

ORDER OF THE COURT (First Chamber)

12 May 2016 (*)

(Reference for a preliminary ruling — Article 53(2) of the Rules of Procedure of the Court — Judicial cooperation in civil matters — Regulation (EU) No 1259/2010 — Scope — Recognition of a private divorce pronounced by a religious court in a third country — Manifest lack of jurisdiction of the Court)

In Case C-281/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht München (Higher Regional Court, Munich, Germany), made by decision of 2 June 2015, received at the Court on 11 June 2015, in the proceedings

Soha Sahyouni

v

Raja Mamisch

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, A. Arabadjiev, J.-C. Bonichot, C.G. Fernlund and S. Rodin, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of

- the German Government, by T. Henze and J. Mentgen, acting as Agents,
- the Belgian Government, by C. Pochet, L. Van den Broeck and S. Vanrie, acting as Agents,
- the French Government, by D. Colas and F.-X. Bréchet, acting as Agents,
- the Hungarian Government, by M. Fehér, G. Koós and M. Bóra, acting as Agents,
- the European Commission, by M. Wilderspin, acting as Agent,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 53(2) of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ 2010 L 343, p. 10).

2 The request has been made in proceedings between Ms Soha Sahyouni and Mr Raja Mamisch concerning legal proceedings for recognition of a matrimonial judgment adopted by a religious court in a third country.

Legal context

EU law

3 Article 1(1) of Regulation No 1259/2010 provides that that regulation is to apply ‘in situations involving a conflict of laws, to divorce and legal separation’.

4 Article 8 of the regulation is worded as follows:

‘In the absence of a choice ..., divorce and legal separation shall be subject to the law of the State:

- (a) where the spouses are habitually resident at the time the court is seised; or, failing that
- (b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seised, in so far as one of the spouses still resides in that State at the time the court is seised; or, failing that
- (c) of which both spouses are nationals at the time the court is seised; or, failing that
- (d) where the court is seised.’

5 Under Article 1(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), that regulation applies, whatever the nature of the court or tribunal, in civil matters relating to divorce, legal separation or marriage annulment.

6 Article 2 of the regulation states:

‘For the purpose of this regulation:

...

(4) the term “judgment” shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision;

...’

7 In accordance with Article 21(1) of that regulation, a judgment given in a Member State is to be recognised in the other Member States without any special procedure being required.

German law

8 The Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (Law on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction) provides as follows:

‘Paragraph 107. Recognition of foreign decisions in matrimonial matters

(1) Decisions delivered abroad by which a marriage is annulled ... shall be recognised only if the Land Justice Administration has found that the requirements for recognition are met. If a court or authority of a State of which both spouses were nationals at the time of the decision has ruled, recognition shall not depend on a finding by the Land Justice Administration.

(2) The Justice Administration of the Land in which one of the spouses habitually resides shall have jurisdiction. ...

(3) The Länder Governments may delegate, by regulation, the powers conferred by these provisions on the Länder Justice Administrations to one or more Oberlandesgericht presidents. ...

(4) The decision shall be made on application. The application may be made by any person showing legal interest in the recognition.

...

(6) If the Land Justice Administration finds that the requirements for recognition are met, the spouse who did not make the application may ask the Oberlandesgericht to rule.

...

(7) The Civil Chamber of the Oberlandesgericht in the jurisdiction of which the Land Justice Administration has its seat shall be the competent court. ...

(8) The above provisions shall apply mutatis mutandis when an application is made for a finding that the requirements for recognition are not met.

...

Article 109. Exclusions from recognition

(1) A foreign decision shall not be recognised

1. if the courts of the other State do not have jurisdiction under German law;

...

4. where recognition of the decision would lead to a result which is manifestly incompatible with the essential principles of German law and, more particularly, where recognition of that decision is incompatible with the fundamental rights.

...

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

9 On 27 May 1999, Mr Mamisch and Ms Sahyouni married within the jurisdiction of the Islamic Court of Homs (Syria). Mr Mamisch has held Syrian nationality from birth. In 1977, he acquired German nationality by naturalisation. Since that year he has held both nationalities. Ms Sahyouni has held Syrian nationality from birth. She acquired German nationality after her marriage.

