removal)

I. Introduction

1. A child of British nationality, who was habitually resident in the United Kingdom, is wrongfully removed by her mother to a non-Member State (here: India), where she acquires her habitual residence. The father of that child brings an action before a UK court seeking the child's return to the United Kingdom and rights of access.

2. Does that UK court have jurisdiction to rule on such an action pursuant to Article 10 of Regulation (EC) No 2201/2003? [2] That is, in essence, the question put by the High Court of Justice (England & Wales), Family Division (United Kingdom).

3. Consideration must thus be given, in the present case, to the territorial scope and the conditions of application of Article 10 of that regulation.

[1] Original language: French.

[2] Council Regulation 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). Regulation No 2201/2003 is also known as the 'Brussels IIa Regulation'.

4. At the end of my analysis, I will conclude that, when a child is abducted and removed to a non-Member State, the courts of the Member State in which that child was habitually resident immediately before the wrongful removal or retention retain their jurisdiction, for an unlimited period of time, including where the child acquires its habitual residence in that non-Member State.

II. Legal context

A. International law

5. The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, concluded in The Hague on 19 October 1996 ('the 1996 Hague Convention'), lays down rules intended to strengthen the protection of children in international situations and to avoid conflicts between the legal systems of the signatory States in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children.

6. Under Article 7 of that convention:

'1. In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another 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 State for a period of at least one year after the person, institution or any other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

2. 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) above 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.

3. So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.'

B. EU law

1. The provisions concerning the United Kingdom's withdrawal from the European Union

7. By its Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community[3] ('the Withdrawal Agreement'), the Council approved that agreement, which was attached to that decision,[4] on behalf of the European Union and of the European Atomic Energy Community.

8. Article 86 of the Withdrawal Agreement, which is entitled 'Pending cases before the Court of Justice of the European Union', states in paragraphs 2 and 3:

'2. The Court of Justice of the European Union shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period.

3. For the purposes of this Chapter, proceedings shall be considered as having been brought before the Court of Justice of the European Union, and requests for preliminary rulings shall be considered as having been made, at the moment at which the document initiating the proceedings has been registered by the registry of the Court of Justice or the General Court, as the case may be.'

9. In accordance with Articles 126 to 132 of the Withdrawal Agreement, during the transition period, which starts on the date of entry into force of that agreement and ends on 31 December 2020, unless it is extended, EU law continues to apply to and in the United Kingdom subject to the conditions laid down in that agreement.

2. Regulation No 2201/2003

10. Under recitals 1, 2, 12, 21 and 33 of Regulation No 2201/2003:

'(1) The European Community has set the objective of creating an area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the Community is to adopt, among others, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) The Tampere European Council endorsed the principle of mutual recognition of judicial decisions as the cornerstone for the creation of a genuine judicial area, and identified visiting rights as a priority.

…

[3] OJ 2020 L 29, p. 1.

[4] OJ 2020 L 29, p. 7.

(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.

…

(21) The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.

…

(33) This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union.'

11. Article 1 of that regulation, which is entitled 'Scope' and appears in Chapter I of the Regulation entitled 'Scope and definitions', states in paragraphs 1 and 2:

'1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

…

(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

2. The matters referred to in paragraph 1(b) may, in particular, deal with:

(a) rights of custody and rights of access;

…'

12. Article 2 of Regulation No 2201/2003, which is entitled 'Definitions' and also appears in Chapter I, provides:

'For the purposes of this Regulation:

…

3. the term "Member State" shall mean all Member States with the exception of Denmark;

…

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;

…

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.'

13. Chapter II of Regulation No 2201/2003, which is entitled 'Jurisdiction', contains, in Section 2, comprising Articles 8 to 15, the rules of jurisdiction in matters of parental responsibility.

14. Article 8 of that regulation, which is entitled '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.'

15. Article 10 of that regulation, which is entitled 'Jurisdiction in cases of child abduction', is worded as follows:

'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.'

16. Under Article 12 of Regulation No 2201/2003, which is entitled 'Prorogation of jurisdiction':

'1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

(a) at least one of the spouses has parental responsibility in relation to the child;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

…

3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

(a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

4. Where the child has his or her habitual residence in the territory of a third State which is not a contracting party to the [1996 Hague Convention], jurisdiction under this Article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third State in question.'

17. Article 14 of Regulation No 2201/2003, which is entitled 'Residual jurisdiction', states:

'Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State.'

