VIEW OF ADVOCATE GENERAL SHARPSTON
delivered on 16 June 2010 [1]

1. A child born in Italy in 2006 to an Italian father and an Austrian mother, who were never married, is at present in Austria with her mother, against the wishes of the father. In the context of proceedings seeking to determine the exercise of parental responsibility in respect of the child, an Italian court ordered her return to Italy. The Oberster Gerichtshof (Supreme Court) (Austria) seeks a preliminary ruling on five questions concerning the grounds on which enforcement of that order might be refused.

Legal background

2. The situation is governed, in European Union law, by Council Regulation (EC) No 2201/2003, [2] read in conjunction with the Hague Convention of 1980. [3]

The Convention

3. In the preamble to the Convention, the signatory States declare that they are '[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody' and state that they desire 'to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their

1 — Original language: French.

2 — Regulation 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').

3 — Convention on the Civil Aspects of International Child Abduction, concluded on 25 October 1980 and in force since 1 December 1983, to which all the Member States are party ('the Convention'). Unlike the Regulation, the Convention does not contain any rules of jurisdiction. In that regard, the Regulation draws on the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, concluded at The Hague on 19 October 1996 (OJ 2008 L 151, p. 39). It should be noted that, under Article 60, the Regulation takes precedence over the Convention in so far as the latter concerns matters governed by the Regulation.

habitual residence, as well as to secure protection for rights of access'.

4. Under Article 3 of the Convention:

'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 subparagraph 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.'

5. Article 12 of the 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.

...'

6. Under Article 13 of the 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.'

7. Article 17 of the Convention provides:

'The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.'

8. Under Article 19 of the Convention:

'A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.'

The Regulation

9. Several recitals in the preamble to the Regulation are relevant to the analysis of the questions raised in this reference for a preliminary ruling, in particular:

'(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.

...

(17) 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 Hague Convention of 25 October 1980 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.

...

(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.

...

(23) 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.

(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.'

10. Article 2 of the Regulation defines certain terms used therein. In particular:

'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.

...'

11. Under Article 8 of the Regulation, and subject to the provisions of Articles 9, 10 and 12, the courts of a Member State are to 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.

12. In that regard, Article 10 of the Regulation [4] 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 and:

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

4 — Articles 9 and 12, which relate, respectively, to the situation where a child moves lawfully to another Member State and to the situation where the jurisdiction of the courts of another Member State with which the child has a substantial connection is accepted unequivocally by all parties, are not relevant to this case.

or

(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.'

(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:

13. Under Article 11 of the Regulation:

(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;

'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 [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.

(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);

2. When applying Articles 12 and 13 of the [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.

(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);

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 13(b) of the [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 [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 [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 concerns the possibility of a transfer to a court better placed to hear the case. It 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.

2. Paragraph 1 shall apply:

(a) upon application from a party; or

(b) of the court's own motion; or

(c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.

A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:

(a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or

(b) is the former habitual residence of the child; or

(c) is the place of the child's nationality; or

(d) is the habitual residence of a holder of parental responsibility; or

(e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time-limit by which the courts of that other Member State shall be seised in accordance with paragraph 1.

If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

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.' [5]

15. Chapter III of the Regulation is entitled 'Recognition and enforcement'. Section 1 thereof concerns recognition. In that section, Article 23 lists the grounds of non-recognition for judgments relating to parental responsibility. It provides:

'A judgment relating to parental responsibility shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

5 — Article 53 of the Regulation provides for the designation, by each Member State, of one or more central authorities 'to assist with the application of this Regulation' (see point 22 below).

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought;

or

(g) if the procedure laid down in Article 56 has not been complied with. [6]'

16. Article 24 of Section 1 provides:

'The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in ... Article 23(a) may not be applied to the rules relating to jurisdiction set out in Articles [8] to 14. [7]'

17. Section 4 of Chapter III, entitled 'Enforceability of certain judgments concerning rights of access and of certain judgments which require the return of the child', comprises Articles 40 to 45. Article 40, entitled '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.'

6 — Article 56 of the Regulation concerns the placement of a child in institutional care or with a foster family in another Member State.

7 — The text as cited here includes references only to the provisions relating to parental responsibility and excludes those relating to divorce, legal separation or marriage annulment, which are not relevant here.

18. Under Article 42, entitled '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(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 [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.'

19. The information which must be certified in that regard includes, as set out in point 13 of Annex IV, the following attestation:

'The judgment entails the return of the children and the court has taken into account in issuing its judgment the reasons for and evidence underlying the decision issued pursuant to Article 13 of the [Convention].'

20. Under Article 43 of the Regulation:

'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 Article 41(1) or 42(1).'

21. Article 47 of the Regulation, entitled '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.'

22. Article 53 of the Regulation provides that each Member State must designate one or more central authorities to assist with the application of the Regulation. Under Article 55(c) of the Regulation, one of the functions of those authorities, in cases specific to parental responsibility, is to 'facilitate communications between courts, in particular for the application of Article 11(6) and (7) and Article 15'.

Factual and procedural background

23. I will proceed here as I did in my View in *Rinau*,[8] by summarising in tabular form the main elements of the factual and procedural background to the dispute, as set out in the order for reference and supporting documents.

8 — Case C-195/08 PPU [2008] ECR I-5271.

Date	Italy	Austria
6.12.2006	Birth of the child; under Italian law, the parents have joint custody.	
31.1.2008	The mother leaves the shared home with the child.	
4.2.2008	The father applies to the Tribunale per i Minorenni di Venezia (Court for matters concerning minors, Venice) for sole custody of the child and a ban preventing the mother from leaving Italy with the child.	
8.2.2008	The Tribunale per i Minorenni di Venezia imposes a provisional ban preventing the mother from leaving Italy with the child.	
	The mother applies for sole custody of the child.	In spite of the ban, the mother travels to Austria with the child.
16.4.2008		The father seeks the return of the child under the Convention.
23.5.2008	Pending a final judgment on custody, the Tribunale per i Minorenni di Venezia orders that a psychologist's report be obtained and that regular contact be maintained between the child and the father, partly in Italy and partly in Austria, under the supervision of the respective social services departments; in order that the mother may travel between the two countries with the child to allow contact with the father, it withdraws the ban on leaving Italy; it grants provisional joint custody to both parents and allows the mother to keep the child with her in Austria, with sole decision-making power over the child's daily life.	Initially, the Austrian courts are unaware of the existence and content of that judgment.

Date	Italy	Austria
6.6.2008		On application by the mother, the Bezirksgericht Judenburg (District Court, Judenburg, the district in which the mother and child reside) prohibits the father from making contact with the mother and the child, on the ground that he has harassed the mother.
3.7.2008		On the basis of Article 13(b) of the Convention (grave risk of psychological harm in the event of separation from the mother), the Bezirksgericht Leoben (District Court, Leoben, the district neighbouring Judenburg) [9] dismisses the father's application (of 16 April 2008) seeking an order for the return of the child to Italy.
1.9.2008		On appeal by the father, the Landesgericht Leoben (Regional Court, Leoben) sets aside the order of 3 July 2008 on the basis of Article 11(5) of the Regulation, as the father has not been heard by the Bezirksgericht.

9 — It is not clear from the file why proceedings in Austria were pursued before two separate district courts.

Date	Italy	Austria
6.9.2008		The order of the Bezirksgericht Judenburg of 6 June 2008 expires, its period of validity having ended.
21.11.2008		The Bezirksgericht Leoben hears the father and again dismisses his application, on this occasion citing the order of the Tribunale per i Minorenni di Venezia of 23 May 2008 (of which it now has knowledge), ordering that the child should stay with the mother in Austria.
7.1.2009		The Landesgericht Leoben confirms the dismissal of the father's application, again on the grounds of Article 13(b) of the Convention.

Date	Italy	Austria
9.4.2009	The father asks the Tribunale per i Minorenni di Venezia to order the return of the child under Article 11(8) of the Regulation.	
15.5.2009	The mother claims that the Tribunale per i Minorenni di Venezia lacks jurisdiction, on the basis of Article 10 of the Regulation; in the alternative, she requests the transfer of the case to the Bezirksgericht Judenburg, on the basis of Article '15(b)(5)' [10]	
30.4.2009 and 19.5.2009	The Tribunale per i Minorenni di Venezia hears the parties' representatives, the mother not appearing in person; the representatives state that they are prepared to discuss a schedule of contacts between father and child, to be arranged by an expert appointed by the court.	

10 — See footnote 36 above.of the Regulation.

