JUDGMENT OF THE COURT (Second Chamber)

15 July 2010 *

In Case C-256/09,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Bundesgerichtshof (Germany), made by decision of 10 June 2009, received at the Court on 10 July 2009, in the proceedings

Bianca Purrucker

v

Guillermo Vallés Pérez,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of Chamber, P. Lindh, A. Rosas (Rapporteur), U. Lõhmus and A. Arabadjiev, Judges,

* Language of the case: German.

Advocate General: E. Sharpston,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 17 March 2010,

after considering the observations submitted on behalf of:

— Ms Purrucker, by B. Steinacker, Rechtsanwältin,

— the German Government, by J. Möller and J. Kemper, acting as Agents,

— the Czech Government, by M. Smolek, acting as Agent,

— the Spanish Government, by J. López-Medel Báscones, acting as Agent,

— the Italian Government, by G. Palmieri, acting as Agent, and by G. Russo, avvocato dello Stato,

— the Hungarian Government, by R. Somssich, K. Szíjjártó and S. Boreczki, acting as Agents,

— the Portuguese Government, by L. Inez Fernandes, acting as Agent,

— the United Kingdom Government, by H. Walker, acting as Agent, and by K. Smith, barrister,

— the European Commission, by A.-M. Rouchaud-Joët and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 May 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation 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).

2 The reference was made in an appeal brought before the Bundesgerichtshof by Ms Purrucker, the mother of the children Merlín and Samira Purrucker, against the decision of the Oberlandesgericht Stuttgart (Germany) of 22 September 2008 in so far as it ordered the enforcement of a judgment of the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial (Spain) awarding custody of those children to their father.

Legal context

3 The Convention on the Civil Aspects of International Child Abduction was signed on 25 October 1980 within the framework of the Hague Conference on private international law ('the 1980 Hague Convention'). It entered into force on 1 December 1983. All Member States of the European Union are contracting parties to the convention.

4 The 1980 Hague Convention contains various provisions intended to ensure the immediate return of a child who is unlawfully removed or retained.

5 Article 16 of the 1980 Hague Convention provides, inter alia, that after receiving notice of a wrongful removal or retention of a child, the judicial authorities of the Contracting State to which the child has been removed or in which it has been retained is not to decide on the merits of rights of custody until it has been determined that the conditions of that convention for the return of the child are not met.

6 The convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children was signed on 19 October 1996, also within the framework of the Conference on private international law ('the 1996 Hague Convention'). It replaced the convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants.

7 A number of Member States, including the Federal Republic of Germany and the Kingdom of Spain, have not ratified the 1996 Hague Convention. They were authorised to do so by Council Decision 2008/431/EC of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law (OJ 2008 L 151, p. 36).

8 In Chapter II of the 1996 Hague Convention, which is entitled 'Jurisdiction', Article 11 is worded as follows:

'1. In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.

2. The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.

3. The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.'

9 In Chapter IV of the 1996 Hague Convention, which is entitled 'Recognition and Enforcement', Article 23 provides:

'1. The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.

2. Recognition may however be refused:

(a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;

...'

10 Article 26 of that convention, which is also part of Chapter IV, states:

'1. If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State.

...

3. The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 23, paragraph 2.'

11 Article 31 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) provides:

'Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.'

12 Similar provision is made in Article 24 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1972 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and – amended version – p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1) ('the Brussels Convention').

13 Before the entry into force of Regulation No 2201/2003, the Council of the European Union had drawn up, by act of 28 May 1998, on the basis of Article K.3 of the Treaty on European Union, the Convention on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters (OJ 1998 C 221, p. 1, 'the Brussels II Convention').

That convention did not enter into force. Since its text was the inspiration for Regulation No 2201/2003, the explanatory report on that convention (OJ 1998 C 221, p. 27), prepared by Dr A. Borrás, has been called in aid to clarify the interpretation of that regulation.

14 Regulation No 2201/2003 was preceded by Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (OJ 2000 L 160, p. 19). Regulation No 1347/2000 was repealed by Regulation No 2201/2003, the scope of which is broader.

15 Recitals 12, 16, 21 and 24 in the preamble to Regulation No 2201/2003 state:

'(12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

...

(16) This Regulation should not prevent the courts of a Member State from taking provisional, including protective measures, in urgent cases, with regard to persons or property situated in that State.

…

(21) The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.

…

(24) The certificate issued to facilitate enforcement of the judgment should not be subject to appeal. It should be rectified only where there is a material error, i.e. where it does not correctly reflect the judgment.'

16 Under Article 2 of Regulation No 2201/2003:

'For the purposes of this Regulation:

(1) the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1;

…

(4) the term "judgment" shall mean … 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) the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;

…

(9) the term "rights of custody" shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;

…

(11) the term "wrongful removal or retention" shall mean a child's removal or retention where:

(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention

and

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.'

17 Article 8(1) of that regulation provides:

'The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.'

18 Article 9(1) of Regulation No 2201/2003 provides:

'Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.'

19 Article 10 of the regulation provides:

'In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State …'

20 Article 19(2) of Regulation No 2201/2003 provides:

'Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.'

21 Article 20 of the regulation, entitled 'Provisional, including protective, measures', provides:

'1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.'