C. UK law

18. Sections 1 to 3 of the Family Law Act 1986 concern the jurisdiction of the courts in England and Wales to rule in matters of parental responsibility.

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

19. P ('the child') is a British national, aged three years and four months at the date of the order for reference. The child's parents, who are not married but who exercise joint parental responsibility over her, are of Indian nationality and have leave to remain in the United Kingdom.

20. MCP, the child's mother ('the mother'), contends that she and the child were victims of abuse committed by SS, the child's father ('the father'), and that she fled to India with the child in November 2017 for a period of four months because she had no support in the United Kingdom. The mother states that, following further domestic abuse, she fled with the child to India again in October 2018.

21. She contends that she brought the child back to the United Kingdom temporarily in April 2019, for less than two weeks, because, under Indian immigration rules, the child was not permitted to stay in India for more than 180 days. The child has remained continuously in India since April 2019. The mother states that she returned to live in the United Kingdom and left the child with her maternal grandmother.

22. The father married another woman and had another child. He has not seen the child since 2018 and would like the child to live with him or, alternatively, to have contact with her.

23. On 26 November 2019, the mother applied to the Family Court at Chelmsford (United Kingdom) for a specific issue order for 'permission to change jurisdiction of the child'. The order made further to that application states that that court considered that it had jurisdiction, given the child's habitual residence.

24. On 26 August 2020, the father brought an action before the High Court of Justice (England & Wales), Family Division, the referring court, seeking, inter alia, to secure the child's return to the United Kingdom and rights of access.

25. In the present case, the referring court is called upon to examine the applications made by the mother and the father as set out in points 23 and 24 of this Opinion.

26. That court points out that, even making full allowance for the mother's case, it is strongly arguable that her conduct amounted to a wrongful removal of the child to, or her wrongful retention in, India.

27. The question of its jurisdiction to rule in the case in the main proceedings having been raised, the referring court has doubts in that regard, and observes that Regulation No 2201/2003, which has direct effect and is superior to UK law, is the act to be applied in the first instance in relation to sections 1 to 3 of the Family Law Act 1986. Furthermore, it is the view of that court that, although the child was made a ward of court at a hearing held on 7 September 2020, that fact has no bearing on its jurisdiction to hear and determine the case in the main proceedings.

28. The referring court states that, when the father made his application before it on 26 August 2020, the child had been in India for 22 months living with her maternal grandmother, and that, during that period, she spent two weeks in the United Kingdom in April 2019. Accordingly, on 26 August 2020, the child was fully integrated in an Indian social and family environment. The referring court infers from that fact that, on that date, the child was habitually resident in India and that, accordingly, it does not have jurisdiction to rule in the case in the main proceedings under Article 8 of Regulation No 2201/2003.

29. Moreover, according to that court, at no point prior to 26 August 2020 did the mother agree unequivocally that an English court has jurisdiction to hear and determine questions of parental responsibility in relation to the child. The referring court therefore takes the view that it also does not have jurisdiction on the basis of Article 12 of Regulation No 2201/2003.

30. With regard to Article 10 of that regulation, a literal interpretation suggests that that article concerns relationships between courts of two Member States. An interpretation to that effect appears in paragraph 4.2.1.1. of the European Commission's Practice Guide for the application of the Brussels IIa Regulation [5] ('the Practice Guide'). However, an interpretation acknowledging the global reach of Article 10 of the Regulation was adopted by the Court of Appeal (England & Wales), Civil Division (United Kingdom), by a judgment of 29 July 2014. [6]

31. Lastly, in paragraph 33 of the judgment in *UD*, [7] in line with the Opinion of Advocate General Saugmandsgaard Øe, [8] the Court held that the provisions of Articles 9, 10 and 15 of Regulation No 2201/2003 refer specifically to potential conflicts of jurisdiction between the courts of several Member States. However, that consideration was not strictly for the purpose of resolving the dispute in that case, such that it can be characterised as *obiter dictum*.

32. The referring court is therefore of the view that its jurisdiction to rule in the case in the main proceedings turns on the territorial reach of Article 10 of Regulation No 2201/2003, the interpretation of which is unclear.

33. It is in those circumstances that the High Court of Justice (England & Wales), Family Division, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 10 of [Regulation No 2201/2003] retain jurisdiction, without limit of time, in a Member State if a child habitually resident in that Member State was wrongfully removed to (or retained in) a non-Member State where she, following such removal (or retention), in due course became habitually resident?'

