ECJ: Judgment on Brussels II bis (A)

On 2 April 2009, the ECJ has delivered its judgment in case C-523/07 (*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. Thus, it referred four questions to the ECJ for a preliminary ruling.

With the **first question** referred to the ECJ, the Finnish court basically asks whether Article 1(1) of the Regulation is to be interpreted to the effect that, first, it applies to a single decision ordering a child to be taken into care immediately and placed outside his original home and, second, that decision is covered by the term 'civil matters' for the purposes of that provision, where it was adopted in the context of public law rules relating to child protection. Since the exact question had been dealt with already in case C-435/06 (*C*) – the first judgment on the Brussels II *bis* Regulation (see with regard to this case our previous post which can be found here) – the ECJ referred to its decision in this case and held that

> *Article 1(1) of [the Brussels II bis Regulation] must be interpreted as meaning that a decision ordering that a child be immediately taken into care and placed outside his original home 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.*

The **second question** aims at the definition of "habitual residence" in terms of Art. 8 Brussels II *bis* – in particular in a situation in which the child has a permanent residence in one Member State but is staying in another Member State carrying on a peripatetic life there. With regard to this question the Court held that

> *the concept of 'habitual residence' under Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.*

With its **third question**, the referring court asks first the conditions to which the adoption of a protective measure such as the taking into care of children is subject under Article 20(1) of the Regulation. Secondly, the Finnish court wishes to know whether such a measure may be applied in accordance with national law and whether those provisions are binding. Thirdly, the court asks whether the case has to be transferred

to the court of another Member State having jurisdiction after the protective measure is taken. In this respect the ECJ held:

> *A protective measure, such as the taking into care of children, may be decided by a national court under Article 20 of Regulation No 2201/2003 if the following conditions are satisfied:*
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> *– the measure must be urgent;*
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> *– it must be taken in respect of persons in the Member State concerned, and*
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> *– it must be provisional.*
>
> *The taking of the measure and its binding nature are determined in accordance with national law. After the protective measure has been taken, the national court is not required to transfer the case to the court of another Member State having jurisdiction. However, in so far as the protection of the best interests of the child so requires, the national court which has taken provisional or protective measures must inform, directly or through the central authority designated under Article 53 of Regulation No 2201/2003, the court of another Member State having jurisdiction.*

By means of the **fourth question**, the *Korkein hallinto-oikeus* asks whether a court of a Member State which has no jurisdiction at all must declare that it has no jurisdiction or transfer the case to the court of another Member State. Here, the Court held as follows:

> *Where the court of a Member State does not have jurisdiction at all, it must declare of its own motion that it has no jurisdiction, but is not required to transfer the case to another court. However, in so far as the protection of the best interests of the child so requires, the national court*

which has declared of its own motion that it has no jurisdiction must inform, directly or through the central authority designated under Article 53 of Regulation No 2201/2003, the court of another Member State having jurisdiction.

See with regard to this case also our previous posts on the reference as well as Advocate General Kokott's opinion.