22 Article 21 et seq. of Regulation No 2201/2003 relate to the recognition and enforcement of judgments. Article 21(1) provides in particular that a judgment given in a Member State is to be recognised in the other Member States without any special procedure being required.

23 Article 24 of Regulation No 2201/2003 provides that the jurisdiction of the court of the Member State of origin may not be reviewed.

24 Article 39 of the regulation provides for the issue of a certificate. As is evident from Annex II to the regulation, which lists the details to appear in the certificate, the certificate requires various procedural details, including confirmation ['attestation'] that the judgment is enforceable and that service of the judgment has been effected.

25 Article 46 of the regulation provides:

'Documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments.'

26 Article 60 of Regulation No 2201/2003 provides that the regulation is to take precedence over, inter alia, the 1980 Hague Convention. Article 61 of the regulation concerns the relationship between Regulation No 2201/2003 and the 1996 Hague Convention.

The facts in the main proceedings and the ongoing proceedings

27 The order for reference states that in mid-2005 Ms Purrucker went to Spain to live with Mr Vallés Pérez. She gave birth to twins who were born prematurely in May 2006. The boy, Merlín, was able to leave hospital in September 2006. The girl, Samira, could do so only in March 2007, after intervening complications.

28 By that time, the relationship between Ms Purrucker and Mr Vallés Pérez had deteriorated: Ms Purrucker wanted to return to Germany with her children, while Mr Vallés Pérez was, initially, opposed to this. On 30 January 2007 the parties signed an agreement before a notary which had to be approved by a court in order to be enforceable. Clauses 2 and 3 of that agreement are worded as follows:

'Second – It is agreed that the infant children of the couple are subject to the parental responsibility of the father and the mother both of whom will have custody, without prejudice to the father's right of access to his children, which he can freely exercise at any time and as he wishes, provided that the parties agree to fix the place of residence in the manner prescribed below in paragraph 3.

Third – As regards the place of residence of the mother and children, it is agreed that Ms Purrucker is to move with them to Germany where she is to establish the permanent place of residence and notify it to the children's father, who expressly consents to the mother moving with the children to that country, provided that the mother recognises the father's access rights and that she allows him to visit his children at any time, as he wishes, subject to prior notification to the mother of the dates of visits.

The place of residence shall be permanent, without prejudice to decisions which the couple's children may take on attaining majority.'

29 Ms Purrucker intended to return to Germany with her son D., the child of a previous relationship, and her children Merlín and Samira.

30 Because of complications and the need for surgery, the child Samira could not leave hospital. On 2 February 2007 Ms Purrucker therefore left for Germany with her son Merlín. According to Ms Purrucker's statements to the referring court, her daughter Samira was also to be brought to Germany after she left hospital.

31 There are three sets of proceedings under way involving Ms Purrucker and Mr Vallés Pérez:

— the first, brought in Spain by Mr Vallés Pérez, concerns the granting of provisional measures. It appears that, under certain conditions, these proceedings could be regarded as substantive proceedings concerned with the award of rights of custody of the children Merlín and Samira;

— the second, brought by Ms Purrucker in Germany, is concerned with the award of rights of custody of the abovementioned children;

— the third, brought in Germany by Mr Vallés Pérez, concerns the enforcement of the judgment of the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial granting provisional measures. Those are the proceedings which have given rise to the reference for a preliminary ruling.

The proceedings commenced in Spain to obtain the grant of provisional measures

32 Since Mr Vallés Pérez no longer felt bound by the agreement signed before a notary, he brought proceedings in June 2007 to obtain the granting of provisional measures and, in particular, rights of custody of the children Samira and Merlín, before the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial.

33 The hearing took place on 26 September 2007. Ms Purrucker submitted written observations and was represented at the hearing.

34 By judgment of 8 November 2007, the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial adopted urgent and provisional measures.

35 As is clear from that judgment, annexed to the observations submitted by Ms Purrucker to the Court, that Spanish court states:

'In addition to the relevant substantive Spanish law, the action is based on [the 1980 Hague Convention] (Articles 1 and 2) and on Regulation … No 2201/2003 and the agreement between the Kingdom of Spain and the Federal Republic of Germany of 14 November 1983 on the jurisdiction of the Spanish courts (Article 8).'

36 In paragraph 3 of the grounds, the judgment states the following:

'Third – In the first place, having regard to the European law which is pleaded and the conventions ratified by the Kingdom of Spain and the Federal Republic of Germany in relation to family law, rights of custody and maintenance for children, this court has full jurisdiction given that the parents resided in Spain, that the last family home was established there (Article 769(3) of the Ley de Enjuiciamiento Civil (Spanish code of civil procedure)); Article 1 of [the 1980 Hague Convention] – the court with jurisdiction is that of the place where the child was habitually resident – Merlín was recorded by the census as present in Colmenarejo and his habitual residence was in Spain until his departure for Germany on 2 February 2007.