Date	Italy	Austria
26.5.2009		On application by the mother (not notified to the Tribunale per i Minorenni di Venezia), the Bezirksgericht Judenburg (without having heard the father) assumes jurisdiction to hear the mother's application for custody 'under Article 15(5)' of the Regulation; it asks the Tribunale per i Minorenni di Venezia to decline jurisdiction and to transfer the proceedings to it.
26.6.2009	The father states that he is prepared to comply with the access schedule to be drawn up.	
27.6.2009	The mother states that she does not intend to accept the access schedule to be drawn up, claiming personal difficulties and fears for the well-being of the child.	
8.7.2009	The expert submits the proposed contact schedule to the Tribunale per i Minorenni di Venezia, which, on the same day, receives the request from the Bezirksgericht Judenburg to transfer proceedings.	

Date	Italy	Austria
10.7.2009	The Tribunale per i Minorenni di Venezia dismisses the plea of lack of jurisdiction raised by the mother and refuses to transfer jurisdiction to the Bezirksgericht Judenburg, on the ground that the conditions of Article 15 of the Regulation have not been met (the situation is not exceptional for the purposes of Article 15(1), and a particular connection with Austria within the meaning of Article 15(3) has not been established); it states that it was not possible to complete the psychologist's report due to the mother's failure to cooperate; it orders the prompt return of the child to Italy, either accompanied by the mother (in which social housing would be made available and an access diary drawn up) or to the father, in order to restore the relationship between the father and the child; it also certifies its judgment in accordance with Article 42(2) of the Regulation.	
25.8.2009		The Bezirksgericht Judenburg awards provisional custody to the mother, on the ground that a return to Italy would be prejudicial to the best interests of the child. Its decision is notified to the father, without a translation and without any information on the right to refuse to accept it.

Date	Italy	Austria
22.9.2009		The father applies to the Bezirksgericht Leoben for enforcement of the return order made by the Tribunale per i Minorenni di Venezia on 10 July 2009, relying on Article 47 of the Regulation.
23.9.2009		The Bezirksgericht Judenburg certifies that its order of 25 August 2009 has become final and enforceable.
12.11.2009		The Bezirksgericht Leoben dismisses the application for enforcement of the return order of the Tribunale per i Minorenni di Venezia, on the ground that the return of the child to the father would expose her to psychological harm.
30.11.2009		The father lodges an appeal against the judgment of the Bezirksgericht Leoben of 12 November 2009.

Date	Italy	Austria
20.1.2010		The Landesgericht Leoben upholds the father's appeal, relying on a strict application of the provisions of the Regulation.
16.2.2010		The mother brings an appeal on a point of law before the Oberster Gerichtshof against the judgment of the Landesgericht Leoben of 20 January 2010.
20.4.2010		The Oberster Gerichtshof refers five questions to the Court for a preliminary ruling, requesting that they be dealt with under the urgent procedure.
3.5.2010		The request for a preliminary ruling arrives at the Court.

Questions referred to the Court

24. The referring court accepts that, according to the judgment in Rinau, [11] where a certificate has been issued under Article 42 of the Regulation, the court of enforcement can only declare the enforceability of a judgment given under Article 11(8) of the Regulation and allow the immediate return of the child. Any examination of the substance of the judgment of the Italian court is therefore precluded as a matter of principle. Futhermore, under national rules of procedure, the lack of territorial jurisdiction of that court may not be relied on in the context of an appeal on a

11 — Cited above in footnote 8.

point of law. Nevertheless, it considers that certain points require closer examination.

25. The Oberster Gerichtshof therefore decided to refer the following five questions to the Court:

'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?'

Procedure before the Court

26. As the case is subject to the urgent procedure governed by Article 104b of the Rules of Procedure of the Court, written observations were submitted by the Austrian Government and the European Commission, the only parties, with the exception of the parties to the main proceedings, entitled to make submissions at that stage. The same parties, together with the Czech, German, French, Italian, Latvian, Slovenian and United Kingdom Governments, were represented at the hearing on 14 June 2010. The parents, although entitled to submit written observations and to be represented at the hearing, did not, in this instance, exercise that right.

Analysis

Preliminary remarks

27. The questions referred by the Oberster Gerichtshof are prompted, in no small part, by the perception that there is a conflict between the literal interpretation and the teleological interpretation of certain provisions of the Regulation. It therefore seems important to bear in mind the three fundamental principles which underpin the relevant provisions of the Regulation and which should inform any teleological interpretation. [12]

12 — See also *Rinau*, cited above in footnote 8, paragraph 47 et seq., as well as my View in that case (point 15 et seq.).

28. First, the Regulation is based on the primacy of the interests of the child and respect for its rights. That idea is expressed not only in the objective of taking into account, in each case, the best interests of the child himself or herself but also, and in particular, in the general rule that it is the courts of the child's place of habitual residence which are best placed to settle any issues regarding custody or parental responsibility and which must therefore, in principle, have jurisdiction in the matter. However, it seems to me that, although the court called upon to make a decision in a specific case must take into account the specific interests of each child concerned, the Regulation must be interpreted on the basis of a more comprehensive concept of the best interests of the child, which is generally applicable.

29. Secondly, the Regulation seeks to ensure that any wrongful removal of a child has no legal effect, unless subsequently accepted by the other interested parties. To that end, it first lays down an almost automatic mechanism for securing the return of the child without delay. Second, it strictly limits the possibilities of transferring jurisdiction to the courts of the Member Sate of wrongful removal, allowing those of the Member State of former habitual residence to bypass any judgment of non-return made on the basis of Article 13 of the Convention.

30. Thus, even within the limited field of parental responsibility and wrongful removal of children, the Regulation pursues at least two objectives – the jurisdiction of courts in the State of habitual residence of the child and the return of the child, following a wrongful removal, to the State of former habitual residence – which may prove to be partially incompatible, at least if the period of removal is prolonged, resulting in the child's acquisition of a new habitual residence in the Member State of removal.

31. Thirdly, the Regulation requires national courts to show a high level of mutual trust, keeping the grounds for non-recognition of judgments issued by a court in another Member State to the minimum required and making the recognition and enforcement of those judgments almost automatic. Furthermore, and in the same vein, it lays down a mechanism for cooperation and encourages national courts to use it.

32. In my view, two other aspects of the Regulation should also be emphasised.

33. First, the Regulation provides only for rules concerning jurisdiction, recognition and enforcement. It in no way concerns substantive issues. Contrary to the argument which the Austrian Government appeared to put forward at the hearing, application of the Regulation is not 'European integration at the expense of children'. Rather, the Regulation seeks clearly to define which court has jurisdiction in cross-border situations and to ensure that other courts have confidence in its judgments, since *all* the courts of the Member States must ensure that the best interests of the child concerned prevail when making decisions.

34. Secondly, the Regulation presupposes – and in some cases even requires – that the courts and parties should act swiftly in matters relating to the wrongful removal or retention [13] of a child. Where that swift action is not ensured in reality, application of the Regulation suffers, as this case illustrates. In particular, the Regulation seeks to prevent a situation from becoming complicated by new connections which the child may acquire with the Member State of wrongful removal.

35. Lastly, it is necessary to bear in mind the successive stages of the procedure provided for by the Convention and the Regulation in the event of wrongful (and disputed) removal. First of all, the parent left behind must apply on the basis of Article 12 of the Convention to the courts of the Member State of removal to obtain a return order. That application must be approved, except where one of the exceptional grounds for refusal listed in Article 13 of the Convention exists and where, in the case of a refusal on the basis of Article 13(b), it has not been established that adequate arrangements have been made to secure the protection of the child after its return (see Article 11(4) of the Regulation). The decision must be made, except in exceptional circumstances, within six weeks (Article 11(3) of the Regulation). A judgment of non-return must be communicated to the authorities of the Member State of former habitual residence and the parties (generally the parents) must have the opportunity to be heard before the court having jurisdiction in that State. If appropriate, the latter court may, none the less, order the return of the child (Article 11(8) of the Regulation) and its judgment will be directly enforceable in the Member State of removal, if it is certified in accordance with Article 42 of the Regulation. Such certification is possible, however, only where the court has taken into account the reasons for and evidence underlying the order of non-return. A court which orders return under those circumstances must, furthermore, inform the authorities of the Member State of removal of

13 — The Regulation is concerned both with cases of wrongful removal and cases of wrongful retention. Below, I will discuss only 'wrongful removal', as that is the situation in this case. Nevertheless, the considerations set out apply to both situations.

the details of any measures taken to ensure the protection of the child after its return.

