JUDGMENT OF THE COURT (Third Chamber)

1 July 2010 *

In Case C-211/10 PPU,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 20 April 2010, received at the Court on 3 May 2010, in the proceedings

Doris Povse

v

Mauro Alpago,

THE COURT (Third Chamber),

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

* Language of the case: German.

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

having regard to the request by the national court that the reference for a preliminary ruling be dealt with under an urgent procedure, in accordance with Article 104b of the Rules of Procedure,

having regard to the decision of 11 May 2010 of the Third Chamber granting that request,

having regard to the written procedure and further to the hearing on 14 June 2010,

after considering the observations submitted on behalf of:

— the Austrian Government, by C. Pesendorfer and A. Hable, acting as Agents,

— the Czech Government, by D. Hadroušek, acting as Agent,

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

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

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

— the Latvian Government, by K. Drevina and E. Drobiševska, acting as Agents,

— the Slovenian Government, by A. Vran and V. Klemenc, acting as Agents,

— the United Kingdom Government, by F. Penlington, acting as Agent, and K. Smith, Barrister,

— the European Commission, by M. Wilderspin and S. Grünheid, acting as Agents,

after hearing the Advocate General,

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, 'the regulation').

2 The reference was made in proceedings between Ms Povse and Mr Alpago where the issue is the return to Italy of their daughter Sofia, who is in Austria with her mother, and rights of custody in respect of that child.

Legal context

The Hague Convention of 1980

3 Article 3 of the Hague Convention of 25 October 1980 on the civil aspects of international child abduction ('the 1980 Hague convention'), provides:

'The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

4 Article 12 of that 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.'

5 Under Article 13 of the 1980 Hague Convention:

'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.'

European Union legislation

6 Recital 17 in the preamble to the regulation states:

'In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end [the 1980 Hague Convention] would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.'

7 Recital 21 of 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.'

8 Recital 23 of the preamble to the regulation is worded as follows:

'The Tampere European Council considered in its conclusions (point 34) that judgments in the field of family litigation should be "automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement". This is why judgments on rights of access and judgments on return that have been certified in the Member State of origin in accordance with the provisions of this Regulation should be recognised and enforceable in all other Member States without any further procedure being required. Arrangements for the enforcement of such judgments continue to be governed by national law.'

9 Recital 24 of the preamble to the regulation states:

'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.'

10 Article 2(11) of the regulation defines 'wrongful removal or retention [of a child]' and essentially corresponds to the definition in the first paragraph of Article 3 of the 1980 Hague Convention.

11 Article 8 of the regulation, headed 'General jurisdiction', provides:

'1. 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.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.'

12 Under Article 10 of the regulation, which contains specific rules concerning jurisdiction in cases of child abduction:

'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 and

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.'

13 Article 11 of the regulation, headed 'Return of the child', provides:

'1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of [the 1980 Hague Convention], in order to obtain the return of a child that has been

wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately, either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.'

14 Article 15 of the regulation, headed 'Transfer to a court better placed to hear the case', provides:

'1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or

(b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

…

5. The courts of that other Member State may, where, due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

6. The courts shall cooperate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53.'

15 Article 40 of the regulation is part of Section 4, entitled 'Enforceability of certain judgments concerning rights of access and of certain judgments which require the return of the child', within Chapter III which is entitled 'Recognition and enforcement'. Article 40, headed 'Scope', provides:

'1. This Section shall apply to:

…

(b) the return of a child entailed by a judgment given pursuant to Article 11(8).

2. The provisions of this Section shall not prevent a holder of parental responsibility from seeking recognition and enforcement of a judgment in accordance with the provisions in Sections 1 and 2 of this Chapter.'

16 Under Article 42 of the regulation, headed 'Return of the child':

'1. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.

2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:

(a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity,

(b) the parties were given an opportunity to be heard, and

(c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)).

The certificate shall be completed in the language of the judgment.'

17 Under Article 43 of the regulation, headed 'Rectification of the certificate':

'1. The law of the Member State of origin shall be applicable to any rectification of the certificate.

2. No appeal shall lie against the issuing of a certificate pursuant to Articles 41(1) or 42(1).'

18 Article 44 of the regulation, headed 'Effects of the certificate', is worded as follows:

'The certificate shall take effect only within the limits of the enforceability of the judgment.'

19 Article 47 of the regulation, headed 'Enforcement procedure' provides:

'1. The enforcement procedure is governed by the law of the Member State of enforcement.

2. Any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 41(1) or Article 42(1) shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State.

In particular, a judgment which has been certified according to Article 41(1) or Article 42(1) cannot be enforced if it is irreconcilable with a subsequent enforceable judgment.'

