ECLI:EU:C:2022:87

Provisional text

JUDGMENT OF THE COURT (Third Chamber)

10 February 2022 (*)

(Reference for a preliminary ruling – Validity – Judicial cooperation in civil matters – Jurisdiction to hear and determine an application for divorce – Article 18 TFEU – Regulation (EC) No 2201/2003 – Fifth and sixth indents of Article 3(1)(a) – Difference between the length of the residence period required for the purposes of determining which court has jurisdiction – Distinction between a resident who is a national of the Member State of the court before which the application is brought and a resident who is not a national of that Member State – No discrimination on grounds of nationality)

In Case C-522/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 29 September 2020, received at the Court on 19 October 2020, in the proceedings

OE

v

VY,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Second Chamber, acting as President of the Third Chamber, J. Passer, F. Biltgen, L.S. Rossi (Rapporteur) and N. Wahl, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Council of the European Union, by M. Balta and T. Haas, acting as Agents,

– the European Commission, by M. Wasmeier and M. Wilderspin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The request for a preliminary ruling concerns the validity of the sixth indent of Article 3(1)(a) 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), and the potential consequences in the event that that provision is invalid.

2 The request has been made in proceedings between OE and his wife, VY, concerning an application for dissolution of their marriage brought before the Austrian courts.

Legal context

3 According to recital 12 of Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (OJ 2000 L 160, p. 19), which was repealed, with effect from 1 March 2005, by Regulation No 2201/2003:

‘The grounds of jurisdiction accepted in this Regulation are based on the rule that there must be a real link between the party concerned and the Member State exercising jurisdiction; the decision to include certain grounds corresponds to the fact that they exist in different national legal systems and are accepted by the other Member States.’

4 According to recital 1 of Regulation No 2201/2003:

‘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.’

5 Article 1 of that regulation, headed ‘Scope’, provides, in paragraph 1:

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

(a) divorce, legal separation or marriage annulment;

…’

6 Article 3 of that regulation, headed ‘General jurisdiction’, provides:

‘1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

– the spouses are habitually resident, or

– the spouses were last habitually resident, in so far as one of them still resides there, or

– the respondent is habitually resident, or

– in the event of a joint application, either of the spouses is habitually resident, or

– the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

– the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

2. For the purpose of this Regulation, "domicile" shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.'

7 Article 6 of that regulation, headed 'Exclusive nature of jurisdiction under Articles 3, 4 and 5', provides:

'A spouse who:

(a) is habitually resident in the territory of a Member State, or

(b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States,

may be sued in another Member State only in accordance with Articles 3, 4 and 5.'

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

8 On 9 November 2011, OE, an Italian national, and VY, a German national, were married in Dublin (Ireland).

9 According to the information provided by the referring court, OE left the habitual residence the couple shared in Ireland in May 2018 and has lived in Austria since August 2019.

10 On 28 February 2020, that is, after residing in Austria for more than six months, OE applied to the Bezirksgericht Döbling (District Court, Döbling, Austria) for the dissolution of his marriage with VY.

11 OE submits that a national of a Member State other than the State of the forum is entitled to invoke the jurisdiction of the courts of that latter State under the sixth indent of Article 3(1)(a) of Regulation No 2201/2003, on the basis of observance of the principle of non-discrimination on grounds of nationality, after having resided in the territory of that latter State for only six months

immediately before making the application for divorce, which is tantamount to disregarding the application of the fifth indent of that provision, which requires a period of residence of at least a year immediately before the application for divorce is made.

12 By order of 20 April 2020, the Bezirksgericht Döbling (District Court, Döbling) dismissed OE's application, taking the view that it lacked jurisdiction to hear it. According to that court, the distinction made on the basis of nationality in the fifth and sixth indents of Article 3(1)(a) of Regulation No 2201/2003 is intended to prevent the applicant from forum shopping.

13 By order of 29 June 2020, the Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Matters, Vienna, Austria), hearing the case on appeal, upheld the order of the Bezirksgericht Döbling (District Court, Döbling).

14 OE brought an appeal on a point of law against that order before the referring court, the Oberster Gerichtshof (Supreme Court, Austria).

15 The referring court observes that the distinction, established in the fifth and sixth indents of Article 3(1)(a) of Regulation No 2201/2003, relating to the actual length of residence of the person concerned, is based solely on the criterion of nationality. The referring court notes that there are persons who are born and grow up in a Member State without being a national of that State and concludes therefrom that that criterion does not differentiate sufficiently according to the level of integration of the person concerned and the closeness of his or her relationship with the Member State concerned. Consequently, it has doubts as to whether the difference in treatment arising from those provisions of Regulation No 2201/2003 is compatible with the principle of non-discrimination on grounds of nationality enshrined in Article 18 TFEU.