Question 1

36. The Oberster Gerichtshof asks the Court whether a 'judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv) of the Regulation is to be understood as including 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. [14]

37. In the context of these proceedings, that involves determining whether, as a result of its judgment of 23 May 2008, the Tribunale per i Minorenni di Venezia lost the jurisdiction that it would otherwise have retained under the general rule in Article 10 of the Regulation, as a court of the Member State in which the child had her habitual residence immediately prior to her wrongful removal. The Oberster Gerichtshof takes the view that the child has now acquired a new habitual residence in Austria and that, although the condition in Article 10(a) (in this case, the father's acquiescence) is not satisfied, the first two conditions imposed in alternative (b) have been met (namely that the child resided in Austria for a period of at least one year after the father had knowledge of her whereabouts and that the child is settled in her new environment). If at least one of the additional conditions (i) to (iv) is also met, general jurisdiction passes to the courts of Austria, the Member State of the child's new habitual residence. The Oberster Gerichtshof discounts conditions (i) to (iii), but takes the view that if – as the mother claims – the judgment of the Tribunale per i Minorenni di Venezia of 23 May 2008 is a 'judgment on custody that does not entail the return of the child', condition (iv) will be satisfied.

38. However, the Oberster Gerichtshof is of the view that, on a teleological interpretation, that condition should not be regarded as having been satisfied – even though, interpreted literally, the judgment in question is indeed a 'judgment on custody', as it governs custody of the child, if only provisionally, and does

14 — As the Italian Government stated at the hearing, it appears that the phrase '"parental decision-making power", and in particular the right to determine the place of residence', used in the question referred for a preliminary ruling, is not an entirely correct reflection of the substance of the judgment of the Tribunale per i Minorenni di Venezia of 23 May 2008. However, it is common ground that that judgment indeed relates to custody of the child and does not entail her return.

not entail her return, at least in the immediate future.

39. In essence, its reasoning is as follows. Where a *final* judgment on custody does not entail the return of the child, there is no reason to uphold the jurisdiction of the courts of the State of former habitual residence. Those of the new State of habitual residence will always be in a better position to make subsequent decisions concerning the child and the conditions in Article 10(b)(iv) of the Regulation are understandable and reasonable. By contrast, where a *provisional* authorisation to leave the child with the 'abducting parent' seeks merely to prevent the removal of the child pending the final judgment, a literal interpretation, by removing jurisdiction from the court in the State of former habitual residence, would prevent that court from issuing its final judgment. However, given the objective of the Regulation, that court should lose its jurisdiction only if the custody proceedings *come to an end* and no return order is made. The Austrian Government entirely concurs with that reasoning.

40. Similarly, the Commission points out the risk that a court in the Member State of former habitual residence may be dissuaded from adopting a provisional judgment on custody that would leave the child in the Member State of new habitual residence and would be in the interests of the child, for fear of subsequently being deprived of its jurisdiction to issue a final judgment. The Commission also takes the view that, as exceptions to the general rule of upholding the jurisdiction of the courts of the Member State of former habitual residence, the conditions for transferring jurisdiction listed in Article 10 of the Regulation should be interpreted narrowly rather than broadly.

41. With the exception of the Republic of Slovenia, all the Member States represented at the hearing took essentially the same view.

42. Broadly speaking, I also concur with that view, though I consider that it is necessary to qualify certain aspects of it and to examine other considerations which point to the opposite conclusion and which cannot be dismissed out of hand.

43. First, I would point out that the considerations of the Oberster Gerichtshof are based, to a certain extent, on the reasons which led the Tribunale per i Minorenni di Venezia to grant provisional custody to the mother. However, I am reluctant to adopt such an approach. As a matter of principle, it does not seem to me to be desirable to interpret the Regulation on the basis of the specific reasoning of an individual judgment on custody. The question should rather be whether an objective differentiation may be inferred on the basis of whether or not a judgment is provisional. Furthermore, there remains a risk that the court of one Member State will

misinterpret the reasoning of the court of another Member State. [15] I shall therefore attempt to analyse the issue by adopting a more general approach.

44. Next, I am reluctant, in such a context, to apply baldly the principle that exceptions or derogations to a rule must be interpreted restrictively. Indeed, in the case of Article 10, although the rule upholding the jurisdiction of the court of the former habitual residence is consistent with one of the fundamental principles of the Regulation – namely that of depriving the unlawful act of the abducting parent of any legal effect – the exception is consistent with another fundamental principle, since it is a rule of jurisdiction 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. [16]

45. Lastly, it must be recognised that – as attractive as the result proposed by the referring court, the Commission and almost all the Member States represented at the hearing may seem – there are some arguments which go against it. They can be summarised as follows.

46. Article 10(b)(iv) of the Regulation deals with a situation in which a child has resided for at least one year in the Member State of wrongful removal, where it has acquired a new habitual residence and is settled in its new environment, and in which the courts of the Member State of its former habitual residence have not only failed, during that period, to reach a final judgment on custody of the child, but have also taken the view – albeit temporarily, but in any event for the relevant period of at least one year – that it was in the child's best interests to remain in the Member State of removal. Given the passage of time, it is very probable that those courts will find it increasingly difficult to gather information regarding the child's current situation and social circle (using, for example, psychologists' reports, social services' reports and/or, depending on the age of the child, face-to-face interviews). Furthermore, those courts are located in a Member State with which the child is increasingly likely to be losing contact. In such circumstances, should not the principle that the court which is nearest the child has jurisdiction not prevail over of the principle

15 — I wonder indeed whether this has not occurred, to some extent, in the present case. The Oberster Gerichtshof appears to assume that the Tribunale per i Minorenni di Venezia granted provisional custody to the mother principally in order to avoid the child making repeated changes of location; whereas, from my reading of the order of 23 May 2008, that court sought in particular to facilitate trips made by the child, with her mother, between Austria and Italy, in order to maintain contact with her father.

16 — See recital 12 in the preamble to the Regulation. It should be noted, furthermore, that the criterion of proximity may, by its very nature, produce results which vary with the passage of time.

upholding the jurisdiction of the court of former habitual residence?

47. In my view, the answer is 'no'.

48. Where a child has been wrongfully removed to another Member State, the immediate objective of the Regulation and of the Convention is to ensure its swift return, in order to deprive the 'abducting parent' of any practical or legal benefit he (or she) may hope to reap from the situation. [17] If that objective is effectively achieved, it will also act as a significant deterrent. However, as stated in the explanatory memorandum to the Commission's proposal prior to adoption of the Regulation, [18] 'it may be legitimate in certain cases for the de facto situation created by an unlawful act of child abduction to produce as a legal effect the transfer of jurisdiction. To this end, a balance must be struck between allowing the court that is now closest to the child to assume jurisdiction and preventing the abductor from reaping the benefit of his or her unlawful act.'

49. It is that balance – between two of the principles I have identified above [19] – which Article 10 of the Regulation seeks to strike as regards, first, the general jurisdiction in matters concerning parental responsibility and, secondly, by means of Article 11(8) of that regulation, the special jurisdiction to order the return of the child.

50. With regard to wrongful removals, the basic principle, which seeks to deprive the 'abducting parent' of any benefit obtained from his or her unlawful act, requires that the jurisdiction of the courts of the Member State of former habitual residence should be upheld. That principle applies not only to general jurisdiction but also, and a fortiori, to jurisdiction to order the child's return.

51. It nevertheless seems entirely reasonable – and consistent with the aim of seeking to strike the balance described above – to provide, as does Article 10(a) of the Regulation, that the acquisition of a new habitual residence, *together with the acquiescence of*

17 — I do, however, agree with the point made by the French Government at the hearing, namely that this is not a penalty imposed on the 'abducting parent', but rather a measure which seeks to restore the legal situation which would have prevailed had there been no wrongful removal.

18 — See Article 21 of the proposal for a Council regulation of 17 May 2002 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No 1347/2000 and amending Regulation (EC) No 44/2001 in matters relating to maintenance (COM(2002) 222 final/2), which became Article 10 of the Regulation. The wording of the provision has changed, but the substance is essentially the same.

19 — See points 28 and 29 above.

any party having rights of custody, may result in the transfer of that jurisdiction to the courts of the Member State of new habitual residence. In those circumstances, there is no longer any reason to provide for jurisdiction to order the return of the child.

52. It might appear just as reasonable to provide for the same transfer of jurisdiction each time the child has not only acquired a new habitual residence, but has also resided in the new Member State for more than one year and is settled in its new environment, even in the absence of the express acquiescence of all the parties having rights of custody. That is the solution adopted in Article 7 of the Hague Convention of 1996, [20] which seems consistent with the principle of upholding the jurisdiction of the courts of habitual residence in the best interests of the child. However, although it is clear from the *travaux préparatoires* for the Regulation that several delegations favoured that solution, [21] ultimately a more rigorous approach was consciously selected, limiting the transfer of jurisdiction strictly to the four situations listed exhaustively in the final wording of Article 10(b) of the Regulation.