In addition, the applicant is Spanish, he habitually resides in Spain and these are the first proceedings brought in relation to this case in Spain. This court declared that it had jurisdiction in the order of 28 June holding the action to be admissible, and in the subsequent order of 20 September. Therefore, the court in Albstadt must, if the need arises, be the court which declines jurisdiction in favour of the Spanish court in accordance with Article 19 of [Regulation No 2201/2003]. A court may decline jurisdiction only if the parties have brought before courts of different Member States actions concerning parental responsibility for a child which have the same subject-matter and the same cause of action. It appears that the proceedings subsequently commenced in Germany by Bianca Purrucker consist in a simplified procedure seeking to obtain from the father, Guillermo Vallés, payment of maintenance for the child Merlín. Those proceedings were registered under Number 8FH13/07 by the court for family matters in Albstadt.

The legal representative of Bianca Purrucker submitted at the hearing that this court did not have jurisdiction because, first, Merlín was legally residing in Germany and, consequently, the interests of that child should be dealt with in Germany, and, secondly, the parties had come to a private agreement.

The applicant is opposed (to the referral of the case to the German court) because he does not know Merlín's actual state of health; it is unknown whether the mother will one day return to Spain; the mother left when Samira was close to death. Further, the private agreement was not judicially ratified; it was not approved by the Public Prosecutor; and it may have been entered into because of pressure and deception.

At the hearing, the Public Prosecutor stated that this court has jurisdiction on the ground that the agreement between the parties has not been judicially approved and that urgency requires the adoption of provisional measures. The Public Prosecutor bases the jurisdiction of the Spanish court on the applicant's habitual domicile in Spain, the fact that the deed of private agreement was jointly entered into in Spain and the fact that the child Merlín was born in Spain; the Public Prosecutor questions the legality of Merlín's departure from Spain.

We therefore confirm the jurisdiction of this court to rule on the application for provisional measures.'

37 As reported by the Bundesgerichtshof in the order for reference, the provisional measures which were adopted are in the following terms:

'As a precautionary measure, the court, ruling on the application by Mr Guillermo Vallés Pérez against Ms Bianca Purrucker, adopts the following urgent and immediate provisional measure:

1. Joint rights of custody of the two children Samira and Merlín Vallés Purrucker are awarded to the father, Mr Guillermo Vallés Pérez; both parents are to retain parental responsibility.

In implementation of this measure, the mother must return the infant son Merlín to his father who is domiciled in Spain. Appropriate measures must be taken to allow the mother to travel with the boy and to visit Samira and Merlín whenever she wishes, and, for that purpose, accommodation, which may serve as a family meeting-place, must be placed at her disposal or may be placed at her disposal by a family member or by the trusted person who must be present during the visits for the entire time which the mother spends with the children, it being understood that the accommodation concerned may be that of the father if both parties so agree.

2. Prohibition on leaving Spain with the children without the court's prior approval.

3. Delivery of passports of each of the children to the possession of the parent exercising rights of custody.

4. Any change in the residence of the two children Samira and Merlín is subject to the prior approval of the court.

5. No maintenance obligation is imposed on the mother.

No order is made in relation to costs.

If substantive proceedings are brought, this order is to be registered with the relevant procedural documents.

This order must be duly served on the parties and on the public prosecutor, with notice that no appeal lies against this order.'

38 As is evident from documents annexed to the observations of Ms Purrucker, the judgment of the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial of 8 November 2007 was the subject of a correcting judgment dated 28 November 2007. Paragraph 1 of the operative part was corrected so as to award to the father 'rights of custody' and no longer 'joint rights of custody'.

39 On 11 January 2008 the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial issued a certificate pursuant to Article 39(1) of Regulation No 2201/2003, certifying that its judgment was enforceable and that notice of it had been served.

40 It appears that Mr Vallés Pérez brought substantive proceedings; that on 28 October 2008 the court seised ruled on those proceedings; and that an appeal has been brought against the judgment of that date.

The procedure commenced in Germany in order to obtain rights of custody

41 On 20 September 2007 – in other words, before delivery of the judgment of the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial – Ms Purrucker had brought substantive proceedings before the Amtsgericht Albstadt (the local court in Albstadt, Germany) seeking custody of the children Merlín and Samira. In accordance with Article 16 of the 1980 Hague Convention, the custody proceedings were postponed from 19 March to 28 May 2008, then assigned to the Amtsgericht Stuttgart (Germany), in accordance with Article 13 of the German Law on the enforcement and

application of various legal instruments on international family law (Gesetz zur Aus- und Durchführung bestimmter Rechtsinstrumente auf dem Gebiet des internationalen Familienrechts). The Amtsgericht Stuttgart declined to issue a new provisional measure relating to rights of custody of the two children concerned. It made no ruling on the substance of the case, but expressed doubts as to its international jurisdiction. By a judgment dated 8 December 2008, the Amtsgericht Stuttgart held that, by the judgment of 28 October 2008 referred to in paragraph 40 of this judgment, the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial had declared itself to be the court first seised within the meaning of Articles 16 and 19(2) of Regulation No 2201/2003. The Amtsgericht Stuttgart therefore stayed its proceedings in accordance with Article 19(2) of the regulation until the judgment of the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial acquired the force of *res judicata*.