16 Furthermore, in the event that that difference in treatment is contrary to the principle of non-discrimination, the referring court raises the question of what appropriate legal conclusions should be drawn in a case such as the one in the main proceedings.

17 In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the sixth indent of Article 3[(1)](a) of [Regulation No 2201/2003] infringe the prohibition of discrimination in Article 18 TFEU on the ground that it provides, as a precondition to the jurisdiction of the courts of the State of residence, depending on the nationality of the applicant, for a shorter period of residence than the fifth indent of Article 3[(1)](a) of [Regulation No 2201/2003]?

(2) If the answer to Question 1 is in the affirmative:

Does that infringement of the prohibition of discrimination mean that, based on the fundamental rule laid down in the fifth indent of Article 3[(1)](a) of [Regulation No 2201/2003], a period of residence of 12 months is required for all applicants, irrespective of their nationality, in order to rely upon the jurisdiction of the courts in the place of residence or is it to be assumed that a period of 6 months' residence is the precondition for all applicants?'

Consideration of the questions referred

The first question

18 By its first question, the referring court asks, in essence, whether the principle of non-discrimination on grounds of nationality, enshrined in Article 18 TFEU, precludes a situation in which the jurisdiction of the court of the Member State of residence, as provided for in the sixth indent of Article 3(1)(a) of Regulation No 2201/2003, is subject to the applicant being resident for a minimum period immediately before making his or her application which is six months shorter than that provided for in the fifth indent of Article 3(1)(a) of that regulation on the ground that the person concerned is a national of that Member State.

19 According to the settled case-law of the Court, if the principles of non-discrimination and equal treatment are to be observed, comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, judgments of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, paragraph 85, and of 25 March 2021, *Alvarez y Bejarano and Others* v *Commission*, C-517/19 P and C-518/19 P, EU:C:2021:240, paragraphs 52 and 64).

20 The comparability of different situations must be assessed having regard to all the elements which characterise them. Those elements must, in particular, be determined and assessed in the light of the subject matter and purpose of the EU act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account (see, inter alia, judgments of 6 June 2019, *P.M. and Others*, C-264/18, EU:C:2019:472, paragraph 29 and the case-law cited, and of 19 December 2019, *HK* v *Commission*, C-460/18 P, EU:C:2019:1119, paragraph 67).

21 Moreover, the Court has also held, as regards judicial review of whether the EU legislature has observed the principle of equal treatment, that that legislature has, in the exercise of the powers conferred on it, a broad discretion where it intervenes in a field involving political, economic and social choices and where it is called on to undertake complex assessments and evaluations. Thus, only if a measure adopted in this field is manifestly inappropriate in relation to the objectives which the competent institutions are seeking to pursue can the lawfulness of such a measure be affected (see, inter alia, judgment of 6 June 2019, *P.M. and Others*, C-264/18, EU:C:2019:472, paragraph 26).

22 However, according to that case-law, even where it has such a discretion, the EU legislature is obliged to base its choice on objective criteria appropriate to the aim pursued by the legislation in question (judgment of 6 June 2019, *P.M. and Others*, C-264/18, EU:C:2019:472, paragraph 27).

23 It is in the light of the principles that have just been recalled that it is necessary to ascertain whether, having regard in particular to the objective pursued by the rules on jurisdiction established in Article 3(1)(a) of Regulation No 2201/2003, an applicant such as OE, who is habitually resident in the territory of a Member State other than that of his or her nationality and who initiates a procedure for the dissolution of matrimonial ties before the courts of that Member State, is in a situation which is not comparable to that of an applicant who is a national of that Member State, with the result that requiring the former to have resided in the territory of that same Member State for a longer period before being able to bring his or her application is not contrary to the principle of non-discrimination.

24 According to recital 1 of Regulation No 2201/2003, that regulation is to contribute to the creation of an area of freedom, security and justice, in which the free movement of persons is ensured. Accordingly, with the objective of ensuring legal certainty, Chapters II and III of the regulation lay down rules on jurisdiction and on recognition and enforcement of judgments

concerning the dissolution of matrimonial ties (judgment of 25 November 2021, *IB (Habitual residence of a spouse – Divorce)*, C-289/20, EU:C:2021:955, paragraph 31 and the case-law cited).

