

# Opinion on first Reference for a Preliminary Ruling on Brussels II bis

On 20 September, *Advocate General Kokott* has delivered her opinion on the first reference for a preliminary ruling on the Brussels II *bis* Regulation (Regulation 2201/2003/EC) - *Applicant C*, C-435/06.

The background of the case is as follows: *Applicant C*. has lived with her two minor children and her husband in Sweden. In February 2005, the competent Swedish authority ordered - due to investigations which had been carried out in beforehand - the immediate taking into custody of both children as well as their placement in a foster family outside the home. These protective measures are regarded as public acts in Finland and Sweden. Before the decision of the acting Swedish authority was approved by the *Länsrätt*, *C*. had moved with her children to Finland. After the approval of the decision by the *Länsrätt*, the Swedish police requested administrative assistance from the Finnish police with regard to the enforcement of the Swedish decision. Subsequently, the Finnish police ordered the immediate taking into custody of the children as well as their committal to the Swedish social authorities. After her action against the acts taken by the Finnish authorities at the *Hallinto-oikeus* had failed, the mother, *C.*, appealed to the highest administrative court in Finland, the *Korkein Hallinto-oikeus*, and claimed first to set aside the decision of the *Hallinto-oikeus*, second to revoke the order made by the police and third to bring back the children to Finland. The *Korkein Hallinto-oikeus*, however, had doubts whether the Brussels II *bis* Regulation was applicable. This was decisive since in case of the applicability of the Regulation, Finnish civil - and not administrative - courts would be competent in this case. Further, rules existing within the framework of an cooperation among the administrative authorities in the Nordic States would be superseded by the Regulation. Consequently, the *Korkein Hallinto-oikeus* referred with decision of 13 October 2006 the following questions to the ECJ for a preliminary ruling:

*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 11a Regulation) <sup>2</sup>apply, in a case such as the present, to the enforcement of a public law decision in connection with child welfare, relating to the immediate taking into custody of a child and his or her placement in a foster family outside the home, taken as a single decision, in its entirety;*

*(b) or solely to that part of the decision relating to placement outside the home in a foster family, having regard to the provision in Article 1(2)(d) of the regulation;*

*(c) and, in the latter case, is the Brussels IIa Regulation applicable to a decision on placement contained in one on taking into custody, even if the decision on custody itself, on which the placement decision is dependent, is subject to legislation, based on the mutual recognition and enforcement of judgments and administrative decisions, that has been harmonised in cooperation between the Member States concerned? If the answer to*

*Question 1(a) is in the affirmative, is it possible, given that the Regulation takes no account of the legislation harmonised by the Nordic Council on the recognition and enforcement of public law decisions on custody, as described above, but solely of a corresponding private law convention, nevertheless to apply this harmonised legislation based on the direct recognition and enforcement of administrative decisions as a form of cooperation between administrative authorities to the taking into custody of a child?*

*If the answer to Question 1(a) is in the affirmative and that to Question 2 is in the negative, does the Brussels IIa Regulation apply temporally to a case, taking account of Articles 72 and 64(2) of the regulation and the abovementioned harmonised Nordic legislation on public law decisions on custody, if in Sweden the administrative authorities took their decision both on immediate taking into custody and on placement with a family on 23.2.2005 and submitted their decision on immediate custody to the administrative court for confirmation on 25.2.2005, and that court accordingly confirmed the decision on 3.3.2005?*

Of particular interest is the **first question** referred to the ECJ: With this question, the Finnish referring court basically aims to know whether a decision ordering the immediate taking into custody of a child and his or her placement

outside the home falls within the scope of application of Brussels II *bis*. To answer this question, the Advocate General examines two questions: First, can the immediate taking into custody of a child and his or her placement outside home be qualified as measures concerning parental responsibility in terms of the Regulation? And secondly, do they constitute civil matters?

The first of these questions can be answered easily with regard to the placement of a child in a foster family or in institutional care, since this measure is explicitly mentioned in Art. 1 (2) (d) Brussels II *bis*. In contrast to that, the immediate taking into custody of a child is not referred to in Art. 1 (2) of the Regulation. However, the Advocate General argues - in accordance with several Member States - that the immediate taking into custody of a child and his or her placement in a foster family or in institutional care were connected very strongly (para. 28). As Art. 1 (1) (b) Brussels II *bis* showed, matters of parental responsibility included not only measures regarding the termination or delegation of parental responsibility, but also measures concerning the exercise of parental responsibility. Even though the parents did not lose their custody as such in case of an immediate taking into custody or in case of the placement of the child outside home, they could not exercise essential parts of it anymore (para. 30). Consequently, also the immediate taking into custody of a child constitutes, according to the Advocate General, a matter of parental responsibility.

Of particular interest are the Advocate General's remarks with regard to the second problem - namely the question whether these kind of measures can be regarded as civil matters. Regarding this question, the Swedish government argued, protective measures, such as the immediate taking into custody and the placement of a child in a foster family, did not constitute "civil matters" since they were ordered by public authorities acting in the exercise of their public powers (para. 34). Thus, the Swedish government applied the principles of delimitation which have been elaborated by the ECJ with regard to the Brussels Convention - most recently in *Lechouritou* - also with regard to Brussels II *bis*. This point of view is not shared by the Advocate General. She argues that the aims and the history of the Brussels Convention - with regard to which the delimitation between public and civil matters has been developed - did not necessarily correspond with those of the Brussels II *bis* Regulation. Consequently, the term of "civil matters" had to be interpreted independently with regard to the Brussels II *bis* Regulation (para. 38). Here the Advocate General argues that the restriction

or termination of parental responsibility (Art. 1 (1) (b) Brussels II *bis*) are usually ordered by public authorities. Further, the measures explicitly mentioned in Art. 1 (2) Brussels II *bis* constituted in general public protective measures. This enumeration would not make any sense, if one regarded those measures not as civil matters because a private party (parents) and a public authority are concerned (paras. 40, 41). Further, also recital No. 5 („[...] this Regulation covers all decisions on parental responsibility, including measures for the protection of the child“ [...]) showed that the term of “civil matters” had to be interpreted in an extensive way (para. 42). This was also the case if the measure in question is regarded as a public matter in one Member State (para. 44). Consequently, the Advocate General regards decisions on the immediate taking into custody of a child and the placement of a child in a foster family as civil matters which concern parental responsibility and fall therefore within the scope of the Brussels II *bis* Regulation (para. 53).

With regard to the **second question** referred to the ECJ, the Advocate General holds that Finland and Sweden are - insofar as Brussels II *bis* is applicable - restrained from applying derogating national rules (para. 60).

*The Opinion is not available in English yet, but can be found in several languages, inter alia in Spanish, German, Italian and French on the ECJ's website.*

*See also our older post regarding the reference for a preliminary ruling which can be found here.*