

# **Povse v. Alpago. ECJ preliminary ruling on Reg. (EC) No 2201/2003 under the urgent procedure**

On 3 May 2010, the Oberster Gerichtshof (Austria) referred to the ECJ for a preliminary ruling five questions concerning Regulation (EC) n° 2210/2003 . At the national court request, the reference was dealt with under the urgent procedure provided for in Article 104b of the Rules of Procedure; the reason for doing so was that contact between the child and her father had been broken, and that a delayed decision on enforcement of the judgment of the Tribunale per i Minorenni di Venezia of 10 July 2009 ordering return of the child to Italy would exacerbate the deterioration of the relationship between father and child, and thereby increase the risk of psychological harm if the child were sent back to Italy.

The ECJ's judgment in case C- 211/10 PPU was pronounced on 1 July 2010; it has been published today (OJ C 234, 28 August 2010).

## *The facts of the case*

Ms Povse and Mr Alpago lived together as an unmarried couple in Vittorio Veneto, Italy, until the end of January 2008 with their daughter Sofia, born 6 December 2006. In accordance with Article 317a of the Italian Civil Code, the parents had joint custody of the child. At the end of January 2008, the couple separated and Ms Povse left the family home taking her daughter Sofia with her. Although the Tribunale per i Minorenni di Venezia (Court for matters concerning minors in Venice), by a provisional and urgent decision of 8 February 2008 at the father's request, prohibited the mother from leaving Italy with the child, Ms Povse and her daughter travelled in February 2008 to Austria, where they have lived since that date.

On 16 April 2008 Mr Alpago brought an action before the Bezirksgericht Leoben (Austria) to obtain the return of his child to Italy on the basis of Article 12 of the 1980 Hague Convention.

On 23 May 2008 the Tribunale per i Minorenni di Venezia issued a judgment in which it revoked the prohibition on the mother leaving Italy with the child and awarded, provisionally, custody to both parents, while stating that the child could reside, pending final judgment, in Austria with her mother, to whom the court granted authority to make 'decisions of day to day organisation'. In the same provisional judgment, the Italian court ordered the father to share the costs of supporting the child, established conditions and times for the father to have access to the child and instructed an expert report from a social worker in order to determine the nature of the relationship between the child and the two parents.

Notwithstanding that judgment, a report drawn up on 15 May 2009 by the appointed social worker stated that the access permitted to the father by the mother was minimal and insufficient to allow the father's relationship with his daughter to be assessed, particularly with regard to his parental abilities. Accordingly the social worker concerned considered that he (the father) was unable to carry out his task fully and in the interests of the child.

On 3 July 2008 the Bezirksgericht Leoben dismissed Mr Alpago's action of 16 April 2008, but on 1 September 2008 that decision was set aside by the Landesgericht Leoben (Austria) on the ground that Mr Alpago had not been heard in accordance with Article 11(5) of the regulation.

On 21 November 2008 the Bezirksgericht Leoben again dismissed Mr Alpago's action, on the basis of the judgment of Tribunale per i Minorenni di Venezia of 23 May 2008, according to which the child could reside provisionally with her mother.

On 7 January 2009 the Landesgericht Leoben upheld the decision to dismiss Mr Alpago's action on the ground that there was a grave risk of psychological harm to the child, within the meaning of Article 13(b) of the 1980 Hague Convention.

Ms Povse brought an action before the Bezirksgericht Judenburg (Austria), which had local jurisdiction, requesting that custody of the child be granted to her. On 26 May 2009 that court, without allowing Mr Alpago the opportunity to state his case in accordance with the principle that both parties must be heard, declared that it had jurisdiction on the basis of Article 15(5) of Regulation 2201/2003, and asked the Tribunale per i Minorenni di Venezia to decline its jurisdiction.

However, Mr Alpago had already applied, on 9 April 2009, to the Tribunale per i Minorenni di Venezia, as part of the pending custody proceedings, for an order requiring the return of his child to Italy under Article 11(8) of the regulation. At a hearing arranged before that court on 19 May 2009, Ms Povse declared that she was willing to comply with the programme of meetings between father and daughter drawn up by the social worker. Ms Povse did not disclose her own legal action before the Bezirksgericht Judenburg, which led to the above mentioned decision of 26 May 2009.

On 10 July 2009 the Tribunale per i Minorenni di Venezia declared that it retained jurisdiction since, in its opinion, the conditions governing transfer of jurisdiction as provided for in Article 10 of the Regulation were not satisfied, and held that the inability of the social worker to complete his expert report as instructed by the court was due to the mother's failure to comply with the schedule which the social worker had drawn up in relation to access.

Moreover, by the same judgment of 10 July 2009, the Tribunale per i Minorenni di Venezia ordered the immediate return of the child to Italy and instructed the social services department of the town of Vittorio Veneto, in the event that the mother returned with the child, to make accommodation available to them and to establish an access schedule for the father. The return order was made on the ground that it was desirable to reestablish contact between the child and her father which had been broken because of the mother's attitude. For that purpose, the Tribunale per i Minorenni di Venezia issued a certificate under Article 42 of the regulation.