53. The first three of those situations involve, de facto, the tacit acquiescence of the holders of a right of custody (that is, usually, the parent left behind), in so far as no application for return of the child has been made in the Member State of wrongful removal, or such an application has been either withdrawn or refused without the applicant taking further steps in the proceedings in the Member State of former habitual residence, in accordance with Article 11(7) and (8) of the Regulation.

54. The fourth situation, with which we are here concerned, is that of a judgment on custody *that does not entail the return of the child*, issued by a court of the Member State of former habitual residence. This involves not the tacit acquiescence of that court to the transfer of jurisdiction, but rather a judgment that endorses the acquisition by the child of a new habitual residence in another Member State, which will lead to the transfer of jurisdiction. Thus, although the transfer of jurisdiction

20 — Cited above in footnote 3. That convention was signed by all Member States of the European Union with the exception of the Republic of Malta, but to date has been ratified by only eight of them, excluding the Republic of Austria and the Italian Republic. All the other Member States, with the exception of the Kingdom of Denmark, have been authorised to ratify it or to accede to it simultaneously, in the interest of the European Union (see 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 – Convention concerning jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (OJ 2008 L 151, p. 36)).

21 — See, in particular, Section II(a) of Council document 13940/02 of 8 November 2002 (paragraph 11 et seq.).

takes place automatically under Articles 8 and 9 of the Regulation where a child changes habitual residence by moving lawfully from one Member State to another, to achieve the same result in the case of wrongful removal, the court of the Member State of former habitual residence must legalise that removal by approving it.

55. It is not disputed that a judgment which seeks to provide a lasting solution to the issue of custody constitutes such approval, provided that the other conditions of Article 10(b) of the Regulation (new habitual residence for more than one year, settling in the new environment) are satisfied. According to a literal interpretation (the Slovenian Government highlighted the very broad definition of the term 'judgment' in Article 2(4) of the Regulation), the same would apply to a provisional judgment, meant to be replaced by a subsequent lasting judgment.

56. However, I do not believe that that should be the case. The period of one year which is a precondition for the transfer of jurisdiction in all the situations provided for in Article 10(b) of the Regulation clearly involves, in the first three cases, a deadline for making or confirming an application for the return of the child. It would therefore be astonishing – and inconsistent – if, in the fourth case, it involved a deadline for the conclusion of the procedure. However, that would be the result if provisional judgments were included in the concept of 'judgment on custody that does not entail the return of the child'. In that situation, a court which had not issued any 'judgment on custody that does not entail the [immediate] return of the child' would retain its jurisdiction until the end of the procedure, while a court which had issued such a judgment (which might often prove to be desirable in the interests of the child) would thereby set itself a deadline for issuing a more lasting judgment.

57. Where a court is seised of a dispute relating to the custody of a child, and in particular where that dispute concerns wrongful removal, it is often faced with a major problem. The parents' doggedness may lead one or other of them to use all the available procedures in order to secure the child. In some cases, the parent concerned may mistakenly use the wrong means; in others, he or she may consciously exploit them. Furthermore, since the courts of two Member States are necessarily involved, proceedings in one State may delay those in the other, and any failure in communication may further prolong matters. However, in all cases, there is a real risk that the court seised in the Member State of former

habitual residence may lose de facto control over the duration of the procedure.

58. The present case illustrates this. First, it appears that the Bezirksgericht Leoben dismissed the application for return made by the father on the basis of the Convention only on 3 July 2008, some 11 weeks after that application was lodged on 16 April 2008, whereas Article 11(3) of the Regulation imposes a maximum period of six weeks 'except where exceptional circumstances make this impossible'. Then, following that refusal, instead of applying directly to the Tribunale per i Minorenni di Venezia to obtain an order under Article 11(8) of the Regulation, the father appealed against the refusal in Austria – twice, as the first refusal was annulled and a new refusal decision was issued. Furthermore, even after his second appeal was dismissed, on 7 January 2009, the father waited three months before making the application under Article 11(8) of the Regulation. [22] Throughout that period, the measures intended by the Tribunale per i Minorenni di Venezia to ensure that it had sufficient information to issue a lasting judgment on the custody of the child (contact with the father, psychologist's report) – the very measures on which the decision to leave the child provisionally with her mother in Austria was based – could not be successfully implemented, due to the mother's total lack of cooperation. The period of one year therefore came to an end, though this was due neither to the father's acquiescence nor to a failure by the Tribunale per i Minorenni di Venezia to act. [23]

59. Nevertheless, the court first seised of such a dispute must very often take immediate provisional measures to deal with what is most urgent, while waiting to gather all the information necessary to issue a lasting judgment regarding custody of the child. That is precisely what happened in this case. I do not regard it as conceivable that the legislature intended that jurisdiction should be transferred automatically at the end of one year in such a situation, whereas it would have remained with the first court if that court had not had to take an immediate provisional measure postponing the lasting judgment on custody. That would amount to interrupting the course of proceedings initiated before the court having jurisdiction, on the sole ground that the court had taken a provisional measure which it deemed necessary.

22 — It is possible that that delay can be explained by a misunderstanding of Article 11(7) of the Regulation, which provides for a period of three months to enable the parties to submit observations on the order on non-return; however, we do not have any information in that regard.

23 — Although I cite the present case as an illustration, there are also comparable circumstances in *Rinau*, cited above in footnote 8, and in Case C-256/09 *Purrucker*, pending before the Court. Here, I note that certain delays in the communication of the judgment of the Tribunale per i Minorenni di Venezia of 23 May 2008 to the Austrian courts and of the request of 26 May 2009 by the Bezirksgericht Judenburg to the Tribunale per i Minorenni di Venezia to transfer jurisdiction may also have contributed to the drawing-out of the procedure.

60. On the contrary, the transfer of jurisdiction to the courts of the Member State of wrongful removal may, in my view, be justified only where the passage of time is accompanied by the acquiescence of the applicant parent – bringing a definitive end to any proceedings already initiated or excluding any subsequent proceedings which could have resulted in a return order enforceable under Article 11(8) and Article 42 of the Regulation – or by a judgment issued by the court having jurisdiction before which the case has been brought that terminates the action brought before it and does not entail the return of the child. In that way, the four situations set out in Article 10(b) of the Regulation all have a consistent basis in a judgment which explicitly or implicitly excludes the subsequent use of the mechanism laid down in Article 11(8) and Article 42 of the Regulation.

61. At the hearing, the question was raised as to how the court of the Member State of wrongful removal may determine with certainty whether the judgment of the court of the Member State of former habitual residence is provisional or final in nature. Judgments relating to the custody of a child are always, by their very nature, subject to possible review on the basis of a change in circumstances and therefore never have the same degree of finality as most other judicial decisions. [24] Furthermore, the differences in procedure and terminology between the legal systems of the Member States may complicate the task of distinguishing between a provisional judgment and a 'final' judgment.

62. It seems to me that the answer is to be found in the criterion put forward by the French Government, namely that a judgment on custody must be regarded as provisional for as long as the proceedings of which the court is seised have not run their full course. It is therefore sufficient to assess – with the help, where required, of the relevant central authorities – whether there are measures still to be taken in the relevant proceedings, without its being necessary to bring further proceedings before the court.

63. I therefore conclude that the objectives of the Regulation preclude a literal interpretation of Article 10(b)(iv) and that a provisional measure awarding custody of a child to the abducting parent pending the final (or lasting) judgment on custody is not a 'judgment on custody that does not entail the return of the child' within the meaning of that provision.

Question 2

64. The Oberster Gerichtshof asks whether a return order falls within the scope

24 — See my Opinion in *Purrucker*, cited above in footnote 23, point 118 et seq.

of Article 11(8) of the Regulation only where the court orders return on the basis of a judgment on custody which it has itself delivered.

65. It explains that the mother submits that only a return order made on the basis of a judgment on custody is covered by Article 11(8) of the Regulation. The judgment of the Tribunale per i Minorenni di Venezia of 10 July 2009, the enforcement of which the father is seeking to secure, is not based on a judgment on custody and is therefore not covered by that provision.

66. The Oberster Gerichtshof accepts, rightly, that such an interpretation is substantiated neither by the wording of the provision – which speaks, without qualification, of 'any subsequent judgment which requires the return of the child' – nor by the judgment in *Rinau* [25] – which emphasises the procedural autonomy of a judgment following a judgment of non-return – but takes the view that it cannot be ruled out in the context of a systematic and teleological interpretation. First, it is clear from Article 11(7) of the Regulation that the set of rules in Article 11(6) to (8), giving the last word to the courts of the Member State of former habitual residence, is justified only where the return order is based on a custody decision entailing the return of the child. Secondly, such an interpretation makes the provisions of Article 10 and Article 11 more consistent, taken as a whole.