IV. The urgent procedure

34. By document lodged on 16 November 2020, the referring court requested that the present reference for a preliminary ruling be dealt with under the urgent procedure laid down in Article 107 of the Rules of Procedure of the Court. In support of that request, that court argued

5 This guide is available online at: https://op.europa.eu/en/publication-detail/-/publication/f7d39509-3f10-4ae2-b993-53ac6b9f93ed.

6 Available for consultation online at: http://www.bailii.org/ew/cases/EWCA/Civ/2014/1101.html.

7 Judgment of 17 October 2018 (C-393/18 PPU, 'the judgment in *UD*', EU:C:2018:835).

8 Opinion in *UD* (C-393/18 PPU, EU:C:2018:749, footnote 4).

that the lapse of time could cause serious, perhaps irreparable, harm to the relationship between the child and one of her parents (here: the father) or to the child's development and integration into her family and social environment.

35. On 2 December 2020, the Fifth Chamber of the Court decided, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, to grant the referring court's request.

36. Written observations were lodged by the father, the mother and the Commission. They all also presented oral argument at the hearing held on 4 February 2021.

V. Analysis

37. As a preliminary point, I would observe that it follows from Article 86 of the Withdrawal Agreement, which entered into force on 1 February 2020, that the Court continues to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period. The present request for a preliminary ruling was lodged at the Registry of the Court on 16 November 2020. The Court therefore continues to have jurisdiction to give a ruling on that request.

38. By its question, the referring court asks, in essence, whether Article 10 of Regulation No 2201/2003 is to be interpreted as meaning that the courts of the Member State in which a child was habitually resident immediately before his or her wrongful removal or retention retain their jurisdiction, for an unlimited period of time, where that child is abducted to a non-Member State, including where the child acquires his or her habitual residence in that non-Member State.

A. Article 10 of Regulation No 2201/2003

1. Preliminary considerations

(a) The territorial scope of Regulation No 2201/2003

39. Regulation No 2201/2003 does not expressly define its territorial scope. The question has been raised before the Court as to whether that regulation applied, generally speaking, to the legal relationships involving only Member States or whether it could also cover non-Member States.

40. Thus, in the case which gave rise to the judgment in *UD*, which concerned a potential conflict of jurisdiction between a Member State (the United Kingdom) and a non-Member State (the People's Republic of Bangladesh), the Court examined its jurisdiction to reply to the questions brought before it, which concerned inter alia Article 8(1) of Regulation No 2201/2003.

41. In that regard, the Court first of all stated that Article 1 of that regulation, which defines its scope, specifies the civil matters to which that regulation applies and those to which it does not apply, without making reference to any limitation of the territorial scope of the Regulation.[9] The Court added, in relation to Article 8(1) of Regulation No 2201/2003, that that provision states that the courts of a Member State are to have jurisdiction in matters of parental responsibility with

[9] Judgment in *UD*, paragraph 31.

reference to a child who is habitually resident in that Member State at the time when the matter is brought before the court concerned, and that nothing in that provision indicates that the application of the general rule of jurisdiction in matters of parental responsibility, which it establishes, is conditional on there being a legal relationship involving a number of Member States. [10]

42. The Court went on to hold that Article 8(1) of Regulation No 2201/2003 differs from the rules governing recognition and enforcement laid down in that regulation, which is restricted to recognition of decisions delivered by a court of a Member State. [11] Lastly, the Court observed that the uniform rules of jurisdiction contained in the Regulation are not intended to apply only to situations in which there is a real and sufficient link with the working of the internal market, by definition involving a number of Member States, even though the unification of the rules of jurisdiction introduced by that regulation certainly has the objective of eliminating obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject. [12]

43. Having completed its analysis, the Court found that the general jurisdiction rule provided for in Article 8(1) of Regulation No 2201/2003 may apply to disputes involving legal relations between the courts of a single Member State and those of a non-Member State, and not only relations between courts of a number of Member States, and that it therefore had jurisdiction to reply to the questions referred. [13]

44. It is therefore clear from the case-law of the Court that the application of Article 8(1) of Regulation No 2201/2003 may cover legal relationships involving non-Member States, notwithstanding the fact that the wording of that provision makes no mention whatsoever of such States.