20 Article 60 of the regulation, headed 'Relations with certain multilateral conventions', provides that, in relations between Member States, the regulation is to take precedence over, inter alia, the 1980 Hague Convention.

The dispute in the main proceedings and the questions referred for a preliminary ruling

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

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

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

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

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

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

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

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

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

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

31 Moreover, by the same judgment of 10 July 2009, the Tribunale per i Minorenni di Venezia ordered the immediate return of the child to Italy and instructed the social services department of the town of Vittorio Veneto, in the event that the mother

returned with the child, to make accommodation available to them and to establish an access schedule for the father. The return order was made on the ground that it was desirable to re-establish contact between the child and her father which had been broken because of the mother's attitude. For that purpose, the Tribunale per i Minorenni di Venezia issued a certificate under Article 42 of the regulation.

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

33 On 22 September 2009 Mr Alpago submitted an application to the Bezirksgericht Leoben for enforcement of the judgment of the Tribunale per i Minorenni di Venezia of 10 July 2009 ordering the return of his child to Italy. The Bezirksgericht Leoben dismissed that application on the ground that enforcement of the judgment of the Italian court represented a grave risk of psychological danger to the child. On an appeal brought by Mr Alpago against that decision, the Landesgericht Leoben quashed the decision, on the basis of Case C-195/08 PPU *Rinau* [2008] ECR I-5271, and ordered return of the child.

34 The Oberster Gerichtshof has before it an appeal on a point of law brought by Ms Povse against the decision of the Landesgericht Leoben in which she seeks dismissal of the application for enforcement. Since that court had doubts as to the interpretation of the regulation, it decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

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

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

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

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

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

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

   Does a judgment delivered by a court in the second State and regarded as enforceable under the law of that State, by which provisional custody was awarded to the abducting parent, preclude the enforcement of an earlier return order made in the State of origin under Article 11(8) of [the regulation], in accordance with Article 47(2) of [the regulation], even if it would not prevent the enforcement of a return order made in the second State under the Hague Convention?

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

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

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

The urgent procedure

35 The national court stated that the reason for its request that the reference for a preliminary ruling be dealt with under the urgent procedure provided for in Article 104b of the Rules of Procedure was that contact between the child and her father had been broken. Consequently, a delayed decision on enforcement of the judgment of the Tribunale per i Minorenni di Venezia of 10 July 2009 ordering return of the child to Italy would exacerbate the deterioration of the relationship between father and child and thereby increase the risk of psychological harm if the child were sent back to Italy.

36 On a proposal from the Judge-Rapporteur and after hearing the Advocate General, the Third Chamber of the Court decided on 11 May 2010 to grant the national court's request that the reference for a preliminary ruling be dealt with under the urgent procedure.

Consideration of the questions referred for a preliminary ruling

Preliminary remarks

37 It is not in dispute that the main proceedings relate to the unlawful removal of a child within the meaning of the first subparagraph of Article 3 of the 1980 Hague Convention and Article 2(11) of the regulation.

38 Nor is it in dispute that, pursuant to Article 10 of the regulation, the court which had jurisdiction, at least at the time of the abduction, was the Tribunale per i Minorenni di Venezia, the court with jurisdiction over the place where the child was habitually resident before her unlawful removal.

The first question

39 By this question, the national court seeks to ascertain whether, in a case of unlawful removal of a child, Article 10(b)(iv) of the regulation must be interpreted as meaning that a provisional measure must be considered to be 'a judgment on custody that does not entail the return of the child' within the meaning of that provision.

40 It must be emphasised that the system established by the regulation is based on the central role allocated to the court which has jurisdiction pursuant to the provisions of that regulation and that, in accordance with Recital 21 of the regulation, the recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust, and grounds for non-recognition should be kept to the minimum required.

41 In cases of unlawful removal of children, Article 10 of the regulation allocates, as a general rule, jurisdiction to the courts of the Member State where the child was habitually resident immediately before the child's removal. That jurisdiction is, in principle, retained and is transferred only if the child has acquired a habitual residence in another Member State and, additionally, one of the alternative conditions stated in Article 10 is also satisfied.

42 The national court's question relates specifically to whether, by adopting a provisional measure, the court with jurisdiction transferred jurisdiction, as provided for in Article 10(b)(iv) of the regulation, to the courts of the Member State to which the abducted child was taken.

43 In that regard, it must be recalled that the regulation seeks to deter child abductions from one Member State to another and, in cases of abduction, to obtain the child's return without delay (see *Rinau*, paragraph 52).

