JUDGMENT OF THE COURT (Third Chamber)

23 December 2009 *

In Case C-403/09 PPU,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Višje sodišče v Mariboru (Slovenia), made by decision of 19 October 2009, received at the Court on 20 October 2009, in the proceedings

Jasna Detiček

v

Maurizio Sgueglia,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász, J. Malenovský (Rapporteur) and D. Šváby, Judges,

* Language of the case: Slovene.

Advocate General: Y. Bot,
Registrar: L. Hewlett, Principal Administrator,

having regard to the request of the referring court of 19 October 2009, received at the Court on 20 October 2009, that the reference for a preliminary ruling be dealt with under an urgent procedure pursuant to Article 104b of the Rules of Procedure,

having regard to the decision of the Third Chamber of 27 October 2009 granting that request,

having regard to the written procedure and further to the hearing on 7 December 2009,

after considering the observations submitted on behalf of:

— Ms Detiček, by B. Žibret, odvetnik,

— Mr Sgueglia, by L. Varanelli, odvetnik,

— the Slovenian Government, by N. Aleš Verdir, acting as Agent,

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

— the German Government, by J. Kemper, acting as Agent,

— the French Government, by B. Beaupère-Manokha, acting as Agent,

— the Italian Government, by I. Bruni, acting as Agent, assisted by F. Arena, avvocato dello Stato,

— the Latvian Government, by K. Drevina, acting as Agent,

— the Polish Government, by M. Arciszewski, acting as Agent,

— the Commission of the European Communities, by A.-M. Rouchaud-Joët and M. Žebre, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 20 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 the course of proceedings between Ms Detiček and Mr Sgueglia concerning custody of their daughter Antonella.

Legal context

Community legislation

3 Recital 12 in the preamble to Regulation No 2201/2003 reads as follows:

'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.'

4 Recital 16 in the preamble to the regulation states:

'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.'

5 Recital 21 in the preamble to the regulation states:

'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.'

6 According to recital 33 in the preamble to the regulation:

'This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union [proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1, "the Charter")]. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter …'

7 Article 2 of Regulation No 2201/2003 provides:

'For the purposes of this Regulation:

…

4. the term "judgment" shall mean a divorce, legal separation or marriage annulment, as well as 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;

…

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.'

8 Article 8(1) of the 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.'

9 Article 20 of the regulation, '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.'

10 Article 21(1) and (3) of the regulation provides:

‘1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

…

3. Without prejudice to Section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised.

…’

The 1980 Hague Convention

11 Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (‘the 1980 Hague Convention’) provides:

‘Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative

authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.'

12 Article 13 of the 1980 Hague Convention reads as follows:

'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that —

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

National legislation

13 In accordance with Article 411(1) and (3) of the Code of Civil Procedure (Zakon o pravdnem postopku):

'1. In the course of proceedings relating to matrimonial disputes and disputes in the relationships between parents and children the court may, on application by a party or of its own motion, order provisional measures concerning the custody and maintenance of children of both parties and provisional measures concerning the revocation or limitation of the right of access or concerning the manner in which the right of access is exercised.

…

3. The provisional measures referred to in the previous paragraphs shall be adopted on the basis of the law governing protective measures.'

14 Under Article 272(1) of the Law on enforcement and protective measures (Zakon o izvršbi in zavarovanju, 'the ZIZ'):

'The court shall adopt a provisional measure for the securing of a non-pecuniary claim if the person claiming the right credibly demonstrates that the claim exists or is to be made against the person who, it is asserted, is required to grant that right. The person claiming the right must credibly demonstrate … that the measure is necessary in order to prevent the use of force or the causing of damage difficult to indemnify …'

15 Article 267 of the ZIZ provides:

'A provisional measure may be adopted before judicial proceedings have been initiated, in the course of the proceedings or even after they have been concluded, so long as enforcement has not been effected.'

16 Under Article 278(2) of the ZIZ:

'The court shall stay proceedings and render inoperative the measures taken, on application also by the person against whom the right is asserted, if the circumstances on the basis of which the provisional measure was adopted have subsequently changed in such a way that the measure is no longer necessary.'

17 Article 105(3) of the Law on marriage and family relations (Zakon o zakonski zvezi in družinskih razmerjih) provides:

'If the parents, even with the help of the social services, do not agree on the custody of the children, the court shall decide, on the application of one or both parents, to grant custody of all the children to one of them or to grant custody of certain of the children to one parent and of the other children to the other parent. The court may also decide of its own motion to grant custody of all or certain of the children to another person …'

The main proceedings and the reference for a preliminary ruling

18 Ms Detiček, of Slovene nationality, and Mr Sgueglia, spouses in the course of divorce proceedings, lived in Rome (Italy) for 25 years. Their daughter Antonella was born on 6 September 1997.