25 In that context, Article 3 of that regulation, in Chapter II thereof, lays down the general criteria for jurisdiction with respect to divorce, legal separation and marriage annulment. These criteria, which are objective, alternative and exclusive, meet the need for rules that address the specific requirements of conflicts relating to the dissolution of matrimonial ties (judgment of 25 November 2021, *IB (Habitual residence of a spouse – Divorce)*, C-289/20, EU:C:2021:955, paragraph 32 and the case-law cited).

26 In that regard, while the first to fourth indents of Article 3(1)(a) of Regulation No 2201/2003 expressly refer to the habitual residence of the spouses and of the respondent as criteria, the fifth and sixth indents of Article 3(1)(a) permit the application of the jurisdiction rules of the *forum actoris* (judgment of 25 November 2021, *IB (Habitual residence of a spouse – Divorce)*, C-289/20, EU:C:2021:955, paragraph 33 and the case-law cited).

27 Subject to certain conditions, the latter provisions recognise the courts of the Member State of the territory in which the applicant is habitually resident as having jurisdiction to rule on the dissolution of matrimonial ties in question.

28 Thus, the fifth indent of Article 3(1)(a) of that regulation establishes such jurisdiction where the applicant has resided there for at least a year immediately before that application was made, while the sixth indent of Article 3(1)(a) of that regulation refers to a reduced period of residence required of the applicant, namely six months immediately before the application was made, where the latter is a national of the Member State in question (judgment of 13 October 2016, *Mikołajczyk*, C-294/15, EU:C:2016:772, paragraph 42).

29 It is apparent from the Court's case-law that the rules on jurisdiction laid down in Article 3 of Regulation No 2201/2003, including those laid down in the fifth and sixth indents of paragraph 1(a) of that article, seek to ensure a balance between, on the one hand, the mobility of individuals within the European Union, in particular by protecting the rights of the spouse who, after the marriage has broken down, has left the Member State where the couple had their shared residence and, on the other hand, legal certainty, in particular that of the other spouse, by ensuring that there is a real link between the applicant and the Member State whose courts have jurisdiction to give a ruling on the dissolution of the matrimonial ties concerned (see, to that effect, judgments of 13 October 2016, *Mikołajczyk*, C-294/15, EU:C:2016:772, paragraphs 33, 49 and 50, and of 25 November 2021, *IB (Habitual residence of a spouse – Divorce)*, C-289/20, EU:C:2021:955, paragraphs 35, 44 and 56).

30 Taking into account the objective of ensuring that there is a real link with the Member State whose courts exercise such jurisdiction, an applicant who is a national of that Member State and who, because his or her marriage has broken down, leaves the shared habitual residence of the couple and decides to return to his or her country of origin, is not, in principle, in a situation comparable to that of an applicant who does not hold the nationality of that Member State and who moves there after his or her marriage has broken down.

31 In the first situation, although the nationality of the spouse is not sufficient to determine whether the criteria under the sixth indent of Article 3(1)(a) of Regulation No 2201/2003 are met, it is, nevertheless, already possible to discern that that spouse has a link with that Member State, by reason of the very fact that he or she is a national of that Member State, and that he or she necessarily has institutional and legal ties with the latter and, as a general rule, cultural, linguistic,

social, family or property ties. Therefore, such a link may in itself contribute to establishing the real link required between the applicant and the Member State whose courts exercise such jurisdiction.

32 That assessment is borne out by the considerations set out in paragraph 32 of the explanatory report drawn up by Dr Borrás concerning the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, known as the 'Brussels II Convention' (OJ 1998 C 221, p. 1), which inspired the wording of Regulation No 2201/2003. According to those considerations, the nationality criterion, which now appears in the sixth indent of Article 3(1)(a) of Regulation No 2201/2003, 'demonstrates that there is an initial connection with that Member State'.

33 The same is generally not true of a spouse who, after his or her marriage has broken down, decides to move to a Member State of which he or she is not a national. In fact, that spouse, before his or her marriage, has, in most cases, never had links with that Member State analogous to those which a national of that Member State would have. The closeness of the link between the applicant and the Member State whose courts exercise jurisdiction to rule on the dissolution of the matrimonial ties concerned may therefore reasonably be determined using other factors, such as, in the present case, the requirement that the applicant reside in the territory of that Member State for a sufficiently long period, of at least one year, immediately before the application is made.