44 It follows that the unlawful removal of a child should not, in principle, have the effect of transferring jurisdiction from the courts of the Member State where the child was habitually resident immediately before removal to the courts of the Member State to which the child was taken, even if, following the abduction, the child has acquired a habitual residence in the latter Member State.

45 Accordingly, the condition stated in Article 10(b)(iv) of the regulation must be interpreted strictly.

46 Therefore, in the light of the central role allocated by the regulation to the court which has jurisdiction and the principle that its jurisdiction should be retained, it must be held that a 'judgment on custody that does not entail the return of the child' is a final judgment, adopted on the basis of full consideration of all the relevant factors, in which the court with jurisdiction rules on arrangements for the custody of a child who is no longer subject to other administrative or judicial decisions. The fact that this ruling on the question of custody of the child provides for a review or reconsideration at regular intervals, within a specific period or in certain circumstances, of the issue of custody of the child does not mean that the judgment is not final.

47 That conclusion follows from the structure of the regulation and is also in the interests of the child. If the effect of a provisional measure were a loss of jurisdiction over the issue of custody of the child, the court which has jurisdiction in the Member State where the child was previously habitually resident might be deterred from making such a provisional judgment, notwithstanding the fact that the interests of the child required it.

48 By its decision of 23 May 2008, the Tribunale per i Minorenni di Venezia, the court with jurisdiction under the provisions of the regulation, taking into consideration the factual situation created by the abduction of the child and the interests of the child, revoked the prohibition on leaving Italy, awarded provisional custody to both parents, granted access rights to the father and ordered an expert report from a social worker on the relationship of the child with the two parents, for the precise purpose of making its final judgment on rights of custody. Further, that court granted to the mother the right to take, in relation to the child, the decisions concerning day to day organisation ('decisioni […] concernenti l'ordinaria amministrazione'), namely the parental decisions on the practical aspects of the child's daily life.

49 It is evident from the foregoing that that judgment, described as provisional both by the Tribunale per i Minorenni di Venezia and by the referring court, is in no way a final judgment on rights of custody.

50 Consequently, the answer to the first question is that Article 10(b)(iv) of the regulation must be interpreted as meaning that a provisional measure does not constitute a 'judgment on custody that does not entail the return of the child' within the meaning of that provision, and cannot be the basis of a transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed.

The second question

51 By this question, the referring court seeks to ascertain whether Article 11(8) of the regulation must be interpreted as meaning that a judgment of the court with jurisdiction ordering the return of the child falls within the scope of that provision only when the basis of that order is a final judgment of the same court relating to rights of custody of the child.

52 It must be observed that such an interpretation, which makes the enforcement of a judgment of the court with jurisdiction ordering the return of the child dependent on whether a final judgment on rights of custody has been delivered by that court, has no basis in the wording of Article 11 of the regulation and, specifically, of Article 11(8). On the contrary, Article 11(8) of the regulation extends to 'any subsequent judgment which requires the return of the child'.

53 It is true that Article 11(7) provides that the court or central authority of the Member State where the child was previously habitually resident must notify the parties of information it receives concerning an order of non-return made in the Member State of removal and invite them to make submissions 'so that the court can examine the question of custody of the child'. None the less, that provision merely indicates the final objective of the administrative and judicial procedures, namely regularisation of the child's situation. It cannot be inferred from that provision that a decision on the custody of the child is a prerequisite for the adoption of a decision ordering the return of the child. Indeed, the purpose of that interim decision is also to contribute to achievement of the final objective, in particular, resolving the issue of custody of the child.

54 Likewise, Articles 40 and 42 to 47 of the regulation in no way tie the enforcement of a judgment made under Article 11(8) and accompanied by the certificate referred to in Article 42(1) of the regulation to the prior adoption of a judgment on custody.

55 That interpretation of Article 11(8) of the regulation is confirmed by the Court's case-law.

56 The Court has held that, although intrinsically connected with other matters governed by the regulation, in particular rights of custody, the enforceability of a judgment requiring the return of a child following a judgment of non-return has procedural autonomy, so as not to delay the return of a child who has been wrongfully removed. The Court has also confirmed the procedural autonomy of the provisions of Articles 11(8), 40 and 42 of the regulation and the priority given to the jurisdiction of the court of origin, in the context of Section 4 of Chapter III of the regulation (see, to that effect, *Rinau*, paragraphs 63 and 64).

57 That interpretation is also consistent with the objective and purpose of the system set up by Articles 11(8), 40 and 42 of the regulation.