(b) The relationship between Articles 8 and 10 of Regulation No 2201/2003

45. As is apparent from its title, Article 8 of Regulation No 2201/2003 establishes a general rule of jurisdiction in matters of parental responsibility. Furthermore, again in relation to parental responsibility, Article 10 of that regulation lays down a specific rule of jurisdiction in the case of the international abduction of a child.

46. In the present case, the referring court takes the view in its order that it is strongly arguable that the mother's conduct amounted to a wrongful removal of the child to, or her retention in, India. In that situation, there can be no doubt, in my view, that Article 10 of Regulation No 2201/2003 alone should be applied.

47. Article 8(2) of that regulation provides that paragraph 1 of that article 'shall be subject to the provisions of Articles 9, 10 and 12'. In other words, Article 10 of the Regulation is a special rule of jurisdiction which, as *lex specialis*, takes precedence over Article 8(1) of that regulation in the situations which it is specifically intended to govern, namely the abduction of a child. [14]

[10] Judgment in *UD*, paragraph 32.

[11] Judgment in *UD*, paragraphs 34 and 35.

[12] See, to that effect, judgment in *UD*, paragraph 40.

[13] Judgment in *UD*, paragraphs 41 and 42.

[14] See, to that effect, judgment of 20 September 2018, *Rudigier* (C-518/17, EU:C:2018:757, paragraph 52 and the case-law cited).

48. Accordingly, with regard to parental responsibility in the case of the wrongful removal or retention of a child, Article 10 of Regulation No 2201/2003 alone applies for the purpose of determining the jurisdiction of the courts of the Member States.

2. The scope of Article 10 of Regulation No 2201/2003 in the case of the abduction of a child to a non-Member State

49. Consideration must be given to the scope of Article 10 of Regulation No 2201/2003 in the case where a child, who was habitually resident in a Member State, is wrongfully removed to a non-Member State where that child acquires his or her habitual residence, as is the situation in the case in the main proceedings.

50. In that connection, in accordance with settled case-law of the Court, the interpretation of a provision of EU law requires that account be taken not only of its wording, but also of its context and of the objectives pursued by the rules of which it is part. [15]

(a) The wording of Article 10 of Regulation No 2201/2003

51. Article 10 of Regulation No 2201/2003 provides that, in case of wrongful removal or retention of a child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention are to retain their jurisdiction until the child has acquired a habitual residence in another Member State and certain conditions set out by that article are satisfied.

52. That article could be read, prima facie, as applying only where the child is abducted to another Member State. [16] However, in my view, that is not the correct interpretation. The article consists of two quite distinct parts, and the crucial component is the words '*shall retain their jurisdiction*'. Article 10 of Regulation No 2201/2003 should therefore be construed as follows.

53. Where a child was habitually resident in a Member State, as is the case with the child here, the courts of that Member State are to retain their jurisdiction *until* that child acquires his or her habitual residence in '*another Member State*'. Since reference is made only to another Member State, it can be inferred from this, in my view, that, where a child is wrongfully removed to, or retained in, a *non-Member State*, the courts of the Member State in which that child was habitually resident *continue to have jurisdiction*.

54. In my opinion, although Article 10 of Regulation No 2201/2003 mentions only Member States, it also governs legal relationships involving a non-Member State inasmuch as such relationships cannot result in jurisdiction being transferred to the courts of that non-Member State. It is irrelevant that the child acquires a habitual residence in the non-Member State, inasmuch as, in the light of the wording of Article 10 of that regulation, the child does not acquire his or her habitual residence in another Member State.

[15] Judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 113 and the case-law cited).

[16] See, to that effect, Pataut, É., and Gallant, E., 'Article 10', edited by Magnus, U., and Mankowski, P., *Brussels II bis Regulation*, Otto Schmidt, Cologne, 2017, p. 123, paragraph 3.

55. Accordingly, unlike the situation existing between two Member States, the courts of the Member State in which the child was habitually resident before his or her removal to a non-Member State continue to have jurisdiction for an unlimited period of time (*perpetuatio fori*).

56. In other words, in the light of the wording of Article 10 of Regulation No 2201/2003, there is no 'legal vacuum' in the situation in which a child is wrongfully removed to, or retained in, a *non-Member State*. Since the abduction is not to a Member State, the courts of the Member State of origin *still* have jurisdiction to rule on parental responsibility in relation to that child.