67. I would make clear from the outset that I am in no way convinced that the considerations set out by the referring court should lead to the result it proposes. As I explained in the context of Question 1, the main objective of the Convention is to secure, except in certain exceptional circumstances, the *prompt* return of the child, *before* the issues of custody or parental responsibility are examined. Article 11 of the Regulation seeks to strengthen the provisions of the Convention, still with reference to a return *without delay* – and not after having issued a judgment on the issue of custody, at the end of proceedings which could prove to be lengthy.

68. Nevertheless, the Oberster Gerichtshof considers – and that view was also put forward by several Member States at the hearing – that a return order based on a custody decision requiring the return of the child, made after the finding of facts and taking of evidence, is more likely to be soundly based than an order made in proceedings that are merely summary.

69. Furthermore, according to the referring court, if decisions of the latter type were to fall within the scope of Article 11(8) of the

25 — Cited above in footnote 8, in particular, paragraph 63 et seq.

Regulation, it would be difficult to make sense of the article as a whole. Instead of first requiring the court of the State of wrongful removal to conduct return proceedings under the Convention, the court of the State of former habitual residence could simply make a return order immediately after the abduction, which could be directly enforceable in the other Member State in exactly the same way as a judgment under Article 11(8) of the Regulation. The proceedings under the Convention required by Article 11 of the Regulation would therefore delay matters and would have no intrinsic significance.

70. As regards the first part of that reasoning, I would acknowledge that proceedings involving more careful consideration of the facts are more likely to lead to a sound result. However, if followed correctly, the procedure laid down in Article 11(8) of the Regulation offers, in my view, an entirely adequate guarantee. The situation is one in which the court of the State of wrongful removal has already refused to order the return of the child, on one or more of the grounds listed in Article 13 of the Convention, and has communicated to the court of the State of former habitual residence – possibly with the help of the respective central authorities, as provided for in Article 55(c) of the Regulation – a copy of its judgment together with any relevant documents. That latter court – which is better placed to assess the circumstances in which the child lived before the removal and those in which the child will live following the return, if ordered – may, under Article 42 of the Regulation, certify its judgment issued on the basis of Article 11(8) of the Regulation only if it has taken into account the reasons for and evidence underlying the non-return order. [26] That court may therefore be presumed – in accordance also with the principle of mutual trust underpinning the Regulation – to have rejected those reasons and that evidence on the basis of other evidence of which the first court was not aware.

71. The approach advocated by certain Member States at the hearing appears, in contrast, to be based on mistrust, on the part of the courts of the Member State of removal, with regard to the judgments issued by the courts of the Member State of former habitual residence. Such an approach not only constitutes a negation of the principle of mutual trust, but also takes no account of the clear advantage arising from a twofold examination of the application for return by two courts, one of which is best placed to take into account the current circumstances in which the child lives, while the other is best placed to assess the circumstances in which the child previously lived and will live in the event of its return.

26 — First subparagraph of Article 42(2)(c) of and point 13 of Annex IV to the Regulation.

72. As regards the second part of the reasoning, it seems to me that it is based on a false understanding of the relationship between the Convention and the Regulation. The Convention provides without ambiguity that, in the event of the abduction of a child, it is necessary first to apply to the courts of the State in which the child is present to secure its prompt return. Indeed, those courts are best placed to order the return in the most efficient manner. Their judgments will be enforced directly in accordance with national procedure. It is only where those courts consider that one of the grounds for non-return listed in Article 13 of the Convention applies – therefore, only in situations which are deemed to be exceptional – that it is necessary to apply, under Article 11 of the Regulation, to the court having jurisdiction in the State of former habitual residence. That court must therefore be persuaded that the ground relied upon does not prevent the return of the child before being able to override the judgment of non-return issued under the Convention.

73. If, on the other hand, it fell to the courts of the State of former habitual residence to order the return of the child immediately, first, the enforcement procedure would – always and not only where Article 11(8) of the Regulation is used – be complicated by the need for the authorities of two separate Member States to cooperate, entailing, in most cases, the need to obtain a translation of the relevant documents and, secondly, an essential safeguard of the best interests of the child, namely the compulsory twofold examination in cases of uncertainty concerning the appropriateness of ordering its return, would be lacking.

74. It therefore seems to me that the rules set out in Article 11 of the Regulation, taken as a whole, are entirely consistent, without there being any need to require a prior judgment on custody as the basis for a judgment issued under Article 11(8) of the Regulation.

75. The Oberster Gerichtshof also points out that a judgment issued under Article 11(8) of the Regulation, where it *precedes* a lasting judgment on custody which could lead to a different result, may require the child to change its place of residence twice. That point was also emphasised by several Member States at the hearing.

76. The possibility of the child having to move twice cannot be denied. However, that possibility was accepted, in my view, both by the drafters of the Convention and by those of the Regulation as a necessary corollary of the objective of securing, in the event of wrongful removal or retention, the prompt return or return without delay of the child. That intention appears to me to be very clear in the scheme of the relevant provisions of the Regulation. First, the child is returned to the Member State of its former habitual residence and then issues of custody and parental responsibility are determined. In a certain

number of cases, that will necessarily mean that a child must move twice – or even three times, taking into account the first wrongful removal. Although it is certainly not in the interests of the child concerned to move several times, it seems to me that the wider interest of discouraging any attempt at abduction by depriving it of any legal or practical effect should prevail, in accordance with the spirit of the Regulation (and the Convention).

77. Furthermore, the procedure should be considered in the light of the objective pursued, namely the return of the child before the court having jurisdiction. That return simply 'corrects' the first wrongful removal. The court having jurisdiction must then examine the issue of custody taking into account all the circumstances, and at least some aspects of that examination, such as psychological observations, social reports and, where appropriate, face-to-face interviews, normally require the child to be present. It cannot be in the child's interests to complicate and prolong that process by keeping the child in the Member State of wrongful removal. Finally, the court issues its judgment, which may or may not result in a further move, but will have been issued with full knowledge of the facts.

78. Lastly, the Oberster Gerichtshof suggests that affording the courts of the Member State of former habitual residence the possibility of ordering the return of a child under Article 11(8) of the Regulation, without having first issued a judgment on custody, would go against the principle of mutual trust, as it presupposes that the courts of the other Member State could refuse to order return on subjective grounds.

79. I do not find that argument at all convincing. As I have explained above, the procedure ensures a twofold examination in the event of uncertainty as to the appropriateness of ordering the return of the child and requires a well-considered statement of reasons for any return order issued under Article 11(8) of the Regulation. That does not appear to me to be in any way incompatible with the principle of mutual trust which underpins the Regulation and which – on the contrary – requires the court of a Member State not to attribute any subjective ulterior motive to the courts of another Member State, but to presume that their judgments are as objectively reasoned as those issued by the courts of its own Member State.

80. I therefore take the view that nothing in the wording or the structure of the Regulation restricts the possibility of ordering the return of a child under Article 11(8) of the Regulation to cases in which the same court has already issued a judgment on custody.

Question 3

81. If the answer to Question 1 or 2 is in the affirmative, the Oberster Gerichtshof asks whether it is possible, in the State of enforcement, to rely on the lack of jurisdiction of the court of origin (Question 1) or the inapplicability of Article 11(8) of the Regulation (Question 2) 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, or whether, in such circumstances, the defendant must apply for that certificate to be withdrawn in the Member State of origin, which would mean that enforcement in the State of enforcement could be stayed pending the decision of the State of origin.

82. In so far as I propose a negative response to Questions 1 and 2, Question 3 no longer arises. I will examine it nevertheless, given that the Court may answer either of those questions in the affirmative and, in particular, in the light of the more general interest there may be in clarifying the limits to the possibilities of opposing the enforcement of a judgment certified in accordance with Article 42(2) of the Regulation.

83. The Oberster Gerichtshof notes that, as the Tribunale per i Minorenni di Venezia issued a certificate under Article 42 of the Regulation, the Austrian courts have no jurisdiction to review the substance of its judgment. None the less, it is not inconceivable that those courts may be able to verify whether that judgment was indeed issued on the basis of Article 11(8) of the Regulation. Since, according to Article 40 of the Regulation, Section 4 of the Regulation applies to 'the return of a child entailed by a judgment given pursuant to Article 11(8)', Article 42(1) of the Regulation applies, and the certificate is thus binding, only if such a judgment existed – which would not be the case if the answer to either of the first two questions were in the affirmative.

