OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 29 January 2009 [1]

I — Introduction

1. Even before judgment was delivered in Case C-435/06 *C*, [2] the Supreme Administrative Court of Finland, the Korkein hallinto-oikeus, made another reference to the Court on questions of the interpretation of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. [3]

2. It raises, first, the question — which was answered in the affirmative in the *C* judgment — whether the regulation applies to measures of taking into care and placement of children which are classified in national law as public law measures. Still awaiting clarification, on the other hand, are the further questions on the interpretation of the provisions on jurisdiction over those measures. In particular, a more precise explanation is needed of the concept of the 'habitual residence' of a child, which is the primary connecting factor for international jurisdiction. Other questions relate to the power of a court which does not have jurisdiction over the substance of the matter to take provisional measures.

II — Legal context

Community law

3. Recital 12 in the preamble to Regulation No 2201/2003 explains the reasons for the relevant rules of jurisdiction:

'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

1 — Original language: German.
2 — Judgment of 27 November 2007, [2007] ECR I-10141.
3 — OJ 2003 L 338, p. 1, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004 (OJ 2004 L 367, p. 1) — also known as the Brussels IIa Regulation.

the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.'

4. The following provisions of Regulation No 2201/2003 are of particular relevance to the present case:

'*Article 1*

Scope

1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

...

(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

...'

'*Article 8*

General jurisdiction

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

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

'Article 13

Jurisdiction based on the child's presence

1. Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction.

2. Paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their country.'

'Article 17

Examination as to jurisdiction

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.'

'Article 20

Provisional, including protective, measures

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

another Member State has jurisdiction as to the substance of the matter.

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

III — Facts and questions referred for a preliminary ruling

5. The facts of the main proceedings are as follows, according to the description in the order for reference.

6. A is the mother of C, D and E. She and the children originally lived together with F, the children's stepfather, in Finland. The children had already been taken into the care of the State once in their municipality of residence because of the stepfather's violence. That measure was later discontinued. In 2001 the family moved to Sweden. In summer 2005 they travelled to Finland, originally with the intention of spending the holidays there. In Finland the family lived in a camper van on various campsites and with relatives. The children did not go to school. On 30 October 2005 the family applied to the Finnish municipality Y to be allocated social housing.

7. By decisions of 16 November 2005 the Perusturvalautakunta (Basic Welfare Committee) took C, D and E into immediate care and placed them in a childcare unit, under Paragraph 18 of the Lastensuojelulaki (Law on the protection of children), on the ground that they had been abandoned; the purpose of taking them into care was also to clarify their situation.

8. A and F applied for the decisions on the urgent taking into care to be quashed. By decision of 15 December 2005 the Perusturvalautakunta rejected the application, took the children into care under Paragraph 16 of the Lastensuojelulaki, and ordered them to be placed in a childcare unit. That decision was unsuccessfully challenged by A and F in the Hallinto-oikeus (Administrative Court).

9. The Korkein hallinto-oikeus, which is hearing the appeal against the administrative

court's decision, by order of 22 November 2007 referred the following questions to the Court for a preliminary ruling:

1. (a) Does Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 … apply to the enforcement, such as in the present case, of a public-law decision made in connection with child protection, as a single decision, concerning the immediate taking into care of a child and his or her placement outside the home, in its entirety,

   (b) or, having regard to the provision in Article 1(2)(d) of the regulation, only to the part of the decision relating to the placement outside the home?

2. How is the concept of habitual residence in Article 8(1) of the regulation, like the associated Article 13(1), to be interpreted in Community law, bearing in mind in particular the situation in which a child has a permanent residence in one Member State but is staying in another Member State, carrying on a peripatetic life there?

3. (a) If it is considered that the child's habitual residence is not in the latter Member State, on what conditions may an urgent measure (taking into care) nevertheless be taken in that Member State on the basis of Article 20(1) of the regulation?

   (b) Is a protective measure within the meaning of Article 20(1) of the regulation solely a measure which can be taken under national law, and are the provisions of national law concerning that measure binding when the article is applied?

   (c) Must the case, after the taking of the protective measure, be transferred of the court's own motion to the court of the Member State with jurisdiction?

4. If the court of a Member State has no jurisdiction at all, must it dismiss the case as inadmissible or transfer it to the court of the other Member State?

10. The Finnish, German, Greek, Italian and United Kingdom Governments and the Commission of the European Communities have submitted observations in the proceedings before the Court.

IV — Legal assessment

A — *The first question*

11. The first question is essentially the same as the first question referred in Case C-435/06. That question was answered as follows by the Court in a judgment [4] delivered on 27 November 2007, five days after this order for reference was made:

'Article 1(1) 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, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, is to be interpreted to the effect that a single decision ordering a child to be taken into care and placed outside his original home in a foster family is covered by the term "civil matters" for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.'

12. The first question in the present case should be answered accordingly.

B — *The second question*

13. By the second question the referring court seeks an interpretation of the concept of a child's habitual residence, which Article 8(1) of Regulation No 2201/2003 makes the connecting factor for the jurisdiction of the courts [5] of the relevant Member State for decisions in the field of parental responsibility. That interpretation at the same time affects the jurisdiction of the courts of the Member State in which the child is present

4 — Cited in footnote 2.