42 Ms Purrucker brought an appeal against the judgment of the Amtsgericht Stuttgart. On 14 May 2009 the Oberlandesgericht Stuttgart set aside that judgment and referred the case back to the Amtsgericht Stuttgart for reconsideration. The Oberlandesgericht Stuttgart held that a court is bound to assess its own jurisdiction and that Article 19 of Regulation No 2201/2003 does not confer on any of the courts which are seised exclusive jurisdiction to decide which court was first seised. The Oberlandesgericht Stuttgart observed that the application for rights of custody brought in Spain in June 2007 by Mr Vallés Pérez was part of proceedings brought for the granting of provisional measures, whereas the application for rights of custody brought in Germany on 20 September 2007 by Ms Purrucker was an action relating to the substance of the matter. The legal issues and claims concerned by such an action are different from those concerned by interlocutory proceedings.

43 By an order dated 8 June 2009, the Amtsgericht Stuttgart asked the parties what stage had been reached by the proceedings commenced in Spain and invited their views on the possibility of referring to the Court a question relating to how the court first seised was to be determined, in accordance with Article 104a of the Court's Rules of Procedure.

The proceedings commenced in Germany to obtain enforcement of the judgment delivered by the Spanish court

44 These are the proceedings which have given rise to this reference for a preliminary ruling. Mr Vallés Pérez first requested, inter alia, the return of the child Merlín and brought, as a precautionary measure, an action for a declaration that the judgment delivered by the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial was enforceable. Next, he sought, as a matter of priority, the enforcement of that judgment. Consequently, the Amtsgericht Stuttgart, by a decision of 3 July 2008, and the Oberlandesgericht Stuttgart, by a decision on appeal of 22 September 2008, ordered enforcement of the judgment of the Spanish court and warned the mother that she could be fined if she did not comply with the order.

45 The Bundesgerichtshof gives the following summary of the decision of the Oberlandesgericht Stuttgart:

'There are no grounds on which the enforceability of the Spanish court's judgement can be denied. While the decision of the Spanish court is a provisional measure, Article 2(4) of Regulation No 2201/2003 makes no distinction according to the form of the decision in the context of the recognition and enforcement of judgments from other Member States, and it requires merely a "judgment". Even if the children common to the parties were not heard before the Spanish court, the failure to give a hearing does not infringe any fundamental procedural rule of German law, *a fortiori* given that the children were only 18 months old when the judgment was delivered. The certificate issued by the Spanish court pursuant to Article 39 of Regulation No 2201/2003 prevails over the doubts presented by the defendant about the enforceability of the Spanish judgment, because of the lateness in bringing substantive proceedings. Nor are there any grounds of non-recognition for the purposes of Article 23 of Regulation

No 2201/2003. In particular, there is no infringement of German public policy; the rights of the defence were respected by summoning the defendant to the hearing. The fact that she did not personally attend the hearing, but was satisfied with being represented by her lawyer, was her own choice. In recognition and enforcement proceedings, this court cannot undertake a review of the substance of the case on rights of custody as determined in Spain.'

46 In the appeal which Ms Purrucker brought before the Bundesgerichtshof, she challenges the judgment of the Oberlandesgericht Stuttgart of 22 September 2008 on the ground that, under Article 2(4) of Regulation No 2201/2003, the recognition and enforcement of judgments delivered by the courts of other Member States is not applicable to provisional measures within the meaning of Article 20 of that regulation, because they cannot be classed as judgments relating to parental responsibility.

The order for reference and the question referred for a preliminary ruling

47 The Bundesgerichtshof observes that the question whether the provisions laid down in Article 21 et seq. of Regulation No 2201/2003 are also applicable to provisional measures within the meaning of Article 20 of that regulation or only to judgments on the substance is a matter of debate in academic writing which has not been definitively resolved by the case-law.

48 One argument is that provisional measures within the meaning of Article 20 of Regulation No 2201/2003 are in principle excluded from the scope of the provisions on recognition and enforcement, as laid down in Articles 21 et seq. of that regulation. Article 20 of that regulation contains no more than a simple rule of jurisdiction. The

judgment in Case C-523/07 *A* [2009] ECR I-2805, paragraph 46 et seq., may support that argument, in that it states that provisional measures within the meaning of Article 20 of Regulation No 2201/2003 must be temporary, and that national law must determine how those measures are to be enforced and whether they are binding. If such is the case, Ms Purrucker's appeal must be upheld.

49 Some argue that the scope of Article 2(4) of Regulation No 2201/2003 extends to provisional measures adopted by a court which has jurisdiction in substantive proceedings, provided that the rights of the defence are safeguarded, at least *a posteriori*. That principle is consistent with the Court's case-law to the effect that a hearing *a posteriori* is sufficient to ensure that proceedings are fair (Case 166/80 *Klomps* [1981] ECR 1593). Others argue that the applicability of Regulation No 2201/2003 to provisional measures should be limited to those which have been taken in adversary proceedings, where the rights of the defence are respected.

50 In the latter two cases, the success of the appeal would depend on whether, in the proceedings which gave rise to the provisional measure, Ms Purrucker did in fact exercise the right to be heard. In the opinion of the referring court, an affirmative answer to that question is favoured by the fact that Ms Purrucker was summoned to the hearing, and was represented there by a lawyer, and that the children are at an age when no additional information could be expected from hearing them.