84. The referring court also states that, since that certificate is intended to enable immediate enforcement without further review as to substance, only the court of origin could declare that it had been wrongly issued. However, Article 43 of the Regulation provides only for 'rectification' of the certificate. By contrast, under Article 10 of Regulation No 805/2004, [27] a more recent provision dealing with a similar issue, the European Enforcement Order certificate is, upon application to the court of origin, to be withdrawn where it was clearly wrongly granted. Since the European Union legislature would cer-

27 — Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15)

tainly not have sought to provide a lesser degree of judicial protection in connection with the return of a child than in connection with the enforcement of an uncontested claim, the Oberster Gerichtshof takes the view that the same should apply to the certificate granted in this case. In those circumstances, Article 23 of Regulation No 805/2004 [28] should also apply by analogy, so as to allow a stay of enforcement pending a ruling by the court of origin on the application for rectification or withdrawal of the certificate.

85. The reasoning of the referring court therefore rests largely on a comparison with Regulation No 805/2004, adopted less than five months after the Regulation, the *travaux préparatoires* for both regulations taking place within the Council of the European Union to a large extent during the same time frame. It would therefore be astonishing, in my view, if a significant difference between the two texts (rectification only where there is a material error in the context of the Regulation and rectification where there is a material error and withdrawal if the certificate has been wrongly granted in the context of Regulation No 805/2004) did not reflect the legislature's intention to treat the two situations differently. Indeed, it is clear from those *travaux préparatoires* that various options were contemplated in both cases before settling on the current differing texts. [29]

86. It therefore seems to me that the first of those regulations cannot be interpreted in the light of the second, all the more so since, although both are concerned with the general field of judicial cooperation in civil matters, the specific matters to which they relate are very different and do not necessarily require comparable approaches. Indeed, the importance of ensuring the return of a child in the event of wrongful removal bears no relation to the importance of enforcing payment of an uncontested claim. I would point out, furthermore, that the situations governed by the relevant provisions also differ in that, in the context of the Regulation, what is involved is a conflict, and therefore a dispute, which has already been heard and taken into consideration by at least two courts, whereas, in the context of Regulation No 805/2004, the application for withdrawal of the certificate transforms a supposedly uncontested claim into a claim which is at least partially contested, which may justify suspension by a court of

28 — 'Where the debtor has ... applied for the ... withdrawal of a European Enforcement Order certificate in accordance with Article 10, the competent court or authority in the Member State of enforcement may, upon application by the debtor ... (c) under exceptional circumstances, stay the enforcement proceedings.'

29 — See, for example, in the context of the Regulation, Document 7730/03 of the German delegation of 21 March 2003, which argues fervently (p. 10) for the possibility of appealing against the issuing of the certificate – a position rejected, however, in the Regulation as adopted. In the context of Regulation No 805/2004, on the other hand, it should be noted that the initial Commission proposal (COM(2002) 159 final) simply, but giving full and explicit reasoning in the explanatory memorandum, provided that 'there is to be no appeal' against a decision regarding an application for a certificate – a position maintained by the Commission in its amended proposal (COM(2003) 341 final) even after the European Parliament's proposal for an amendment introducing the possibility of appeal, which was, however, rejected by the Parliament and the Council in the text which was finally adopted.

enforcement which has not previously been seised of the claim.

87. That said, it is clear that the question remains of what options are open where it appears that a certificate of the type referred to in Article 42 of the Regulation has been wrongly granted. Although the importance of securing the prompt return of a child who has been wrongfully removed and of ensuring the simple and rapid enforcement of judgments ordering that return at the end of the procedure provided for in Article 11 of the Regulation militates against the possibility of challenging the certificate provided for in Article 42, it is always possible that a court may grant such a certificate, taking the view (wrongly) that it is entitled to do so, while in reality the conditions necessary for issuing a judgment on the basis of Article 11(8) of the Regulation have not been met.

88. An example put forward at the hearing is that of a court of a Member State of former habitual residence which orders the return of a child, without there previously having been an order on non-return under Article 13 of the Convention in the Member State of wrongful removal, and which certifies its order in accordance with Article 42 of the Regulation. The court concerned would indeed have jurisdiction to issue a judgment ordering the return of the child in those circumstances but, in that case, it would not be a judgment covered by Article 11(8) of the Regulation. Therefore, no provision is made for the certification of such a judgment in accordance with Article 42 of the Regulation [30] and the certificate would thus be wrongly granted.

89. It is hardly conceivable that the legislature would have intended to eliminate all means of remedying such an error, which does not necessarily correspond to the sole possibility of rectification set out in recital 24 in the preamble to the Regulation, namely 'where [the certificate] does not correctly reflect the judgment'.

90. These are issues which I have already considered in my View in *Rinau* [31] and more recently, and in a slightly different context, in my Opinion in *Purrucker*. [32] I will confine myself here to summarising the view I took in that regard, whilst referring to the arguments set out in the two aforementioned cases.

91. The Regulation clearly prohibits any appeal against the issuing of the certificate. However, it does not prohibit an appeal against the certified judgment. Where a party takes the view that the conditions required to

30 — See *Rinau*, cited above in footnote 8, paragraph 58 et seq. Although the immediate enforceability provided for in Articles 42 and 47 of the Regulation does not apply to such an order, the recognition and enforcement procedures laid down for other judgments in Article 28 et seq. may apply to it.

31 — Cited above in footnote 8; see, in particular, points 85 to 96 of the View.

32 — Cited above in footnote 23; see, in particular, points 127, 128 and 148 to 154 of the Opinion.

enable the court concerned to issue that judgment have not been met, it must be able to challenge the jurisdiction of that court before the court itself – which the mother appears to have done in this case – and, if need be, bring an appeal before a higher court. Where there is no legal remedy under national law in those circumstances, the court must, under the third paragraph of Article 267 TFEU, bring the matter before the Court of Justice. Any action or any referral to the Court in those circumstances must be dealt with as expeditiously as possible.

92. That conclusion answers Question 3(a) but, in Question 3(b), the referring court also asks whether, where a certified judgment has been issued but the validity of the certificate is disputed, the requested court may stay enforcement of the judgment in order to make it possible to withdraw the certificate.

93. I would point out that, in the present case, nothing in the order for reference or in the other documents submitted to the Court indicates that the mother pursued her challenge to the jurisdiction of the Tribunale per i Minorenni di Venezia by appealing, in Italy, against the judgment of 10 July 2009, the enforcement of which is requested in Austria by the father.

94. In such circumstances, it seems to me to be simply out of the question that the Austrian courts should be able to stay enforcement of that judgment in order to enable the mother to bring an appeal. Those courts themselves have no jurisdiction to hear an appeal and, as none has been brought before the court having jurisdiction, nothing in the wording or the objectives of the Regulation justifies delaying the enforcement of a judgment intended, it should be remembered, to secure the prompt return of the child.

95. Would the situation have been different if the mother had already brought such an appeal before the father sought enforcement of the judgment in Austria? A stay of enforcement might appear to be more justifiable in those circumstances, as the court of the Member State of enforcement is faced with a genuine, and no longer hypothetical, uncertainty as regards the enforceability of the disputed judgment. It might therefore prevent an unjustified move for the child, which would be followed either by a further move or by the unjustified retention of the child in the Member State of origin.

96. I am not, however, convinced that the Regulation allows such a stay of enforcement. Not only does it make no express provision in that regard, but, in addition, it may be inferred, from the presence elsewhere in the Regulation of a provision allowing a stay of proceedings in connection with an application for a declaration of enforceability of a judgment on the exercise of parental

responsibility, [33] that that omission is intentional – an intention which is confirmed, furthermore, by the fact that the provisions of the current Articles 43 and 44 were subject to vigorous debate when the Regulation was drawn up, [34] yet no provision allowing a stay of enforcement was adopted.

97. Nevertheless, as with my conclusion on the possibility of challenging the judgment, [35] it seems clear to me that the parent challenging that judgment in the Member State of origin must also be able to apply, in that Member State, for a stay of enforcement of the judgment, which the courts of the Member State of enforcement should take into account.

98. In the light of the foregoing considerations, I therefore conclude that the Court's answer to Question 3 should be that where a judgment certified by a court of a Member State in accordance with Article 42(2) of the Regulation is challenged on the ground of the lack of jurisdiction of the court of origin or of the inapplicability of Article 11(8) of the Regulation, the only possible legal remedy is to appeal against the judgment itself (and not against the certificate) before the courts of that Member State. The courts of the Member State of enforcement have no jurisdiction to refuse or stay enforcement.