5 — The term 'court' within the meaning of Regulation No 2201/2003 covers, in accordance with Article 2(1), all the authorities in the Member States with jurisdiction in the matters falling within the scope of the regulation pursuant to Article 1.

but does not have his habitual residence. Under Article 13(1) of the regulation, mere presence creates jurisdiction only if no habitual residence elsewhere can be established.

14. The regulation does not contain a definition of the concept of habitual residence. It merely follows from the use of the adjective 'habitual' that the residence must have a certain stability or regularity.

15. But it does not follow from the lack of a definition that — as the United Kingdom Government considers — the concept is not open to any further legal interpretation and its meaning does not go beyond the natural meaning of the words. On the contrary, the meaning of the concept should be defined more precisely, having regard to its spirit and purpose and to its legislative context. The United Kingdom Government is correct, however, in so far as it submits that the interpretation must leave the national court enough room to take account of all the particular circumstances that are of importance in the specific case.

1. Basic ideas of the rules on jurisdiction in Regulation No 2201/2003 for decisions concerning parental responsibility

16. Children need special protection and care by their parents or — if they do not fulfil their duties — from the State or other persons to whom custody rights are entrusted. If judicial decisions on parental responsibility are necessary, long-drawn-out court proceedings should be avoided as far as possible, in order to cause as little harm as possible to the children's development.

17. For cases with cross-border elements, Regulation No 2201/2003 ensures a clear and comprehensive determination of the international jurisdiction of the courts as a first precondition for swift judicial decisions in the interests of the children's welfare. The terms used in the regulation in this connection must therefore be interpreted autonomously and not by reference to national law, so as to ensure the uniform interpretation and application of the rules on jurisdiction and to avoid conflicts of jurisdiction. [6]

18. As emphasised in particular in recital 12 in the preamble, the regulation allocates

6 — See, to that effect, *C*, cited in footnote 2, paragraphs 46 and 47.

jurisdiction in the first place to the courts of the Member State in which the child is habitually resident: those courts are generally best placed, because of proximity, to judge what is in the interests of the child.

19. It is in the light of that objective that the concept of habitual residence must be interpreted, a concept which is of crucial importance for establishing general jurisdiction under Article 8 of Regulation No 2201/2003, as well as for other types of jurisdiction directly or indirectly connected (Articles 9, 10 and 13).

20. Habitual residence must be distinguished from mere presence. The presence of a child in a Member State also establishes proximity to the courts there, but that relationship does not have the same quality as habitual residence. Article 13 of Regulation No 2201/2003 therefore confers on the courts of the Member State in which the child is present only a residual jurisdiction which gives way if habitual residence in another State can be established.

21. In order, then, to draw a line between the jurisdictions under Articles 8 and 13 of the regulation, criteria must consequently be developed which give the child's residence the quality of 'habitual' residence and differentiate it from less permanent presence.

2. Relations between Regulation No 2201/2003 and multilateral conventions

22. When Regulation No 2201/2003 was adopted, there already existed a number of multilateral conventions applicable to many or all of the Member States, containing rules on jurisdiction for decisions on custody. The regulation has replaced the provisions of those conventions in relations between the Member States in part, and in part it operates alongside the multilateral provisions.

23. The conventions none the less form an important part of the legislative history of the regulation. In addition, the fields of application of the various instruments must be consistently demarcated from each other. That presumes a uniform understanding of the concept of habitual residence to which the provisions of the conventions and of the regulation both relate.

24. As regards its content, Regulation No 2201/2003 is inspired in this area primarily by the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children [7] ('the Child Protection Convention'). [8] Article 5(1) of the Child Protection Convention, like Article 8(1) of the regulation, confers jurisdiction in the first place on the courts of the State of the habitual residence (*résidence habituelle*) of the child.

25. According to Article 61(a) of the regulation, it takes precedence over the Child Protection Convention where the child concerned has his or her habitual residence on the territory of a Member State. That corresponds to Article 52(2) and (4) of the Child Protection Convention, which allows the Member States to apply the rules of jurisdiction of Community law to children whose habitual residence is in the Community.

26. As the Finnish, German, Greek and United Kingdom Governments rightly emphasise, the concept of habitual residence must be given a uniform interpretation, in order to demarcate consistently the scope of application of the Child Protection Convention from the scope of the regulation and avoid conflicts of jurisdiction between the courts of the Member States and the courts of other Contracting States to the Child Protection Convention. [9]

27. Three other relevant conventions, whose relationship to Regulation No 2201/2003 is governed by Article 60 of the regulation, should also be mentioned:

— the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors ('the Protection of Minors Convention') [10] (Article 60(a)),

7 — Council Decision 2008/431/EC of 5 June 2008 (OJ 2008 L 151, p. 36) authorises the Member States which have not already acceded to the convention to ratify or accede to it in the interest of the European Community. The text of the convention is annexed to Decision 2008/431/EC (OJ 2008 L 151, p. 39).