10 The couple lived in Germany until 2003, when they moved to Homs. In summer 2011, on account of the civil war in Syria, they returned to Germany for a short time then, from February 2012, lived alternately in Kuwait and Lebanon. During that time they also stayed in Syria on a number of occasions. Both parties are currently living in Germany again, at different addresses.

11 On 19 May 2013, Mr Mamisch declared his intention to dissolve his marriage by having his authorised representative pronounce the divorce formula before the religious sharia court in Lakatia (Syria). On 20 May 2013, that court declared the couple divorced.

12 On 30 October 2013, Mr Mamisch applied to have the divorce pronounced in Syria recognised. By decision of 5 November 2013, the President of the Oberlandesgericht München (Higher Regional Court, Munich) granted the application, finding that the statutory conditions for recognition of that divorce were satisfied.

13 On 18 February 2014, Ms Sahyouni applied to have that decision set aside and a declaration made that the conditions for recognition of the divorce were not satisfied.

14 By a decision of 8 April 2014, the President of the Oberlandesgericht München (Higher Regional Court, Munich) rejected Ms Sahyouni's application. In that decision, it was held that recognition of the divorce was governed by Regulation No 1259/2010, which also applies to private divorces. In the absence of a valid choice of applicable law and a common habitual residence of the spouses in the year preceding the divorce, the applicable law is determined in accordance with Article 8(c) of that regulation. Where both spouses have dual nationality, the decisive factor is their effective nationality within

the meaning of national law. At the time of the divorce at issue, their effective nationality was Syrian. It was also noted that public policy within the meaning of Article 12 of Regulation No 1259/2010 did not prevent recognition of the divorce decision at issue.

15 In those circumstances, the Oberlandesgericht München (Higher Regional Court, Munich) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Does the scope of [Regulation No 1259/2010], as defined in Article 1 of that regulation, also include “private divorce”, in this instance one pronounced before a religious court in Syria on the basis of sharia?

2. If the answer to Question 1 is in the affirmative:

(a) in the case of an examination as to whether a divorce is eligible for recognition under national law, must Article 10 of [Regulation No 1259/2010] be applied?

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

– is account to be taken in the abstract of a comparison showing that, while the law of the forum grants access to divorce to the other spouse too, that divorce is, on account of the other spouse’s sex, subject to different procedural and substantive conditions than access for the first spouse,

or,

– does the validity of that rule depend on whether the application of the foreign law, which is discriminatory in the abstract, also discriminates in the particular case in question?

(c) If the answer to the second indent of Question 2(b) is in the affirmative:

does the fact that the spouse discriminated against consents to the divorce — including by duly accepting compensation — itself constitute a ground for not applying that rule?’

Consideration of the questions referred

16 Under Article 53(2) of the Rules of Procedure of the Court, where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.

17 That provision should be applied in the present case.

18 It must be noted, first of all, that the referring court has before it not an application for divorce but an application for recognition of a divorce decision which was made by a religious authority in a third country.

19 It must also be noted that it follows in particular from Articles 1 and 8 of Regulation No 1259/2010 that that regulation, which is the subject matter of the questions referred, lays down only the rules governing conflicts of applicable laws in matters of divorce and legal separation and does not govern the recognition, in a Member State, of a divorce decision which has already been pronounced.

20 On the contrary, it is Regulation No 2201/2003 which lays down, *inter alia*, the rules governing recognition and enforcement of matrimonial decisions. Nevertheless, it is not applicable to such decisions pronounced in a third country.

21 In accordance with Article 2, point 4, and Article 21(1) thereof, that regulation is restricted to recognition of decisions delivered by a court of a Member State.

22 Given that Regulation No 2201/2003 applies only between the Member States, the recognition of a divorce decision delivered in a third country does not fall within the scope of EU law.

23 It follows therefrom that neither the provisions of Regulation No 1259/2010, referred to by the referring court, nor those of Regulation No 2201/2003, nor any other legal act of the European Union applies to the dispute in the main proceedings.