Question 4

99. If the answer to Question 1, Question 2 or Question 3(a) is in the negative, the Oberster Gerichtshof asks whether a judgment delivered by a court in the State of enforcement and regarded as enforceable under the law of that State, by which provisional custody was awarded to the abducting parent, precludes, in accordance with Article 47(2) of the Regulation, an earlier return order made by the State of origin under Article 11(8) of the Regulation, even if it would not prevent the enforcement of a return order made by the State of enforcement under the Convention.

100. Before examining that question, which in the context of the main proceedings is concerned with the effects of the order of the Bezirksgericht Judenburg of 25 August 2009, it seems to me helpful to examine the

33 — Article 35 of the Regulation, in Section 2 of Chapter III, which does not apply to judgments ordering the return of the child, governed by Section 4.

34 — See Document 7730/03 of the German delegation of 21 March 2003, cited above in footnote 29. It was then Article 48 of the draft regulation.

35 — See point 91 above.

circumstances in which that court considered itself to have jurisdiction to make that order.

101. It is clear from the judgment of the Tribunale per i Minorenni di Venezia of 10 July 2009 that the mother initially applied to the Italian court for the dispute to be transferred to the Austrian courts under Article 15 of the Regulation. [36] That application was rejected on the ground, first, that the circumstances were not exceptional, but concerned an ordinary dispute between parents relating to the custody of their child (whereas Article 15 applies '[b]y way of exception') and, secondly, that the child did not have a 'particular connection' with Austria, according to the definition set out in Article 15(3).

102. That judgment falls within the jurisdiction of the Tribunale per i Minorenni di Venezia and is not at issue in this reference for a preliminary ruling. Nevertheless, I have certain reservations about it.

103. First, it does not seem correct to me to *exclude* the application of Article 15 of the Regulation on the ground that the proceedings are concerned with an ordinary dispute between parents relating to the custody of their child. The introductory words '[b]y way of exception' do not require, in my view, that the circumstances must be exceptional before the provision may be applied. Rather, they allow a court having jurisdiction to *derogate* from the general rules of jurisdiction and to transfer the case, or a part thereof, to a court of another Member State, with which the child has a particular connection, *if* it considers that the latter court is better placed to hear the case and that the transfer will be in the best interests of the child – a situation which will, in principle, be exceptional.

104. Secondly, it seems to me that, contrary to the reasons given by the Tribunale per i Minorenni di Venezia, a number of the alternative criteria in Article 15(3) of the Regulation (fulfilment of a single one of which would have been sufficient to establish a 'particular connection') were actually met in this case. For example, it is common ground that the child had Austrian nationality as well as Italian nationality, satisfying condition (c) of the provision, which is not limited to cases of single nationality. Moreover, it seems clear that, when the transfer request was refused, the mother had established her habitual residence in Austria, which fulfils criterion (d). [37]

36 — From the reference to Article '15(b)(5)', it is not clear whether the Tribunale per i Minorenni di Venezia sought to refer to Article 15(1)(b), (2)(b) or (3)(b) of the Regulation, each of which could be relevant, as appropriate. However, the most plausible explanation seems to be that the mother applied to that court, under paragraph 1(b), to request the Bezirksgericht Judenburg 'to assume jurisdiction in accordance with paragraph 5'.

37 — I would also point out that the child had habitually resided in Austria for more than half her life (whether or not she had acquired a new 'habitual residence' within the meaning of the Regulation), which might possibly satisfy condition (b) according to the French wording but not necessarily under that of the other language versions.

105. That said, and even if the reasons given by the Tribunale per i Minorenni di Venezia may be regarded as insufficient in certain respects, it is clear that nothing in Article 15 of the Regulation could *require* that court to consider that the Bezirksgericht Judenburg was better placed to hear the case and that the transfer would have been in the best interests of the child, and therefore to decline jurisdiction in favour of the Austrian court. I would also point out that the Court has not been informed of any appeal by the mother against that transfer refusal, which would seem to be the normal approach for her to adopt, if she disputed the reasons given by the Tribunale per i Minorenni di Venezia.

106. Next, the order for reference indicates that, without waiting to see how the Tribunale per i Minorenni di Venezia dealt with her request, the mother applied for custody directly to the Bezirksgericht Judenburg. On 26 May 2009, the latter assumed jurisdiction 'under Article 15(5) of the Regulation' and asked the Italian court to transfer the proceedings to it. It seems that it is on the basis of that assumption of jurisdiction that the Bezirksgericht Judenburg delivered its judgment of 25 August 2009 awarding provisional custody to the mother; the Oberster Gerichtshof seeks to ascertain whether that judgment may preclude enforcement of the return order of the Tribunale per i Minorenni di Venezia of 10 July 2009.

107. The Court does not have the text of that judgment of 26 May 2009, but the brief summary of it provided by the Oberster Gerichtshof seems to indicate that the Bezirksgericht Judenburg assumed jurisdiction in breach of Article 15 of the Regulation. That article in no way allows a court to assume jurisdiction of its own motion. It is clear from Article 15(5) of the Regulation that before it can assume [38] jurisdiction in that way, a court must be seised 'in accordance with paragraph 1(a) or 1(b)' – that is to say, directly or indirectly, on the initiative of the court having jurisdiction, which stays proceedings and invites the parties to seise the court of another Member State, or itself requests that court to assume jurisdiction. Although it is true that a transfer request, made by a court of another Member State with which the child has a 'particular connection', is possible under paragraph 2(c), [39] the outcome of that request is a matter for the court having jurisdiction as to the substance of the case – and therefore for the court of the Member State of (former) habitual residence.

108. Consequently, the jurisdiction of the Bezirksgericht Judenburg to deliver its

38 — I note that the English version of the Regulation provides, more clearly, that the relevant court *accepts* jurisdiction and not that it *assumes* jurisdiction.

39 — It appears from the judgment of the Tribunale per i Minorenni di Venezia of 10 July 2009 that the Bezirksgericht Judenburg actually made such a request, though at the same time as it assumed jurisdiction and therefore without awaiting the response to that request.

judgment of 25 August 2009 seems to be debatable. If, under Article 10(b)(iv) of the Regulation, the Tribunale per i Minorenni di Venezia had lost jurisdiction at that time (a question which I propose to answer in the negative), it is plausible that the Bezirksgericht Judenburg would have acquired jurisdiction by application of the normal rule in Article 8 of the Regulation. However, it could not acquire jurisdiction by means of Article 15 of the Regulation, since the Tribunale per i Minorenni di Venezia did not, of its own motion, take any action to that effect. [40]

109. In its order for reference, the Oberster Gerichtshof sets out a number of reasons why the certificate of the Bezirksgericht Judenburg, certifying that its judgment of 25 August 2009 had become final and enforceable, could have been wrongly granted, in particular because of possible defects in connection with service of the judgment. It states, however, that all other Austrian courts are bound by that certificate and that it may be withdrawn, where appropriate, only by the Bezirksgericht Judenburg itself, on application or of the court's own motion. The Oberster Gerichtshof does not envisage the possibility that the Bezirksgericht Judenburg may have incorrectly assumed jurisdiction and therefore does not state whether it also has no powers to review any lack of jurisdiction. In any event, it seems to me that the assumption of jurisdiction under Article 15 of the Regulation should be open to review within the Austrian judicial system.

110. Without prejudice to the above considerations, which the Oberster Gerichtshof must, where appropriate, take into account, I will examine Question 4 on the assumption, which is that of the Oberster Gerichtshof itself, that the judgment of the Bezirksgericht Judenburg of 25 August 2009 awarding provisional custody to the mother is enforceable.

111. The national court explains that although, in matters relating to rights of custody, an enforceable judgment which is irreconcilable with a previous judgment precludes, in principle, enforcement of the latter judgment – as is expressly provided for in the second subparagraph of Article 47(2) of the Regulation – that is not necessarily true under national law. Indeed, the Oberster Gerichtshof itself recently held that a return order made in Austria under the Convention must be enforced even if it is contrary to a provisional custody measure taken by another Austrian court, since Article 17 of the Convention provides that the sole fact that a decision relating to custody has been given in the requested State is not to be a ground for refusing to return a child. If, under Article 47(2) of the Regulation, a return order made abroad must be treated in exactly the same way as the judgment of a national court,

40 — I would also point out that Article 15 applies only if the court which transfers the case itself has jurisdiction. On the basis of that article, the Bezirksgericht Judenburg therefore, implicitly but necessarily, recognised the jurisdiction of the Tribunale per i Minorenni di Venezia on 26 May 2009.

a provisional measure awarding custody cannot preclude its enforcement.