34 Furthermore, the difference in the minimum period of actual residence of the applicant in the territory of the Member State whose courts exercise such jurisdiction, immediately before the application is made, depending on whether or not the applicant is a national of that Member State, is based on an objective factor which is necessarily known to the applicant's spouse, namely the nationality of his or her spouse.

35 In that regard, once a spouse, because of the breakdown of his or her marriage, leaves the couple's habitual residence and returns to the territory of the Member State of which he or she is a national in order to establish his or her new habitual residence there, the other spouse can expect that an application for dissolution of the matrimonial ties may well be brought before the courts of that Member State.

36 Since respect for the legal certainty of that other spouse is, at least in part, ensured by the nationality of his or her spouse, which represents an institutional and legal link to the Member State whose courts exercise jurisdiction to rule on the dissolution of the matrimonial ties concerned, it is not manifestly inappropriate for such a link to have been taken into consideration by the EU legislature when it determined the period of actual residence required of the applicant in the territory of that Member State of which he or she is a national, in so far as that link distinguishes the situation of the latter from that of an applicant who does not have the nationality of the Member State concerned.

37 It is true that the distinction made by the EU legislature in the fifth and sixth indents of Article 3(1)(a) of Regulation No 2201/2003 is based on a presumption that a national will, in principle, have closer links with his or her country of origin than a person who is not a national of the State concerned.

38 However, having regard to the objective of ensuring that there is a real link between the applicant and the Member State whose courts exercise jurisdiction to give a ruling on the dissolution of the matrimonial ties concerned, the objective nature of the criterion based on the nationality of the applicant, as provided for in the sixth indent of Article 3(1)(a) of Regulation No 2201/2003, cannot be disputed without calling into question the discretion of the EU legislature which adopted that criterion.

39 Furthermore, the Court has also accepted, with regard to a criterion based on the nationality of the person concerned, that although in borderline cases occasional problems must arise from the introduction of any general and abstract system of rules, there are no grounds for taking exception to the fact that the EU legislature has resorted to categorisation, provided that it is not in essence discriminatory having regard to the objective which it pursues (see, by analogy, judgments of 16 October 1980, *Hochstrass* v *Court of Justice*, 147/79, EU:C:1980:238, paragraph 14, and of 15 April 2010, *Gualtieri* v *Commission*, C-485/08 P, EU:C:2010:188, paragraph 81).

40 In the present case, the EU legislature cannot be criticised for having, in part, introduced, as regards the application of the *forum actoris* rule on jurisdiction, a criterion relating to the nationality of the applicant, in order to make it easier to determine whether he or she has a real link with the Member State whose courts exercise jurisdiction to rule on the dissolution of the matrimonial ties concerned, and making the admissibility of the action for the dissolution of the matrimonial ties of the applicant who is a national of that Member State subject to completion of a prior period of residence which is shorter than that required of an applicant who is not a national of that Member State.

41 It follows that, having regard to the objective of ensuring that there is a real link between the applicant and the Member State whose courts exercise jurisdiction to give a ruling on the dissolution of the matrimonial ties concerned, the distinction made by the EU legislature, on the basis of a criterion relating to the nationality of the applicant, in the fifth and sixth indents of Article 3(1)(a) of Regulation No 2201/2003, does not constitute a difference in treatment on grounds of nationality prohibited by Article 18 TFEU.

42 In the light of all the findings above, the answer to the first question is that the principle of non-discrimination on grounds of nationality, enshrined in Article 18 TFEU, must be interpreted as not precluding a situation in which the jurisdiction of the courts of the Member State in the territory of which the habitual residence of the applicant is located, as provided for in the sixth indent of Article 3(1)(a) of Regulation No 2201/2003, is subject to the applicant being resident for a minimum period immediately before making his or her application which is six months shorter than that provided for in the fifth indent of Article 3(1)(a) of that regulation on the ground that the person concerned is a national of that Member State.

The second question

43 Given the answer to the first question, there is no need to examine the second question.

Costs

44 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 (Third Chamber) hereby rules:

The principle of non-discrimination on grounds of nationality, enshrined in Article 18 TFEU, must be interpreted as not precluding a situation in which the jurisdiction of the courts of the Member State in the territory of which the habitual residence of the applicant is located, as provided for in the sixth indent of Article 3(1)(a) 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, is subject to the applicant being resident for a minimum period immediately before making his or her application which is six months shorter than that provided for in the fifth indent of Article 3(1)(a) of that regulation on the ground that the person concerned is a national of that Member State.

[Signatures]

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* Language of the case: German.