51 Lastly, there is also an argument that all provisional measures are governed by the system established by Regulation No 2201/2003. First, provisional measures taken under Article 20 of Regulation No 2201/2003 are regarded as judgments within the meaning of Article 2(4) thereof, to which the provisions laid down in Article 21 et seq. of that regulation, relating to recognition and enforcement, are applicable. Secondly, the proponents of this argument even maintain that if provisional measures within

the meaning of Article 20 of Regulation No 2201/2003 were not covered by the definition of a 'judgment' provided in Article 2(4), the provisions laid down in Article 21 et seq. of the regulation, relating to the recognition and enforcement of judgments delivered in other Member States, would none the less apply to such measures. According to such an argument, Article 21 et seq. unquestionably applies to the provisional measure adopted by the Spanish court, and the appeal must be dismissed.

52 The Bundesgerichtshof observes that the judgment of the Spanish court is not contrary to German public policy.

53 In the light of the foregoing, the Bundesgerichtshof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Do the provisions of Article 21 et seq. of [Regulation No 2201/2003] concerning the recognition and enforcement of decisions of other Member States, in accordance with Article 2(4) of that regulation, also apply to enforceable provisional measures, within the meaning of Article 20 of that regulation, concerning the right to child custody?'

Procedure before the Court

54 In accordance with Article 54a of the Rules of Procedure, the Judge-Rapporteur and the Advocate General asked Ms Purrucker to submit to the Court the judgments of 8 December 2008, 14 May 2009 and 8 June 2009, which are referred to in paragraphs 41, 42 and 43 of this judgment and to which Ms Purrucker made reference in her observations.

55 It is clear from the observations submitted that, in all probability, only Ms Purrucker and the Spanish Government had been aware of the grounds stated in the judgment of the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial of 8 November 2007, particularly those relating to the jurisdiction of the Spanish court. Several of the governments which submitted observations proposed answers to the question referred which were based on the assumption that that jurisdiction was established, whereas the European Commission envisaged various possibilities.

56 When that judgment, annexed to the observations of Ms Purrucker, was notified to the parties concerned for the purposes of Article 23 of the Statute of the Court of Justice of the European Union, the Court invited those parties again to state their views in writing on the question referred, taking into consideration paragraph 3 of that judgment, as set out in paragraph 36 of this judgment. The Court also invited the Spanish Government to provide some clarification on the procedure for the granting of provisional measures in cases such as that before the referring court.

The question referred for a preliminary ruling

57 By its question, the Bundesgerichtshof asks whether the provisions laid down in Article 21 et seq. of Regulation No 2201/2003 also apply to enforceable provisional measures, relating to rights of custody, within the meaning of Article 20 of that regulation.

58 The relevance of that question has been challenged, first, on the ground that the provisional measures concerned in the main proceedings do not fall within the scope of Article 20 of that regulation, since they were taken by a court which had jurisdiction as to the substance of the matter and, secondly, on the ground that even if those measures had been taken by a court which did not have jurisdiction as to the substance of the matter, they could not in any event fall within the scope of that provision in so far as they related to the child Merlín, since he was not in Spain when the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial delivered its judgment.

59 Those contradictory arguments reveal the need, when interpreting Article 20 of Regulation No 2201/2003, to consider not only the effects of a decision which falls within the scope of that provision but also the question of which decisions fall within its scope.

60 Article 20 of Regulation No 2201/2003 is the last article of Chapter II of the regulation, on jurisdiction. It is not one of the articles dealing specifically with jurisdiction in relation to parental responsibility, which make up Section 2 of that chapter, but is part of Section 3, entitled 'Common provisions'.

61 It is evident from the position of Article 20 in the structure of Regulation No 2201/2003 that it cannot be regarded as a provision which determines substantive jurisdiction for the purposes of that regulation.

62 That finding is supported by the wording of Article 20, which merely states that, in urgent cases, the provisions laid down in Regulation No 2201/2003 'shall not prevent' the courts of a Member State from taking such provisional, including protective, measures as may be available under the law of that Member State even if, under that regulation, a court of another Member State has jurisdiction as to the substance of

the matter. Likewise, Recital 16 in the preamble states that the regulation 'should not prevent' the adoption of such measures.

63 It follows that Article 20 of Regulation No 2201/2003 can cover only measures adopted by courts which do not base their jurisdiction, in relation to parental responsibility, on one of the articles in Section 2 of Chapter II of the regulation.

64 It is therefore not only the nature of the measures which may be adopted by the court – provisional, including protective, measures as opposed to judgments on the substance – which determines whether those measures may fall within the scope of Article 20 of the regulation but rather, in particular, the fact that the measures were adopted by a court whose jurisdiction is not based on another provision of that regulation.