(b) The context of Article 10 of Regulation No 2201/2003

57. The interpretation to the effect that the courts of the Member State in which a child was habitually resident retain their jurisdiction, for an unlimited period of time, in cases of abduction to a non-Member State appears to me to be confirmed by the context of Article 10 of Regulation No 2201/2003.

58. As I have set out in points 40 to 43 of this Opinion, the Court has expressly acknowledged that Article 8(1) of Regulation No 2201/2003 on general jurisdiction in matters of parental responsibility could apply to legal relationships involving non-Member States.

59. I see no reason to adopt a different interpretation in respect of the other provisions of that regulation concerning the jurisdiction of the courts of a Member State in matters of parental responsibility, which include Article 10 of the Regulation. Indeed, it appears wholly illogical for the court of a Member State to have to apply Article 8(1) of Regulation No 2201/2003 where the legal relationships involve a non-Member State, but not Article 10 of that regulation in cases of abduction to a non-Member State.

60. In addition, since Article 10 of Regulation No 2201/2003 is *lex specialis* as compared with Article 8(1) of that regulation, it would seem to me that, if the latter provision can apply to disputes involving relationships between the courts of a Member State and those of a non-Member State, the same conclusion must be drawn as regards Article 10 of the Regulation.

61. Furthermore, in accordance with the case-law of the Court, Regulation No 2201/2003 is based, as is apparent from recitals 2 and 21 thereof, on the principle of mutual recognition of judicial decisions, the cornerstone for the creation of a genuine judicial area, and on the principle of mutual trust. The latter principle requires each Member State, save in exceptional circumstances, to consider all other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law. [17]

62. It appears to me that, in the context of applying Article 10 of Regulation No 2201/2003, the fact that all Member States comply, in principle, with EU law justifies recognising, subject to certain conditions, the jurisdiction of the courts of the Member State to which a child was abducted and where he or she has acquired a habitual residence.

[17] Judgment of 19 November 2020, *ZW* (C-454/19, EU:C:2020:947, paragraph 49 and the case-law cited).

63. By contrast, if a child has been abducted to a non-Member State, the cooperation and mutual trust provided for in EU law cannot apply. Therefore, having regard to the context of Article 10 of Regulation No 2201/2003, there is no justification for accepting the jurisdiction of the courts of that non-Member State, including in the case where the abducted child has acquired his or her habitual residence in the latter State.

(c) The objectives of Article 10 of Regulation No 2201/2003

64. According to recital 12 of Regulation No 2201/2003, the grounds of jurisdiction established by that regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. It follows that that regulation proceeds from the idea that the best interests of the child must come first. [18]

65. Under recital 33 of the Regulation, the latter seeks to ensure respect for the fundamental rights of the child, as set out in Article 24 of the Charter of Fundamental Rights of the European Union. [19] In that regard, Article 24(2) of the Charter states that, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a *primary consideration*.

66. Thus, in general terms, it is the objective of Regulation No 2201/2003 to ensure, in the best interests of the child, that the court which is nearest the child and which, accordingly, is best informed of the child's situation and state of development, takes the necessary decisions. [20] Article 8 of that regulation gives expression to that objective by establishing a general jurisdiction in favour of the courts of the Member State in which the child is habitually resident. [21]

67. With regard to Article 10 of Regulation No 2201/2003, the EU legislature sought to protect the best interests of the child in the particular case of wrongful removal or retention. Thus, the Court has observed that the same regulation seeks to *deter child abductions* between Member States and, in cases of abduction, to obtain the child's return without delay. The Court added that the wrongful abduction of a child should not, in principle, have the effect of transferring jurisdiction from the courts of the Member State where the child was habitually resident immediately before removal to the courts of the Member State to which the child was taken, even if, following the abduction, the child has acquired a habitual residence in the latter Member State. Accordingly, it took the view that the conditions set out in Article 10(a) and (b) of Regulation No 2201/2003 must be interpreted restrictively. [22]

68. The Court has therefore stated that, even where the abducted child has acquired his or her habitual residence in another Member State, the courts of the Member State where the child resided before his or her abduction continue, in principle, to have jurisdiction in matters of parental responsibility. In other words, an unlawful action, that is to say the abduction of a child by one of its parents, does not entail a change in the court having jurisdiction to rule on parental responsibility, with a view to protecting the best interests of that child.

