AG Opinion on Brussels II bis Regulation

Yesterday, Advocate General *Kokott* delivered her opinion in case C-523/07 (*Applicant A*).

The case, which has been referred to the ECJ by the Finnish *Korkein hallinto-oikeus*, concerns three children who lived originally in Finland with their mother (*A*) and stepfather. In 2001 the family moved to Sweden. In summer 2005 they travelled to Finland – originally with the intention to spend their holidays there. In Finland, the family lived on campsites and with relatives and the children did not go to school there. In November 2005 the children were taken into immediate care and placed into a child care unit. This was unsuccessfully challenged by the mother and the stepfather.

The *Korkein hallinto-oikeus*, which is hearing the appeal, had doubts with regard to the interpretation of the Brussels II *bis* Regulation and referred the following **questions** to the ECJ for a preliminary ruling:

> *1(a) Does Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, (the Brussels IIa Regulation) apply to the enforcement, such as in the present case, of a public-law decision made in connection with child protection, as a single decision, concerning the immediate taking into care of a child and his or her placement outside the home, in its entirety,*
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> *(b) or, having regard to the provision in Article 1(2)(d) of the regulation, only to the part of the decision relating to the placement outside the home?*
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> *2 How is the concept of habitual residence in Article 8(1) of*

the regulation, like the associated Article 13(1), to be interpreted in Community law, bearing in mind in particular the situation in which a child has a permanent residence in one Member State but is staying in another Member State, carrying on a peripatetic life there?

3(a) If it is considered that the child's habitual residence is not in the latter Member State, on what conditions may an urgent measure (taking into care) nevertheless be taken in that Member State on the basis of Article 20(1) of the regulation?

(b) Is a protective measure within the meaning of Article 20(1) of the regulation solely a measure which can be taken under national law, and are the provisions of national law concerning that measure binding when the article is applied?

(c) Must the case, after the taking of the protective measure, be transferred of the court's own motion to the court of the Member State with jurisdiction?

4 If the court of a Member State has no jurisdiction at all, must it dismiss the case as inadmissible or transfer it to the court of the other Member State?

AG *Kokott* suggested in her **opinion** to answer these questions as follows:

1. Article 1(1) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, must be interpreted as meaning that a single decision ordering a child to be taken into care immediately and placed outside his or her original home in a child care unit is covered by the term "civil matters" for the purposes of that provision,

where that decision was adopted in the context of public law rules relating to child protection.

With regard to this first question, the AG could refer to the judgment given by the ECJ in case C-435/06 *(Applicant C*) since the question referred to the Court has essentially been the same. *(See with regard to case C-435/06 our previous posts on the reference, the opinion and the judgment).*

2. A child is habitually resident under Article 8(1) of Regulation No 2201/2003 in the place in which the child – making an overall assessment of all the relevant factual circumstances, in particular the duration and stability of residence and familial and social integration – has his or her centre of interests. Only if no habitual residence in that sense can be established and if no jurisdiction based on Article 12 exists do the courts of the Member State in which the child is present have jurisdiction under Article 13(1) of the regulation.

Of particular interest are the AG's remarks on the second question which concerns the interpretation of the concept of the child's habitual residence – which is not defined in the Regulation itself. Here, the AG emphasises that the basic idea underlying the rules on jurisdiction in Brussels II *bis* is that the courts of the Member State should have jurisdiction which are best placed to take decisions concerning parental responsibility. And these are – because of proximity – the courts of the Member State in which the child is habitually resident (para. 18). Even though also mere presence may establish proximity to the courts of the respective State, the AG stresses that mere presence does not lead to a relationship of the same quality as habitual residence (para. 20). Thus, criteria must be developed in order to distinguish habitual residence from mere presence.

Taking into consideration the wording and objectives of

Brussels II *bis* as well as the relevant multilateral conventions, AG *Kokott* states that "the concept of habitual residence in Article 8 (1) of the Regulation should therefore be understood as corresponding to the actual centre of interests of the child." (para. 38)

As relevant criteria for the distinction between habitual residence and the mere (temporary) presence, the AG designates in particular a certain duration and regularity of residence, which might be interrupted as long as it is only a temporary absence (para. 41 et seq.). Further, the familial and social situation of the child constitute important indicators for habitual residence (para. 47 et seq.).

> *3. (a) Article 20(1) of Regulation No 2201/2003 allows the courts of a Member State in urgent cases to take all provisional measures for the protection of a child who is present in that Member State, even if the courts of another Member State have jurisdiction under the regulation over the substance of the matter. There is urgency if immediate action is, in the view of the court seised in the State of the child's presence, necessary to preserve the child's welfare.*

With regard to this question, the AG stresses that Art. 20 (1) Brussels II *bis* has to be interpreted narrowly since it authorises courts to act which do not have jurisdiction over the substance of the matter (para. 56). Further, the AG clarifies that there are basically three requirements which have to be taken into consideration with regard to the application of Art. 20 (1): First, the measure may relate only to children who are present in the respective Member State (para. 57). Second, there must be an urgent case (para. 58) and third, Art. 20 (1) permits only provisional measures since the final decision is reserved to the court which has jurisdiction over the substance of the matter (para. 60).

> *(b) Article 20(1) of the regulation allows the taking of*

the provisional measures that are available under the law of the Member State of the court seised, and those measures need not be expressly designated as provisional measures under national law. It is otherwise for the referring court to determine which measures may be taken under national law and whether the provisions of national law are binding.

(c) The regulation does not oblige the court which has taken a provisional measure under Article 20(1) to transfer the case to the court of another Member State with jurisdiction over the substance of the matter. However, it does not preclude the court seised from informing the court with jurisdiction, directly or via the central authorities, of the measures taken.

4. A court which under the regulation lacks jurisdiction over the substance of the matter and does not consider any provisional measures under Article 20(1) of the regulation to be necessary must declare that it lacks jurisdiction, under Article 17 of the regulation. The regulation does not provide for a transfer to the court with jurisdiction. However, it does not preclude the court seised from informing the court with jurisdiction, directly or via the central authorities, of its decision.

See with regard to this case also our post on the reference which can be found here.