65 The case before the referring court shows that it is not always straightforward, from reading a judgment, to make such a classification of a judgment adopted by a court for the purposes of Article 2(1) of Regulation No 2201/2003. The Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial declares that the action is based on the relevant substantive Spanish law, on the 1980 Hague Convention, on Regulation No 2201/2003 and on the agreement between the Kingdom of Spain and the Federal Republic of Germany of 14 November 1983 on the jurisdiction of the Spanish courts. Of those provisions, that court appears to base its jurisdiction more specifically on Article 769(3) of the Spanish code of civil procedure and Article 1 of the 1980 Hague Convention. As regards the facts which, in the light of those provisions, support that assumption of jurisdiction, the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial refers cumulatively to the residence of the parents, the last family home, the child's habitual residence until his departure to Germany, the nationality of the applicant, the applicant's habitual residence in Spain and to the fact the proceedings before the court are the first brought on the matter in Spain. Lastly, the court refers to the opinion of the Public Prosecutor who, aside from the abovementioned factors,

takes into consideration the fact that the document signed before a notary was jointly entered into in Spain and the fact that the child Merlín was born in Spain.

66 It is clear that most of the facts referred to by the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial do not represent criteria capable of establishing jurisdiction under Articles 8 to 14 of Regulation No 2201/2003. As regards the facts representing criteria specified in Articles 8, 9 and 10 of that regulation which are capable of establishing such jurisdiction, namely the child's habitual residence and the child's former habitual residence, they do not make it possible to ascertain on which of those three provisions that court relied, if it did so, to hold that it had jurisdiction under that regulation.

67 As is evident from the observations submitted to the Court and the difficulties encountered by the parties concerned who submitted observations in proposing an answer to the question referred, the effect of all those factors is to create substantial doubt, on reading the judgment of the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial, as to whether that court recognised the primacy of Regulation No 2201/2003 over the other provisions referred to in that judgment and how it applied that regulation to the facts of the case.

68 In the opinion of the Czech Government, the principle of mutual trust which underpins Regulation No 2201/2003 requires – when it is not expressly stated that a judgment falls within the scope of Article 20 of the regulation – a presumption that a court which adopts a judgment has jurisdiction for the purposes of that regulation. In the opinion of Ms Purrucker and the German Government, on the other hand, a lack of clarity as to whether jurisdiction for the purposes of Regulation No 2201/2003 exists ought on the contrary to entail a presumption that that judgment is a measure falling within the scope of Article 20 of that regulation.

69 In that regard, it should be borne in mind that, as a part of European Union law, Regulation No 2201/2003 takes precedence over national law. Furthermore, it takes precedence over most of the international conventions concerning the matters within its scope, under the conditions referred to in Articles 59 to 63.

70 As is evident from Recital 2 in the preamble to Regulation No 2201/2003, the principle of mutual recognition of judicial decisions is the cornerstone for the creation of a genuine judicial area.

71 As stated in Recital 21 of the regulation, that recognition should be based on the principle of mutual trust.

72 It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of Regulation No 2201/2003 are required to respect, and as a corollary the waiver by Member States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in matters of parental responsibility (see, by analogy, in relation to insolvency proceedings, Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 40).

73 That principle of mutual trust implies that the court of a Member State hearing an application relating to parental responsibility must determine whether it has jurisdiction having regard to Articles 8 to 14 of Regulation No 2201/2003 (see, by analogy, *Eurofood IFSC*, paragraph 41) and that it must be clearly evident from the judgment delivered by that court that the court concerned has intended to respect the directly applicable rules of jurisdiction, laid down by that regulation, or that the court has made its ruling in accordance with those rules.

74 The other side of the coin, as stated in Article 24 of the regulation, is that courts of other Member States may not review the assessment made by the first court of its jurisdiction.

75 That prohibition does not preclude the possibility that a court to which a judgment is submitted which does not contain material which unquestionably demonstrates the substantive jurisdiction of the court of origin may determine whether it is evident from that judgment that the court of origin intended to base its jurisdiction on a provision of Regulation No 2201/2003. As stated by the Advocate General in point 139 of her Opinion, to make such a determination is not to review the jurisdiction of the court of origin but merely to ascertain the basis on which that court considered itself competent.

76 It follows from the above that where the substantive jurisdiction, in accordance with Regulation No 2201/2003, of a court which has taken provisional measures is not, plainly, evident from the content of the judgment adopted, or where that judgment does not contain a statement, which is free of any ambiguity, of the grounds in support of the substantive jurisdiction of that court, with reference made to one of the criteria of jurisdiction specified in Articles 8 to 14 of that regulation, it may be inferred that that judgment was not adopted in accordance with the rules of jurisdiction laid down by that regulation. None the less, that judgment may be examined in the light of Article 20 of the regulation, in order to determine whether it falls within the scope of that provision.

77 Article 20 of Regulation No 2201/2003 provides that a number of conditions must be satisfied. As the Court has made clear, the authority of the courts covered by Article 20(1) of that regulation to adopt provisional, including protective, measures is subject to three cumulative conditions, namely:

— the measures concerned must be urgent;

— they must be taken in respect of persons or assets in the Member State where those courts are situated; and

— they must be provisional (*A*, paragraph 47, and Case C-403/09 PPU *Detiček* [2009] ECR I-12193, paragraph 39).

78 It follows that any judgment in which it is not clear that it has been adopted by a court which has or claims to have substantive jurisdiction does not necessarily fall within the scope of Article 20 of Regulation No 2201/2003, but falls within the scope of that provision solely where it satisfies the conditions laid down in Article 20.