58 Within that system, when a court of the Member State to which the child has been unlawfully removed has made a decision of non-return pursuant to Article 13 of the 1980 Hague Convention, the regulation, Article 60 of which declares its precedence over that convention in relations between Member States, reserves to the court which has jurisdiction under that regulation any decision concerning the possible return of the child. Thus, Article 11(8) provides that a judgment of the court which has jurisdiction is enforceable in accordance with Section 4 of Chapter III of the regulation in order to secure the return of the child.

59 It must be borne in mind that, before making that judgment, the court which has jurisdiction must take into consideration the reasons for and evidence underlying the decision of non–return. The consideration of those matters is one reason why such a judgment, once it is made, is enforceable, in accordance with the principle of mutual trust which underpins the regulation.

60 Moreover, under that system the issue of the return of the child is examined twice, thereby ensuring that the judgment is more soundly based and that the interests of the child have increased protection.

61 Further, as the European Commission has correctly observed, the court which is ultimately responsible for determining rights of custody must have the power to determine all the interim arrangements and measures, including fixing the child's place of residence, which might possibly require the return of the child.

62 The objective of the provisions of Articles 11(8), 40 and 42 of the regulation, namely, that proceedings be expeditious, and the priority given to the jurisdiction of the court of origin are scarcely compatible with an interpretation according to which a judgment ordering return must be preceded by a final judgment on rights of custody. Such an interpretation would constitute a constraint which might compel the court with jurisdiction to take a decision on rights of custody when it had neither all the information and all the material needed for that purpose, nor the time required to make an objective and dispassionate assessment.

63 As regards the argument that such an interpretation might lead to the child being moved needlessly, if the court with jurisdiction were ultimately to award custody to the parent residing in the Member State of removal, it must be stated that the importance of delivering a court judgment on the final custody of the child that is fair and

soundly based, the need to deter child abduction, and the child's right to maintain on a regular basis a personal relationship and direct contact with both parents, take precedence over any disadvantages which such moving might entail.

64 One of the fundamental rights of the child is the right, set out in Article 24(3) of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1), 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 (see Case C-403/09 PPU *Detiček* [2009] ECR I-12193, paragraph 54). It is clear that an unlawful removal of the child, following the taking of a unilateral decision by one of the child's 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 (see *Detiček*, paragraph 56).

65 Consideration of the situation at issue in the main proceeding again demonstrates the correctness of this approach.

66 The grounds for the judgment of 10 July 2009 whereby the court with jurisdiction ordered the return of the child were that the relationship between the child and her father had been broken. Consequently, it is in the child's best interests to re-establish that relationship and also to ensure, if possible, that the mother is in Italy, so that the relationship of the child with both parents, and the parental abilities and characters of the parents, can be examined thoroughly by the competent Italian authorities, prior to delivery of a final judgment on custody and parental responsibility.

67 Consequently, the answer to the second question is that Article 11(8) of the regulation must be interpreted as meaning that a judgment of the court with jurisdiction ordering the return of the child falls within the scope of that provision, even if it is not preceded by a final judgment of that court relating to rights of custody of the child.

The third question

68 In the light of the answers to the first two questions referred for a preliminary ruling, there is no need to answer this question.

The fourth question

69 By this question, the national court asks whether the second subparagraph of Article 47(2) of the regulation must be interpreted as meaning that a judgment granting provisional custody rights, delivered subsequently by a court in the Member State of enforcement and deemed enforceable under the law of that State, precludes enforcement of a certified judgment delivered previously which orders the return of the child, as being irreconcilable with the earlier judgment.

70 As is clear from Recital 24 and Articles 42(1) and 43(2) of the regulation, the issue of a certificate is not subject to appeal, and a judgment thus certified is automatically enforceable, there being no possibility of opposing its recognition.

71 Moreover, under Article 43(1) of the regulation, the law of the Member State of origin is to be applicable to any rectification of the certificate, subject to the qualification that, according to Recital 24 of the regulation, it should be rectified only where there is a material error, i.e. where it does not correctly reflect the judgment. It is further provided, in Article 44 of the regulation, that the certificate is to take effect only within the limits of the enforceability of the judgment and, in the second subparagraph of Article 47(2) of the regulation, that a certified judgment cannot be enforced if it is irreconcilable with a subsequent enforceable judgment.

72 It must also be recalled that, as stated in Recital 23 of the regulation, arrangements for the enforcement of such judgments continue to be governed by the national law of the Member State of enforcement.

73 It follows from the foregoing provisions, which establish a clear division of jurisdiction between the courts of the Member State of origin and those of the Member State of enforcement and are intended to secure the rapid return of the child, that a certificate issued under Article 42 of the regulation, which gives to the judgment thus certified a specific enforceability, is not subject to any appeal. The requested court can do no more than declare such a judgment to be enforceable, since the only pleas in law which can be relied on in relation to the certificate are those to support an action for rectification or doubts as to its authenticity, according to the rules of law of the Member State of origin (see, to that effect, *Rinau*, paragraphs 85, 88 and 89). The only rules of law of the requested Member State that are applicable are those governing procedural matters.