19 On 25 July 2007 the competent court in Tivoli (Italy), the Tribunale di Tivoli, before which divorce proceedings were pending between Ms Detiček and Mr Sgueglia which also related to the custody of Antonella, provisionally granted sole custody of Antonella to Mr Sgueglia and ordered her to be placed temporarily in the children's home of the Calasantian Sisters in Rome.

20 On the same date Ms Detiček left Italy with her daughter Antonella to go to Zgornje Poljčane in Slovenia, where they are still living today.

21 By judgment of 22 November 2007 of the Okrožno sodišče v Mariboru (Regional Court, Maribor) (Slovenia), confirmed by judgment of the Vrhovno sodišče (Supreme Court) (Slovenia) of 2 October 2008, the order of the Tribunale di Tivoli of 25 July 2007 was declared enforceable in the territory of the Republic of Slovenia.

22 On the basis of the judgment of the Vrhovno sodišče, enforcement proceedings were brought before the Okrajno sodišče v Slovenski Bistrici (District Court, Slovenska Bistrica) (Slovenia) for the child to be returned to Mr Sgueglia and placed in the children's home. However, by order of 2 February 2009, that court suspended enforcement until the final disposal of the main proceedings.

23 On 28 November 2008 Ms Detiček made an application to the Okrožno sodišče v Mariboru for a provisional and protective measure giving her custody of the child.

24 By order of 9 December 2008, that court allowed Ms Detiček's application and gave her provisional custody of Antonella. It based its decision on Article 20 of Regulation No 2201/2003 in conjunction with Article 13 of the 1980 Hague Convention, on the grounds of change of circumstances and the interests of the child.

25 In that respect, it held that Antonella was settled in her social environment in Slovenia. Return to Italy with enforced placement in a children's home would be contrary to her welfare, as that would cause irreversible physical and psychological trauma. In addition, during the judicial proceedings in Slovenia, Antonella had expressed the wish to remain with her mother.

26 Mr Sgueglia challenged that order before the same court, which dismissed his action by order of 29 June 2009.

27 Mr Sgueglia appealed to the Višje sodišče v Mariboru (Court of Appeal, Maribor) (Slovenia) against the order of 29 June 2009.

28 In those circumstances, the Višje sodišče v Mariboru decided to stay the proceedings and refer the following two questions to the Court for a preliminary ruling:

'1. Does a court of the Republic of Slovenia (a Member State of the European [Union]) have jurisdiction under Article 20 of [Regulation No 2201/2003] to take protective measures in a situation in which a court of another Member State, having by virtue of that regulation jurisdiction as to the substance, has already taken a protective measure declared enforceable in the Republic of Slovenia?

If the answer to the first question is in the affirmative:

2. May a Slovene court, pursuant to national law (as permitted by Article 20 of [Regulation No 2201/2003]), take a protective measure under Article 20 of [Regulation No 2201/2003] amending or rendering inoperative a final and enforceable protective measure taken by a court of another Member State which under [Regulation 2201/2003] has jurisdiction as to the substance?'

The urgent procedure

29 The Višje sodišče v Mariboru asked for the reference for a preliminary ruling to be dealt with under an urgent procedure pursuant to Article 104b of the Rules of Procedure.

30 The referring court justified its request by stating that there is an enforceable judicial decision adopting protective measures, taken by the Italian court and giving custody of the child to the father, and a contrary judicial decision adopting protective measures, taken by the Slovenian court and giving custody of the child to the mother. The court also states that there is need to act quickly, since a delayed decision would be contrary to the interests of the child, and could lead to an irreparable change for the worse in the relationship between the child and her father. It states, finally, that the provisional nature of the measure adopted in the proceedings for protective measures concerning the custody of the child of itself demands urgent action by the Court, in order not to prolong the state of legal uncertainty.

31 The Third Chamber of the Court, after hearing the Advocate General, decided on 27 October 2009 to grant the referring court's request for the reference for a preliminary ruling to be dealt with under an urgent procedure.