79 As regards the effects of a measure falling within the scope of Article 20 of the regulation, the Court has held that, since such a measure is adopted on the basis of provisions of national law, the binding nature of that measure must stem from the national legislation concerned (*A*, paragraph 52).

80 Article 20(2) of Regulation No 2201/2003 states, moreover, that measures taken pursuant to Article 20(1) of the regulation are to cease to apply when the court of the Member State having jurisdiction under that regulation as to the substance of the matter has taken the measures it considers appropriate.

81 It follows from the fact that Regulation No 2201/2003 is binding and directly applicable and from the wording of Article 20 thereof that a measure falling within the scope of that provision may, in the Member State of the court which has adopted the judgment, prevail over an earlier judgment adopted by a court of another Member State which has substantive jurisdiction. On the other hand, a judgment which does

not fall within the scope of Article 20 of the regulation because it does not comply with the conditions laid down in that provision cannot take precedence over such an earlier judgment (see the situation referred to in *Detiček*, in particular paragraph 49).

82 As regards the effect of a judgment within the scope of Article 20 of Regulation No 2201/2003 in Member States other than that of the court which has adopted it, the Commission and several Member States have argued that measures within the scope of Article 20 should be able to qualify for the system of recognition and enforcement provided for by that regulation. They have suggested the possibility of a removal of persons or assets after the court has ruled, or the possibility that the child might suffer an accident or illness requiring that authority be obtained from someone in another Member State.

83 None the less it must be held that, as the Advocate General stated in points 172 to 175 of her Opinion, the system of recognition and enforcement provided for by Regulation No 2201/2003 is not applicable to measures which fall within the scope of Article 20 of that regulation.

84 It was not the intention of the Europe Union legislature that there should be such applicability. As is clear from the explanatory memorandum in the Commission's 2002 proposal which led to the adoption of Regulation No 2201/2003 (COM(2002) 222 final), Article 20(1) of that regulation has its origins in Article 12 of Regulation No 1347/2000, which is a re-statement of Article 12 of the Brussels II convention. The explanatory memorandum in the Commission's 1999 proposal which led to the adoption of Regulation No 1347/2000 (COM (1999) 220 final) and the Borrás report on the Brussels II convention both indicate, in identical terms in relation to those articles, that '[t]he rule laid down in this Article is confined to establishing territorial effects in the State in which the measures are adopted'.

85 The Borrás report emphasises in that regard the difference in wording between Article 12 of the Brussels II Convention and Article 24 of the Brussels Convention in that 'the measures to which Article 24 … refers are restricted to matters within the scope of the Convention [and] … on the other hand, have extraterritorial effects.' It is clear from this comparison with the Brussels convention that those drafting the Brussels II convention intended to establish a link between the matters which provisional measures could deal with and the territorial effect of those measures.

86 The explanation for that link may be the risk of circumvention of rules laid down in other European Union legislation, in particular Regulation No 44/2001. As was stated both in the explanatory memorandum in the Commission's 1999 proposal which led to the adoption of Regulation No 1347/2000 and in the Borrás report, the provisional measures covered by Article 20 of Regulation No 2201/2003 relate both to persons and assets and encompass, consequently, matters outwith the scope of that regulation. Thus, if the system of recognition and enforcement provided for in Regulation No 2201/2003 were applicable, that would create the possibility of the recognition and enforcement, in other Member States, of measures relating to matters outwith the scope of that regulation, measures the adoption of which might, for example, be contrary to rules providing for the specific or exclusive jurisdiction of other courts pursuant to Regulation No 44/2001.

87 There is no evidence whatsoever in Regulation No 2201/2003 of an intention to cast aside the explanations given in those preparatory documents in relation to the effects of measures falling within the scope of Article 20 of that regulation. On the contrary, the position of that provision within the regulation and the expressions 'shall not prevent' and 'should not prevent', to be found in Article 20(1) and Recital 16 of the regulation, show that measures within the scope of Article 20 do not fall into the category of judgments which are adopted in accordance with the rules of jurisdiction laid down by that regulation and which qualify, therefore, for the system of recognition and enforcement established thereunder.

88 That conclusion cannot be challenged on the basis of Article 11(1) of the 1996 Hague Convention. Under that provision, '[i]n all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection'.

89 As stated by the German Government in its written observations, two significant differences distinguish Article 11(1) of the 1996 Hague Convention from Article 20 of Regulation No 2201/2003. First, Article 11 of the convention is manifestly designed to be a rule of jurisdiction and structurally is to be found in the list of provisions of that type, which is not true of Article 20 of the regulation, as stated in paragraph 61 of this judgment.

90 Moreover, while the 1996 Hague Convention provides for the recognition and enforcement of measures adopted in accordance with Article 11 thereof, it should be borne in mind that, under the rules laid down in that convention – more specifically, in Article 23(2)(a) on recognition, and Article 26(3), which refers back to Article 23(2), on enforcement – review of the international jurisdiction of the court which adopted the measure is permissible. That is not true of the system of recognition and enforcement provided for in Regulation No 2201/2003, since Article 24 of that regulation prohibits any review of the jurisdiction of the court of the Member State of origin.