[18] Judgment of 12 November 2014, *L* (C-656/13, EU:C:2014:2364, paragraph 48 and the case-law cited).

[19] Judgment of 11 July 2008, *Rinau* (C-195/08 PPU, EU:C:2008:406, paragraph 51).

[20] Judgment of 9 November 2010, *Purrucker* (C-296/10, EU:C:2010:665, paragraph 84).

[21] Judgment of 15 February 2017, *W and V* (C-499/15, EU:C:2017:118, paragraph 52).

[22] Judgment of 1 July 2010, *Povse* (C-211/10 PPU, EU:C:2010:400, paragraphs 43 to 45) and order of 10 April 2018, *CV* (C-85/18 PPU, EU:C:2018:220, paragraph 51).

69. That objective is likewise clear from the *travaux préparatoires* for Regulation No 2201/2003, according to which the 'fact that jurisdiction automatically follows a change in the child's habitual residence presents the risk of resorting to unlawful action to establish artificial jurisdictional links with a view to obtaining custody of a child'. [23]

70. I find it difficult to image that the objective of deterring child abductions vanishes solely because a child is removed to a non-Member State. If that were not the case, the parent abducting the child would simply have to go to a non-Member State, which may – incidentally – be in close proximity to a Member State, for Article 10 of Regulation No 2201/2003 to cease to apply. The child would thus be deprived of the rights afforded by that regulation, which is intended to protect his or her best interests.

71. In the light of the foregoing considerations, I am of the opinion that, on the basis of the wording of Article 10 of Regulation No 2201/2003, the context of that article and the objectives pursued by the rules of which it is part, the view must be taken that, where a child who was habitually resident in a Member State is abducted to a non-Member State, the courts of that Member State retain their jurisdiction, for an unlimited period of time, to rule on parental responsibility in respect of that child.

3. The impact of citizenship of the Union of the child abducted to a non-Member State

72. In the present case, the interpretation proposed is further borne out by the fact that the child is a British national and, on that basis, was a Union citizen at the time of the facts in the main proceedings.

73. The Court has consistently held that Article 20 TFEU confers on every individual who is a national of a Member State citizenship of the Union, which is intended to be the fundamental status of nationals of the Member States. [24]

74. Citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaty and the measures adopted for their implementation. [25]

75. In that context, the Court has held that Article 20 TFEU precludes national measures, including decisions refusing a right of residence to the members of the family of a Union citizen, which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status. [26]

76. It is my view that such case-law should be used as guidance in a case such as that in the main proceedings. Where a child with citizenship of the Union is abducted to a non-Member State, to regard the courts of that State as having jurisdiction to rule on parental responsibility in respect of

[23] See the Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000 and amending Regulation (EC) No 44/2001 in matters relating to maintenance, presented by the Commission on 3 May 2002 (COM(2002) 222 final, p. 11).

[24] Judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)* (C-836/18, EU:C:2020:119, paragraph 35 and the case-law cited).

[25] Judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)* (C-836/18, EU:C:2020:119, paragraph 36 and the case-law cited).

[26] Judgment of 27 February 2020, *Subdelegación del Gobierno en Ciudad Real (Spouse of a Union citizen)* (C-836/18, EU:C:2020:119, paragraph 37 and the case-law cited).

that child is tantamount to cutting any link with EU law, even though that child is the victim of wrongful removal or retention. However, in my opinion, that unlawful action cannot deprive such a child of the genuine enjoyment of the right to have parental responsibility examined in his or her regard by a court of a Member State.

77. Consequently, Article 20 TFEU appears to me to confer jurisdiction on the courts of the Member State in which the child with citizenship of the Union was habitually resident immediately before his or her abduction to a non-Member State.

78. In order to conduct a comprehensive assessment of the territorial scope and the conditions of application of Article 10 of Regulation No 2201/2003, the arguments put forward in support of an application of that article that is restricted to the Member States should now be examined.

4. The arguments in support of an application of Article 10 of Regulation No 2201/2003 that is restricted to the Member States

79. Firstly, the referring court observes that, in paragraph 33 of the judgment in *UD*, the Court stated that, unlike certain provisions of Regulation No 2201/2003 concerning jurisdiction such as Articles 9, 10 and 15, the terms of which necessarily imply that their application is dependent on a potential conflict of jurisdiction between courts in a number of Member States, it does not follow from the wording of Article 8(1) of that regulation that that provision is limited to disputes relating to such conflicts.