24 In those circumstances, the question arises whether, despite the fact that the dispute in the main proceedings is outside the scope of EU law, the Court nevertheless has jurisdiction to answer the questions referred.

25 In that regard, in paragraphs 36 and 37 of its judgment of 18 October 1990 in *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360), the Court held that the authors of the Treaty did not intend to exclude from the jurisdiction of the Court requests for a preliminary ruling on a provision of EU law in the specific case where the national law of a Member State refers to the content of that provision in order to determine rules applicable to a situation which is purely internal to that State and that, on the contrary, it is manifestly in the interest of the EU legal order that, in order to forestall future differences of interpretation, every provision of EU law should be given a uniform interpretation irrespective of the circumstances in which it is to be applied.

26 In its earlier case-law, the Court has held that it has jurisdiction to give preliminary rulings on questions concerning provisions of EU law in situations where the facts of the cases being considered by the national courts were outside the scope of EU law but where those provisions of EU law had been rendered applicable by domestic law due to a reference made by that law to the content of those provisions (see, *inter alia*, judgment of 18 October 2012 in *Nolan*, C-583/10, EU:C:2012:638, paragraph 45 and the case-law cited). Thus, where, in regulating situations outside the scope of the EU measure concerned, national legislation seeks to adopt the same solutions as those adopted in that measure, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions taken from that measure should be interpreted uniformly (see judgment of 18 October 2012 in *Nolan*, C-583/10, EU:C:2012:638, paragraph 46 and the case-law cited).

27 The Court has also pointed out that an interpretation by it of provisions of EU law in situations outside its scope is justified where those provisions have been made applicable to such situations by national law in a direct and unconditional way, in order to ensure that internal situations and situations governed by EU law are treated in the same way. Accordingly, the Court is called upon to ascertain whether there are indications sufficiently precise to enable that reference to EU law to be established (see, to that effect, judgment of 18 October 2012 in *Nolan*, C-583/10, EU:C:2012:638, paragraphs 47 and 48).

28 However, although the Court may, in such circumstances, make the requested interpretation, it is not for the Court to take such an initiative if it is not apparent from the order for reference that the national court is actually under such an obligation (see order of 30 January 2014 in *C*, C-122/13, EU:C:2014:59, paragraph 15).

29 It is on the sole basis of the information provided by the referring court in its order for reference that the Court can ascertain whether it has jurisdiction to answer the questions raised before it.

30 In the present case, the order for reference does not contain any element capable of establishing the jurisdiction of the Court on the basis of the case-law set out in paragraphs 25 to 27 of this order, since the referring court suggests that Regulation No 1259/2010 is applicable to the facts in the main proceedings and merely asserts that ‘the President of the Oberlandesgericht München (Higher Regional Court, Munich) held that the divorce’s eligibility for recognition [was] governed by Regulation No 1259/2010, which also [applied] to private divorces’.

31 No other indication is provided by the referring court to establish that Regulation No 1259/2010 or any other provision of EU law applies to the facts of the main proceedings.

32 Nonetheless, it is appropriate to note that the referring court may still submit a new request for a preliminary ruling when it is in a position to supply the Court with all the elements enabling it to rule (see, to that effect, orders of 14 March 2013 in *EBS Le Relais Nord-Pas-de-Calais*, C-240/12, not published, EU:C:2013:173, paragraph 22; 18 April 2013 in *Adiamix*, C-368/12, not published, EU:C:2013:257, paragraph 35; and 5 November 2014 in *Hunland-Trade*, C-356/14, not published, EU:C:2014:2340, paragraph 24).

33 In those circumstances, it must be held, on the basis of Article 53(2) of the Rules of Procedure, that it is clear that the Court has no jurisdiction to answer the questions referred by the Oberlandesgericht München (Higher Regional Court, Munich).

Costs

34 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 (First Chamber) hereby orders:

The Court of Justice of the European Union has no jurisdiction to answer the questions referred by the Oberlandesgericht München (Higher Regional Court, Munich) by decision of 2 June 2015.

[Signatures]

*Language of the case: German.