91 As stated by the United Kingdom Government at the hearing, to accept the recognition and enforcement of measures within the scope of Article 20 of Regulation No 2201/2003 in all other Member States, including the State which has substantive jurisdiction, would, in addition, create a risk of circumvention of the rules of jurisdiction laid down by that regulation and of forum shopping, which would be contrary to

the objectives pursued by that regulation and, in particular, to the objective of making sure that the best interests of the child are taken into consideration by ensuring that decisions concerning the child are taken by the court geographically close to his habitual residence, that court being regarded by the European Union legislature as the court best placed to assess the measures to be taken in the interests of the child.

92 The fact that measures falling within the scope of Article 20 of Regulation No 2201/2003 do not qualify for the system of recognition and enforcement provided for under that regulation does not, however, prevent all recognition or all enforcement of those measures in another Member State, as was stated by the Advocate General in point 176 of her Opinion. Other international instruments or other national legislation may be used, in a way that is compatible with the regulation.

93 Moreover, Regulation No 2201/2003 lays down not only rules relating to the jurisdiction of the courts and to the recognition and enforcement of their judgments, but also to cooperation between the central authorities of the Member States in relation to parental responsibility. It should be possible to put such cooperation in motion in order to provide assistance, in a way that is compatible with the regulation and with national legislation, in exceptional circumstances of urgency such as those mentioned in paragraph 82 of this judgment.

94 In paragraph 42 of *Detiček*, the Court defined the concept of urgency, as used in Article 20 of Regulation No 2201/2003, as relating both to the situation of the child and to the impossibility in practice of bringing the application concerning parental responsibility before the court with jurisdiction as to the substance.

95 In that regard, it should be borne in mind that, although the specific detailed rules concerning the defendant's right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency (see, by analogy, in relation to insolvency proceedings, *Eurofood IFSC*, paragraph 66).

96 There is no dispute that, in the main proceedings, Ms Purrucker was heard by the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial before it adopted the provisional measures. On the other hand, it is evident from the explanatory information provided by the Spanish Government relating to the procedure in the main proceedings, in answer to a request from the Court, that:

— there is no appeal against a judgment containing provisional measures, which means that the defendant can seek to amend the judgment adopting those measures only during substantive proceedings which are brought subsequently or at the same time as the application for provisional measures;

— any party may bring substantive proceedings before the court, both the party who has applied for the provisional measures and the party who has not done so;

— if provisional measures precede substantive proceedings, their effects are to expire if the main action is not submitted within 30 days of their adoption;

— where provisional measures have been requested prior to substantive proceedings, the main action is to be submitted to the court which has territorial jurisdiction, which may or may not be the same as the court which ordered the prior provisional measures;

— only by bringing an appeal against the judgment ruling on the substance of the case at first instance is it possible to submit the question of jurisdiction to another court; and

— it is difficult to estimate the average time which may elapse between the judgment ordering provisional measures and a judgment on appeal before a different court.

97 In view of the importance of the provisional measures – whether they are adopted by a court which has substantive jurisdiction or not – which may be ordered in matters of parental responsibility and, in particular, in view of their possible consequences for young children (see, to that effect, Case C-195/08 PPU *Rinau* [2008] ECR I-5271, paragraph 81), especially in relation to separated twins, and given the fact that, as it happens, the court which adopted the measures issued a certificate pursuant to Article 39 of Regulation No 2201/2003, when the force of the provisional measures covered by that certificate was subject to the condition that substantive proceedings be brought within 30 days, it is vital that a person affected by such a procedure, even if that person has been heard by the court which adopted the provisional measures, be able to take steps to bring an appeal against the judgment ordering those measures in order – before a court which is different from the court which adopted the measures and which is capable of ruling promptly – inter alia, to challenge the substantive jurisdiction which that court attributed to itself, or, if it is not evident from the judgment that that court had, or had attributed to itself, substantive jurisdiction on the basis of that regulation, to dispute that the conditions set out in Article 20 of Regulation No 2201/2003, as restated in paragraph 77 of this judgment, were satisfied.

98 It should be possible to bring that appeal without the fact of doing so creating any legal presumption whatsoever that the person bringing the appeal accepts the substantive jurisdiction which the court which adopted the provisional measures may have attributed to itself.

99 It is for the national court to apply, in principle, national law while taking care to ensure the full effectiveness of European Union law, a task which may lead it to refrain from applying, if need be, a national rule preventing that or to interpret a national rule which has been drawn up with only a purely domestic situation in mind in order to apply it to the cross-border situation at issue (see, in particular, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 16; Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 25; Case C-253/00 *Muñoz and Superior Fruiticola* [2002] ECR I-7289, paragraph 28; and Case C-443/03 *Leffler* [2005] ECR I-9611, paragraph 51).

100 In the light of all of the foregoing, the answer to the question referred is that the provisions laid down in Article 21 et seq. of Regulation No 2201/2003 do not apply to provisional measures, relating to rights of custody, which fall within the scope of Article 20 of that regulation.

Costs

101 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 (Second Chamber) hereby rules:

The provisions laid down in Article 21 et seq. 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, do not apply to provisional measures, relating to rights of custody, falling within the scope of Article 20 of that regulation.

[Signatures]