On 25 August 2009 the Bezirksgericht Judenburg issued an interim order, awarding provisional custody of the child to Ms Povse. That court sent a copy of that order by mail to the father in Italy, without any information on his right to refuse acceptance of service and without any translation. On 23 September 2009 that order became final and enforceable under Austrian law.

On 22 September 2009 Mr Alpago submitted an application to the Bezirksgericht Leoben for enforcement of the judgment of the Tribunale per i Minorenni di Venezia of 10 July 2009 ordering the return of his child to Italy. The Bezirksgericht Leoben dismissed that application on the ground that enforcement of the judgment of the Italian court represented a grave risk of psychological danger to the child. On an appeal brought by Mr Alpago against that decision, the

Landesgericht Leoben quashed the decision, on the basis of Case C-195/08 PPU Rinau [2008] ECR I-5271, and ordered return of the child.

Ms Povse brought an appeal against the decision of the Landesgericht Leoben seeking dismissal of the application for enforcement. Having doubts as to the interpretation of the regulation the Oberster Gerichtshof decided to stay proceedings and to refer to the Court five questions for a preliminary ruling.

### *The questions*

‘1. Is a “judgment on custody that does not entail the return of the child” within the meaning of Article 10(b)(iv) of [the Regulation] also to be understood as meaning a provisional measure by which “parental decision-making power” and in particular the right to determine the place of residence is awarded to the abducting parent pending the final judgment on custody?

2. Does a return order fall within the scope of Article 11(8) of [the Regulation] only where the court orders return on the basis of a judgment on custody delivered by that court?

3. If Question 1 or 2 is answered in the affirmative:

(a) Can the lack of jurisdiction of the court of origin (Question 1) or the inapplicability of Article 11(8) of [the Regulation] (Question 2) be relied on in the second State as against the enforcement of a judgment in respect of which the court of origin has issued a certificate in accordance with Article 42(2) of [the Regulation]?

(b) Or, in such circumstances, must the opposing party apply for that certificate to be revoked in the State of origin, thereby allowing enforcement in the second State to be stayed pending the decision in the State of origin?

4. If Questions 1 and 2 or Question 3(a) are/is answered in the negative:

Does a judgment delivered by a court in the second State and regarded as enforceable under the law of that State, by which provisional custody was awarded to the abducting parent, preclude the enforcement of an earlier return order made in the State of origin under Article 11(8) of [the Regulation], in

accordance with Article 47(2) of [the Regulation], even if it would not prevent the enforcement of a return order made in the second State under the Hague Convention?

5. If Question 4 is also answered in the negative:

(a) Can the second State refuse to enforce a judgment in respect of which the court of origin has issued a certificate under Article 42(2) of [the regulation] if, since its delivery, the circumstances have changed in such a way that enforcement would now constitute a serious risk to the best interests of the child?

(b) Or must the opposing party invoke that change of circumstances in the State of origin, thereby allowing enforcement in the second State to be stayed pending the judgment in the State of origin?

#### *AG's opinion*

The view of Advocate General Sharspton was delivered on 16 June 2010. After a quite long reasoning she concludes that:

'1) A provisional measure awarding custody of a child to the abducting parent pending the final (or lasting) judgment on custody is not a 'judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv) of Council Regulation (EC) No 2201/2003 .

2) A return order falls within the scope of Article 11(8) of Regulation No 2201/2003 irrespective of whether or not the court orders return on the basis of a judgment on custody delivered by that court.

3) Where a judgment certified by a court of a Member State in accordance with Article 42(2) of Regulation No 2201/2003 is challenged on the ground of the lack of jurisdiction of the court of origin or of the inapplicability of Article 11(8) of that regulation, the only possible legal remedy is to appeal against the judgment itself (and not against the certificate) before the courts of that Member State. The courts of the Member State of enforcement have no jurisdiction to refuse or stay enforcement.

4) A judgment delivered by a court in the State of enforcement, awarding

provisional custody to the abducting parent, does not preclude the enforcement of an earlier return order made by the State of origin under Article 11(8) of Regulation No 2201/2003.

5) Where a judgment certified by a court of a Member State in accordance with Article 42(2) of Regulation No 2201/2003 is challenged on the ground that its enforcement would constitute a serious risk to the best interests of the child, because the circumstances have changed since that judgment was delivered, the only possible legal remedy is to appeal against the judgment itself (and not against the certificate) before the courts of that Member State. The courts of the Member State of enforcement have no jurisdiction to refuse or stay enforcement.'

### *The judgment*

Quite close to the view of the Advocate General, the ECJ stated that

1. Article 10(b)(iv) 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 a provisional measure does not constitute a 'judgment on custody that does not entail the return of the child' within the meaning of that provision, and cannot be the basis of a transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed.
2. Article 11(8) of Regulation No 2201/2003 must be interpreted as meaning that a judgment of the court with jurisdiction ordering the return of the child falls within the scope of that provision, even if it is not preceded by a final judgment of that court relating to rights of custody of the child.
3. The second sub-paragraph of Article 47(2) of Regulation No 2201/2003 must be interpreted as meaning that a judgment delivered subsequently by a court in the Member State of enforcement which awards provisional rights of custody and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously by the court which has jurisdiction in the Member State of origin and ordering the return of the child.

4. Enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the court which has jurisdiction in the Member State of origin, which should also hear any application to suspend enforcement of its judgment.