80. However, that does not appear to me to be the decisive factor as regards the jurisdiction of the courts of a Member State in the case where a child is abducted to a non-Member State. That finding is *obiter dictum* and based on a line of reasoning *a contrario*. However, such a line of reasoning has, by definition, relative and limited legal force, as it is merely an argument used in the context of examining Article 8(1) of Regulation No 2201/2003. In addition, in that judgment the Court did not interpret Article 10 of that regulation because the case did not relate to the abduction of a child.

81. Secondly, the referring court refers to the Practice Guide, which – it claims – states that the territorial scope of Article 10 of Regulation No 2201/2003 is restricted to the Member States. In that regard, that court mentions paragraph 4.2.1.1 of that guide, according to which, 'to deter parental child abduction between Member States, Article 10 ensures that the courts of the Member State where the child was habitually resident before the unlawful removal or retention ("Member State of origin") remain competent to decide on the substance of the case also thereafter. Jurisdiction may be attributed to the courts of the new Member State ("the requested Member State") only under very strict conditions'.

82. However, I would point out, first, that, in the Practice Guide, the Commission did not consider the situation of the abduction of a child to a non-Member State. Second, in any case, even though that document is a useful tool for interpreting Regulation No 2201/2003, it is not legally enforceable and cannot, therefore, bind the Court in the interpretation of that regulation. [27]

[27] See, by analogy, judgment of 8 May 2019, *Inspecteur van de Belastingdienst* (C-631/17, EU:C:2019:381, paragraph 41).

83. Thirdly, the referring court also states that Article 10 of Regulation No 2201/2003 should be interpreted as having a territorial scope confined to the Member States because otherwise the jurisdiction retained by the Member State of origin would continue to exist indefinitely. In that court's view, that Member State would thus be in a stronger position jurisdictionally vis-à-vis a non-Member State than a Member State,[28] which would be difficult to understand.

84. I do not agree with that analysis. As I have already observed in point 61 of this Opinion, Regulation No 2201/2003 is based on cooperation and mutual trust between the courts of the Member States, which allows, subject to certain conditions, jurisdiction to be transferred between those courts. Since provision is not made for cooperation and mutual trust in the case of courts of a non-Member State, it appears to me entirely justified and consistent with that regulation for the courts of the Member State in which a child was habitually resident before his or her abduction to a non-Member State to continue to have jurisdiction for an unlimited period of time, with a view to ensuring that the best interests of that child are protected.

85. Fourthly, it could be argued that, in the case of the abduction of a child to a non-Member State, Regulation No 2201/2003 does not apply and that reference must therefore be made to the 1996 Hague Convention, Article 7 of which is worded in very similar terms to those of Article 10 of that regulation. However, the application of that convention presupposes that the non-Member State in question has acceded to it. In the present case, India is not one of the parties to that convention. Accordingly, there is no need, in the present case, to give specific consideration to the consistency between Regulation No 2201/2003 and the 1996 Hague Convention.[29] I would simply note that this case shows that, in the case where a child was habitually resident in a Member State immediately before his or her abduction, the application of Article 7 of the 1996 Hague Convention will not always be a substitute for the non-application of Article 10 of Regulation No 2201/2003.

86. Fifthly, if the 1996 Hague Convention is not applicable, reference would have to be made either to a bilateral agreement between the Member State and the non-Member State concerned, or to the national rules of that Member State on the jurisdiction of the courts, on the basis of Article 14 of Regulation No 2201/2003. However, it cannot be assumed that those national rules necessarily guarantee the same protection of the best interests of the child as, or a higher level of protection of those interests than, Regulation No 2201/2003 in the case of abduction to a non-Member State. Thus, in the present case, the referring court states that sections 1 to 3 of the Family Law Act 1986 do not provide for any additional jurisdictional grounds as compared with those laid down in that regulation.

87. Sixthly, at the hearing, the mother and the Commission argued that, if the courts of the Member State in which a child was habitually resident continue to have jurisdiction, for an unlimited period of time, in the case of abduction to a non-Member State, there could be a conflict with the courts of that non-Member State if the matter were brought before those courts by one of the parents and they were not to recognise the jurisdiction of the European Union judicature.

[28] In so far as Article 10 of Regulation No 2201/2003 permits jurisdiction to be transferred between the courts of the Member States, subject to certain conditions.