74 On the other hand, questions concerning the merits of the judgment as such, and in particular the question whether the necessary conditions enabling the court with jurisdiction to hand down that judgment are satisfied, including any challenges to its jurisdiction, must be raised before the courts of the Member State of origin, in accordance with the rules of its legal system. Likewise, an application to suspend enforcement of a certified judgment can be brought only before the court which has

jurisdiction in the Member State of origin, in accordance with the rules of its legal system.

75 Accordingly, no plea in law can be raised before the courts of the Member State of removal challenging the enforcement of such a judgment, since the rules of law of that State govern solely matters of procedure, as provided for in Article 47(1) of the regulation, namely the arrangements for enforcement of the judgment. However, proceedings such as those which are the subject of this question are concerned neither with formal requirements nor matters of procedure, but rule on matters of substance.

76 Consequently, the question whether a certified judgment is irreconcilable, within the meaning of the second subparagraph of Article 47(2) of the regulation, with a subsequent enforceable judgment must be addressed only in relation to any judgments subsequently handed down by the courts with jurisdiction in the Member State of origin.

77 Such irreconcilability might arise not only in cases where the judgment was set aside or varied following legal action brought in the Member State of origin. It was observed at the oral hearing that the court with jurisdiction may, on its own motion or, in some circumstances, at the request of the social services, revisit its own position, when the interests of the child so require, and hand down a fresh enforceable judgment, without expressly withdrawing the first, which would thereby lapse.

78 To hold that a judgment delivered subsequently by a court in the Member State of enforcement can preclude enforcement of an earlier judgment which has been certified in the Member State of origin and which orders the return of the child would amount to circumventing the system set up by Section 4 of Chapter III of the regulation. Such

an exception to the jurisdiction of the courts in the Member State of origin would deprive of practical effect Article 11(8) of the regulation, which ultimately grants the right to decide to the court with jurisdiction and which takes precedence, under Article 60 of the regulation, over the 1980 Hague Convention, and would recognise the jurisdiction, on matters of substance, of the courts in the Member State of enforcement.

79 Consequently, the answer to the fourth question is that the second subparagraph of Article 47(2) of the regulation must be interpreted as meaning that a judgment delivered subsequently by a court in the Member State of enforcement which awards provisional custody rights and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously by the court which has jurisdiction in the Member State of origin and ordering the return of the child.

The fifth question

80 By this question the referring court asks whether the enforcement of a certified judgment can be refused in the Member State of enforcement because, as a result of a change of circumstances arising after its adoption, it might be seriously detrimental to the best interests of the child, or whether such a change must be invoked before the courts in the Member State of origin, which would imply suspending enforcement of the judgment in the requested Member State, pending the outcome of proceedings in the Member State of origin.

81 In that regard, a significant change of circumstances in relation to the best interests of the child constitutes an issue of substance, which may, in appropriate cases, cause the decision of the court which has jurisdiction over the return of the child to change. However, in accordance with the division of jurisdiction referred to more than once in this judgment, such an issue must be resolved by the court with jurisdiction in the Member State of origin. Moreover, that court, within the system established by the regulation, also has jurisdiction to assess the best interests of the child, and that is the court which must hear an application for any suspension of enforcement of its judgment.

82 That conclusion is not called in question by the reference, in the first subparagraph of Article 47(2) of the regulation, to the enforcement of a judgment delivered in another Member State in the 'same conditions' as if it had been delivered in the Member State of enforcement. That requirement must be interpreted strictly. It can refer only to the procedural arrangements under which the return of the child must take place, and can on no account provide a substantive ground of opposition to the judgment of the court which has jurisdiction.

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

Costs

84 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:

1. **Article 10(b)(iv) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, must be interpreted as meaning that a provisional measure does not constitute a 'judgment on custody that does not entail the return of the child' within the meaning of that provision, and cannot be the basis of a transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed.**

2. **Article 11(8) of Regulation No 2201/2003 must be interpreted as meaning that a judgment of the court with jurisdiction ordering the return of the child falls within the scope of that provision, even if it is not preceded by a final judgment of that court relating to rights of custody of the child.**

3. **The second subparagraph of Article 47(2) of Regulation No 2201/2003 must be interpreted as meaning that a judgment delivered subsequently by a court in the Member State of enforcement which awards provisional rights of custody and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously by the court**

which has jurisdiction in the Member State of origin and ordering the return of the child.

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

[Signatures]