The questions referred for a preliminary ruling

32 By its two questions, which should be considered together, the referring court asks essentially whether Article 20 of Regulation No 2201/2003 must be interpreted as allowing a court of a Member State to take a provisional measure in matters of parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another Member State, which has jurisdiction under that regulation as to the substance of the dispute relating to custody of the child, has already

delivered a judgment provisionally giving custody of the child to the other parent, and that judgment has been declared enforceable in the territory of the former Member State.

33 According to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording and context but also the objectives pursued by the rules of which it forms part (see, to that effect, inter alia, Case C-301/98 *KVS International* [2000] ECR I-3583, paragraph 21; Case C-300/05 *ZVK* [2006] ECR I-11169, paragraph 15; and Case C-301/08 *Bogiatzki,* [2009] ECR I-10185, paragraph 39).

34 It also follows from settled case-law that the Member States must not only interpret their national law in a manner consistent with Community law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28).

35 It must be observed to begin with that, according to recital 12 in the preamble to Regulation No 2201/2003, the grounds of jurisdiction in matters of parental responsibility established by the regulation are shaped in the light of the best interests of the child, in particular the criterion of proximity.

36 Under Article 8 of Regulation No 2201/2003, jurisdiction in matters of parental responsibility is conferred, primarily, on the courts of the Member State in which the child is habitually resident at the time the court is seised. Because of their geographical proximity, those courts are generally the best placed to assess the measures to be taken in the interests of the child.

37 In the present case, it appears from the order for reference and the order of the Okrožno sodišče v Mariboru of 9 December 2008 that the Tribunale di Tivoli is, in accordance with Article 8, the court with jurisdiction as to the substance of any question relating to parental responsibility in the main proceedings.

38 However, Article 20(1) of Regulation No 2201/2003 provides that the courts of a Member State in which the child is present are entitled, under certain conditions, to take such provisional, including protective, measures as may be available under the law of that State, even if that regulation confers jurisdiction as to the substance of the matter on a court of another Member State. In that it is an exception to the system of jurisdiction laid down by the regulation, that provision must be interpreted strictly.

39 As appears from the very wording of Article 20(1) of Regulation No 2201/2003, the courts referred to in that provision are entitled to take such provisional or protective measures only on condition that three cumulative conditions are satisfied, namely that the measures concerned must be urgent, must be taken in respect of persons or assets in the Member State where those courts are situated, and must be provisional (see, to that effect, Case C-523/07 *A* [2009] ECR I-2805, paragraph 47).

40 Failure to comply with any one of those three conditions therefore has the consequence that the measure contemplated cannot fall within Article 20(1) of Regulation No 2201/2003.

41 The condition of urgency should be examined first.

42 Since Article 20(1) of Regulation No 2201/2003 authorises a court which does not have jurisdiction as to the substance to take, exceptionally, a provisional measure concerning parental responsibility, it must be considered that the concept of urgency in that

provision relates 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.

43 According to the order for reference, the Okrožno sodišče v Mariboru found in its order of 9 December 2008 that the case was urgent within the meaning of Article 20(1) of Regulation No 2201/2003, referring to the change of circumstances since the Tribunale di Tivoli had taken the provisional measure in matters of parental responsibility giving sole custody of the child to her father. That change in circumstances derived from the fact that the child had in the meantime settled well into the environment in which she is now living in Slovenia. In those circumstances, the Okrožno sodišče v Mariboru took the view that the child's return to Italy, which would result from the enforcement of the order of the Tribunale di Tivoli, would place her in a situation liable seriously to harm her welfare.

44 However, the circumstances mentioned by the Okrožno sodišče v Mariboru are not grounds for finding that the case is urgent within the meaning of Article 20(1) of Regulation No 2201/2003.

45 First, to acknowledge that there is a situation of urgency in a case such as the present one would run counter to the principle of mutual recognition of judgments given in the Member States established by Regulation No 2201/2003, a principle which is itself based, as follows from recital 21 in the preamble to that regulation, on the principle of mutual trust between Member States.

46 Among the provisions which express the principles referred to in the preceding paragraph, mention should be made in particular of Article 28(1) of Regulation No 2201/2003, according to which a judgment on the exercise of parental responsibility given in the Member State of origin, enforceable in that Member State, must in

principle be enforced in the requested Member State, and Article 31(3) of the regulation, which prohibits any review as to the substance of a judgment whose enforcement is sought.