112. In its question, the Oberster Gerichtshof therefore presupposes that the second subparagraph of Article 47(2) of the Regulation ('a judgment which has been certified according to … Article 42(1) cannot be enforced if it is irreconcilable with a subsequent enforceable judgment') refers to any subsequent enforceable judgment, including in the Member State of enforcement. The Commission disputes that interpretation, arguing that it would render nugatory the procedure envisaged by the legislature in Article 11(8) of the Regulation, which gives to the courts of the Member State of former habitual residence the last word as regards the return of a child. The second subparagraph of Article 47(2) of the Regulation is to be understood as meaning that a subsequent judgment of a court *of the Member State of origin* may render inoperative a judgment on return made under Article 11(8), which must therefore not be enforced.

113. Although the wording of the provision does not provide the precision proposed by the Commission, I concur with its view. In addition to the arguments which it advances – and it is certain that Article 11(8) of the Regulation would be meaningless if the relevant judgment could be overridden by a subsequent judgment of the court which had already delivered the judgment of non-return under Article 13 of the Convention – it is clear that the 'subsequent enforceable judgment' can only be that of a court having jurisdiction. However, by definition, if it is a judgment concerning parental responsibility, the courts of the Member State in which the judgment under Article 11(8) of the Regulation was given have jurisdiction and not those of the Member State to which the child was wrongfully removed.

114. At the hearing, the question was raised as to why, if the second subparagraph of Article 47(2) of the Regulation is limited to cases of setting aside a judgment certified in the Member State of origin, the legislature did not expressly state this, rather than choosing the term 'irreconcilable', which could also apply in the case of a judgment given subsequently in the Member State of enforcement. However, it seems to me that a satisfactory response was also given to that question. Even if we rule out the possibility that a court of the Member State of enforcement may, simply by delivering a contrary judgment, render inoperative the judgment which must, under Article 11(8) of the Regulation, constitute the last word on the child's return, there may be other types of judgments which are irreconcilable with the return order – for example, if an order is made for the return of a child to a parent who, in the meantime, has been sentenced to a term of imprisonment. Moreover, it must be noted that Article 47 of the Regulation also applies to judgments certified under Article 41 of the Regulation, which are

concerned with visiting rights and which may therefore also be affected by subsequent judgments of various kinds.

115. In any event, the Regulation should be interpreted, in so far as possible, in a manner consistent with the Convention and, in particular, not in such a way that the scope of the strengthened decision-making power, granted to the courts of the Member State of former habitual residence by Article 11(8) of the Regulation and by the system of certification provided for in Article 42 of the Regulation, would effectively be weakened in relation to Article 17 of the Convention, which provides, in particular, that the sole fact that a decision relating to custody has been given in the requested State is not to be a ground for refusing to return a child, but that the authorities of that State may take account of the reasons for such a decision.

Question 5

116. Finally, if the answer to Question 4 is in the negative, the Oberster Gerichtshof asks whether the State of enforcement may 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, or whether that change of circumstances must be invoked in the State of origin, and whether it is possible for enforcement in the State of enforcement to be stayed pending the decision of the State of origin.

117. The national court explains that the mother would probably refuse to go to Italy with the child and cannot be compelled to do so. Enforcement of the return order would therefore separate the child from the mother in order to hand the child over to the father. In accordance with Article 47(2) of the Regulation, enforcement should be carried out under the same conditions as would apply if the judgment had been delivered in Austria. According to the Austrian case-law, a return order made in Austria under the Convention cannot be enforced if a change of circumstances has resulted in a serious risk that the child might be exposed to physical or psychological harm, which could be the case if the child has lived for a significant length of time in the State of enforcement.

118. In this case, the child seems to have lived for a little over a year in Italy, since the Tribunale per i Minorenni di Venezia made its return order one and a half years after the wrongful removal of the child to Austria. There was no contact between the father and

child during the nine months following that order and contact was limited to visits during the preceding 18 months. Accordingly, the child has spent more than two thirds of her life separated from her father. The national court considers that it is not inconceivable that removing the child from her mother in order to hand her over to the father might pose a serious risk to her psychological development and that, even though the attitude of the mother is open to criticism, this would not justify the risk of exposing the child to such harm.

119. It is therefore possible that such a return order made in Austria would not be enforced. Since Article 47 of the Regulation requires the same treatment to be applied as that pertaining to judgments delivered in the State of enforcement, the judgment of the Tribunale per i Minorenni di Venezia should also not be enforced.

120. However, according to the spirit and the purpose of the relevant provisions, it is for the Tribunale per i Minorenni di Venezia to determine whether the circumstances have changed. The issue is not enforcement per se, but the substantive justification for the return order. From that standpoint, the mother would have to make an application to the Tribunale per i Minorenni di Venezia to have the order made by that court set aside. Pending a decision, it should be permissible to stay enforcement of the order in Austria.

121. In that regard, the Austrian Government points out that, according to Article 47(1) of the Regulation, the enforcement procedure is governed by the law of the Member State of enforcement. All the obstacles to enforcement which arise under that law must be taken into account. In this case, those obstacles include all the circumstances arising subsequently which might pose a risk to the best interests of the child. If it were for the court of the State of origin to examine such obstacles, this would lead to a separation of the examination of the various obstacles and to parallel jurisdiction of the courts of the two States, promoting neither mutual trust nor the best interests of the child, which must remain the ultimate criterion. Finally, it is consistent with the general scheme of the Regulation for the courts of the State of enforcement to have jurisdiction. In accordance with the criterion of proximity, the authorities of the State in which the child is present are more capable of assessing whether the circumstances have changed since the judgment was delivered.

122. The Commission, on the other hand, considers that Article 47(2) of the Regulation must be interpreted taking into account the principle of the child's swift return and the allocation of jurisdiction which it implies. Since the final binding judgment on return is a matter for the Member State of former habitual residence, the judgment of the State of enforcement should determine only the arrangements for enforcement. The first subparagraph of Article 47(2) of the Regulation therefore means that the formal requirements of the State of enforcement – for example, as regards time-limits, the competent services and the systems of penalties – are applicable to the enforcement per se, whereas the court of the Member State of origin has exclusive jurisdiction to rule on substantive arguments

relating to the lawfulness of the enforcement order – for example, to decide whether enforcement of the judgment should be stayed because, due a change of circumstances since the enforcement order was issued, its application would no longer be in the best interests of the child.

123. For my part, I concur with the Commission's view, which seems, in part, to convince the national court itself.[41] According to the general scheme of the Regulation, the final decision as to whether it is appropriate to order the return of the child is solely a matter for the courts of the State of former habitual residence. Since one of the courts of the State of wrongful removal has delivered a judgment of non-return under Article 13 of the Convention, their jurisdiction in the matter has been exhausted, except as regards, where appropriate, the withdrawal or setting-aside of that judgment. Any subsequent judgment on the merits – which must take into account the grounds and evidence on the basis of which the judgment of non-return was made – is a matter for the court having jurisdiction in the Member State of former habitual residence. That subsequent judgment must, where appropriate, be enforced in the other Member State – certainly in accordance with the *procedure* (that is to say, the *formalities*) determined by its own law, but without any possibility of taking into account any *substantive* considerations which might preclude enforcement.

124. It seems clear to me that any risk of physical or psychological harm is a substantive consideration, not a formal one. If the final judgment ordering the return of the child is challenged, it is therefore to the court which delivered that judgment, and not to that which is responsible for its enforcement, that the interested party must apply.

125. As regards the possibility of staying proceedings pending the outcome of such a challenge, the considerations which I set out in points 93 to 97 above apply and it must be concluded that such a possibility is not available before the court of enforcement, but that, in the event of a challenge before the courts of the Member State of origin, they should be able to order a stay of enforcement pending the decision on the challenge.

126. Finally, and in any event, I would point out that the referring court mentions the possibility of psychological harm resulting not only from the separation of the child from her father during the nine months following the judgment of the Tribunale per i Minorenni di Venezia of 10 July 2009, but also

41 — See point 120 above.

from the separation during the preceding 18 months. However, even if enforcement of that judgment could be called into question, in any way, by subsequent developments, it could not be called into question on the basis of any aspect of the preceding situation, which the Tribunale per i Minorenni di Venezia must necessarily have taken into account. Furthermore, as regards such subsequent developments, it must be pointed out that they cannot include the mere passage of time if the procedure provided for by the Regulation is correctly applied, since an order made under Article 11(8) of the Regulation is immediately enforceable, without there being any possibility of opposing its recognition.

Conclusion

127. In the light of all the foregoing considerations, I take the view that the Court should answer the questions raised by the Oberster Gerichtshof as follows:

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

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

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

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

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