[29] Under Article 52(3) of the 1996 Hague Convention, 'agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting Parties, the application of the provisions of this Convention'. That provision thus explains, in my view, that where the legal relationships involve a Member State and a non-Member State party to that convention, the Convention prevails over Regulation No 2201/2003.

88. However, first, that problem also exists in the context of applying Article 8(1) of Regulation No 2201/2003, but that situation did not prevent the Court from acknowledging, in the judgment in *UD*, that that provision may apply to disputes involving relationships between the courts of a Member State and those of a non-Member State. Second, the existence of a potential conflict between the courts of a Member State and those of a non-Member State is inherent in EU legal rules that have global scope. Such a potential conflict does not appear to me to be a sufficient ground for depriving a child of the protection of his or her best interests in cases of abduction to a non-Member State.

89. Accordingly, no argument appears to me capable of calling into question the interpretation of Article 10 of Regulation No 2201/2003 to the effect that the courts of the Member State in which a child was habitually resident immediately before his or her wrongful removal or retention retain their jurisdiction to rule on parental responsibility in respect of that child, for an unlimited period of time, in the case where the child is abducted to a non-Member State, including where the child has acquired his or her habitual residence in that non-Member State.

B. Article 12 of Regulation No 2201/2003

90. In the event that the Court were not to agree with that analysis and were to take the view that the application of Article 10 of Regulation No 2201/2003 is restricted to legal relationships involving only Member States, it is necessary to examine whether Article 12 of that regulation would nevertheless allow jurisdiction to rule on a case such as that in the main proceedings to be conferred on the courts of a Member State.

91. In that regard, Article 12(3) of the Regulation provides that the courts of a Member State have jurisdiction in relation to parental responsibility 'in proceedings other than those referred to in paragraph 1' of that article where, firstly, the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State, and, second, the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time when the court is seised and is in the best interests of the child. Paragraph 1 of that article states that the courts of a Member State exercising jurisdiction by virtue of Article 3 of that regulation on an application for divorce, legal separation or marriage annulment are to have jurisdiction in any matter relating to parental responsibility connected with that application where the conditions laid down in that article are satisfied. [30]

92. Article 12(3) of Regulation No 2201/2003 thus requires the existence to be shown of an agreement, express or at least unequivocal, on the prorogation of jurisdiction between all the parties to the proceedings, at the latest at the time when the document instituting the proceedings or an equivalent document is lodged with the court chosen. [31]

93. In the present case, the referring court states that the child is habitually resident in India. However, that court also explains that, on the date on which it was seised of the matter, that is to say, on 26 August 2020, the mother at no point agreed expressly or otherwise in an unequivocal

[30] Judgment of 12 November 2014, *L* (C-656/13, EU:C:2014:2364, paragraph 39).

[31] Judgment of 12 November 2014, *L* (C-656/13, EU:C:2014:2364, paragraph 56).

manner that the UK court has jurisdiction to deal with the parental-responsibility issues concerning the child. I therefore take the view that Article 12(3) of Regulation No 2201/2003 is inapplicable in a case such as that in the main proceedings.

94. Furthermore, Article 12(4) of that regulation provides that, where the child has his or her habitual residence in the territory of a non-Member State which is not a contracting party to the 1996 Hague Convention, jurisdiction under Article 12 of that regulation is to be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the non-Member State in question. However, since not all of the parties have agreed expressly or otherwise in an unequivocal manner to the jurisdiction of the referring court, it seems to me that, in any event, that provision is likewise inapplicable in a case such as that in the main proceedings.

95. In the event that the Court were to take the view that Articles 10 and 12 of Regulation No 2201/2003 are not applicable in the present case, I am of the opinion that, in the light of paragraphs 41 and 42 of the judgment in *UD*, it should not dismiss the present request for a preliminary ruling as inadmissible, but rather declare that it lacks jurisdiction.

VI. Conclusion

96. In the light of the foregoing considerations, I propose that the Court answer the question referred by the High Court of Justice (England & Wales), Family Division (United Kingdom), for a preliminary ruling as follows:

Article 10 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, must be interpreted as meaning that the courts of the Member State in which a child was habitually resident immediately before his or her wrongful removal or retention retain their jurisdiction to rule on parental responsibility in respect of that child, for an unlimited period of time, in the case where that child is abducted to a non-Member State, including where the child acquires his or her habitual residence in that non-Member State.