47 In the present case, a provisional judgment in matters of parental responsibility was delivered by the court with jurisdiction as to the substance, namely the Tribunale di Tivoli, and that judgment was declared enforceable in Slovenia. If a change of circumstances resulting from a gradual process such as the child's integration into a new environment were enough, under Article 20(1) of Regulation No 2201/2003, to entitle a court not having jurisdiction as to the substance to adopt a provisional measure amending the measure in matters of parental responsibility taken by the court with jurisdiction as to the substance, any delay in the enforcement procedure in the requested Member State would contribute to creating the conditions that would allow the former court to block the enforcement of the judgment that had been declared enforceable. Such an interpretation would undermine the very principles on which that regulation is based.

48 Second, the change in the child's circumstances in the present case results from a wrongful removal within the meaning of Article 2(11) of Regulation No 2201/2003. The provisional measure taken by the Okrožno sodišče v Mariboru is based not only on Article 20(1) of Regulation No 2201/2003 but also on Article 13 of the 1980 Hague Convention, which applies only in the case of wrongful removal or detention.

49 The recognition of a situation of urgency in a case such as the present one would run counter to the aim of Regulation No 2201/2003 to deter the wrongful removal or retention of children between Member States (see, to that effect, Case C-195/08 PPU *Rinau* [2008] ECR I-5271, paragraph 52). To accept that a measure involving a change of parental responsibility could be taken under Article 20(1) of Regulation No 2201/2003 would amount, by consolidating a factual situation deriving from wrongful conduct, to strengthening the position of the parent responsible for the wrongful removal.

50 Next, as is apparent from the very wording of Article 20(1) of Regulation No 2201/2003, provisional measures must be taken in respect of persons in the Member State in which the courts with jurisdiction to take such measures are located.

51 A provisional measure in matters of parental responsibility ordering a change of custody of a child is taken not only in respect of the child but also in respect of the parent to whom custody of the child is now granted and of the other parent who, following the adoption of the measure, is deprived of that custody.

52 In the present case, it is common ground that one of the persons in respect of whom such a measure is taken, namely the father, resides in another Member State, and there is nothing to suggest that he is in the Member State whose court is claiming jurisdiction under Article 20(1) of Regulation No 2201/2003.

53 Finally, the above considerations are supported by the requirements which follow from recital 33 in the preamble to Regulation No 2201/2003, which states that the regulation recognises the fundamental rights and observes the principles of the Charter, seeking in particular to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter.

54 One of those fundamental rights of the child is the right, set out in Article 24(3) of the Charter, to maintain on a regular basis a personal relationship and direct contact with both parents, respect for that right undeniably merging into the best interests of any child.

55 Article 20 of Regulation No 2201/2003 cannot be interpreted in such a way that it disregards that fundamental right.

56 In this respect, it is clear that the wrongful removal of a child, following a decision taken unilaterally by one of the parents, more often than not deprives the child of the possibility of maintaining on a regular basis a personal relationship and direct contact with the other parent.

57 Article 20 of Regulation No 2201/2003 cannot therefore be interpreted in such a way that it can be used by the parent who has wrongfully removed the child as an instrument for prolonging the factual situation caused by his or her wrongful conduct or for legitimating the consequences of that conduct.

58 It is true that, under Article 24(3) of the Charter, an exception may be made to the child's fundamental right to maintain on a regular basis a personal relationship and direct contact with both parents if that interest proves to be contrary to another interest of the child.

59 It follows that a measure which prevents the maintenance on a regular basis of a personal relationship and direct contact with both parents can be justified only by another interest of the child of such importance that it takes priority over the interest underlying that fundamental right.

60 However, a balanced and reasonable assessment of all the interests involved, which must be based on objective considerations relating to the actual person of the child and his or her social environment, must in principle be performed in proceedings before the court with jurisdiction as to the substance in accordance with the provisions of Regulation No 2201/2003.

61 In the light of all the above considerations, the answer to the questions referred is that Article 20 of Regulation No 2201/2003 must be interpreted as not allowing, in circumstances such as those of the main proceedings, a court of a Member State to take a provisional measure in matters of parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another

Member State, which has jurisdiction under that regulation as to the substance of the dispute relating to custody of the child, has already delivered a judgment provisionally giving custody of the child to the other parent, and that judgment has been declared enforceable in the territory of the former Member State.

Costs

62 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 (Third Chamber) hereby rules:

Article 20 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 not allowing, in circumstances such as those of the main proceedings, a court of a Member State to take a provisional measure in matters of parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another Member State, which has jurisdiction under that regulation as to the substance of the dispute relating to custody of the child, has already

delivered a judgment provisionally giving custody of the child to the other parent, and that judgment has been declared enforceable in the territory of the former Member State.

[Signatures]