8 — Commission Proposal for a Council Regulation 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). See also my Opinion in Case C-435/06 *C* [2007] ECR I-10141, point 49.

9 — See, with reference to determining the scope of application, my Opinion in *C*, cited in footnote 8, point 50.

10 — *Actes et documents de la Neuvième session de la Conférence de La Haye de droit international privé (1960)*, volume IV (English translation accessible at http://hcch.e-vision.nl/index_en.php?act=conventions.pdf&cid=39).

— the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children ('the European Custody Convention') [11] (Article 60(d)), and

— the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ('the Child Abduction Convention') [12] (Article 60(e)).

28. Under Article 60 of Regulation No 2201/2003, the regulation takes precedence over those conventions in relations between the Member States in so far as they concern matters governed by the regulation.

29. The Protection of Minors Convention was the precursor instrument on which the Child Protection Convention was based. [13] It already determined habitual residence as a connecting factor for jurisdiction. The European Custody Convention likewise focuses on habitual residence for the return of abducted children, as does the Child Abduction Convention.

30. Article 11 of Regulation No 2201/2003 followed the Child Abduction Convention especially and took over its guiding principles, as the Court recently pointed out in its judgment in *Rinau*. [14] Both provisions pursue the aim that abducted children should return

11 — Accessible at http:/www.conventions.coe.int/Treaty/en/Treaties/html/105.htm

12 — *Actes et documents de la Quatorzième session de la Conférence de La Haye de droit international privé (1980)*, volume III, pp. 413 ff. (English version accessible at http://hcch.e-vision.nl/index_en.php?act=conventions.pdf&cid=24).

13 — See P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention, *Proceedings of the Eighteenth Session of the Hague Convention of Private International Law (1996)*, volume II, p. 534, 539, point 1 (accessible at http://hcch.e-vision.nl/upload/expl34.pdf).

14 — See Case C-195/08 PPU *Rinau* [2008] ECR I-5271, paragraphs 49 and 62.

immediately to the State in which they had their habitual residence before the unlawful removal. That coordination also makes a uniform understanding of the concept of habitual residence necessary.

31. The relevant multilateral conventions deliberately decline to provide a definition of habitual residence and leave it to the courts to define in more detail in connection with their assessment of the facts in the individual case. [15] As the governments involved in the proceedings emphasise, the convention is based on the idea that what is decisive here is the actual centre of life of the child concerned, which is to be ascertained by reference to all the relevant circumstances, and is to be distinguished from the legalistic concept of domicile. [16]

3. Relevance of the Court's case-law on the concept of habitual residence in the law concerning officials and social law

32. The Commission takes a slightly different approach with its proposed interpretation. It refers for the definition of habitual residence to the considerations which were applied in drafting the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters. [17]

33. The explanatory report to the convention (the Borrás Report) relates that it was decided not to introduce a definition of habitual residence. However, it was taken into account that the Court has given the following definition to the term habitual residence in other fields of law: 'the place of habitual residence is that in which the [person] concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests. For the purposes of determining habitual

15 — See the Commission's proposal, cited in footnote 8, p. 9. P. Lagarde explains that it was decided not to include a definition of habitual residence in the Child Protection Convention, in order not to disturb the application of the existing conventions which also use that term (Explanatory Report on the Child Protection Convention, cited in footnote 13, p. 553, point 40).

16 — See, on the Protection of Minors Convention: Explanatory report by W. de Steiger, *Actes et decisions de la Neuvième session de la Conférence de La Haye de droit international privé (1960)*, volume IV, p. 219, 225 f. (accessible at http://hcch.e-vision.nl/upload/expl10f.pdf).
On the Child Abduction Convention: Explanatory report by E. Pérez-Vera, *Actes et documents de la Quatorzième session de la Conférence de La Haye de droit international privé (1980)*, volume III, p. 426, 445, point 66 (accessible at http://hcch.e-vision.nl/upload/expl28.pdf). The relevant case-law of the courts of the Contracting States to the Child Abduction Convention is in the INCADAT database (http://www.incadat.com/index.cfm).
On the European Custody Convention: Explanatory report, point 15 (accessible at http://www.conventions.coe.int/Treaty/en/Reports/html/105.htm), which refers to Resolution (72) 1 of the Committee of Ministers of the Council of Europe of 18 January 1971 on the Standardisation of the Legal Concepts of 'Domicile' and 'Residence' (accessible at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=587935&SecMode=1&DocId=642796&Usage=2).

17 — OJ 1998 C 221, p. 2. The Convention did not enter into force, but may be regarded as a precursor in terms of content of Regulation No 2201/2003. Its provisions were largely taken over in Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (OJ 2000 L 160, p. 19), which was replaced by Regulation No 2201/2003.

residence, all the factual circumstances which constitute such residence and, in particular, the actual residence of the [person] concerned must be taken into account.' [18]

34. At the hearing, however, the agents representing Finland, Germany and the United Kingdom rightly opposed the use of that definition for defining more precisely the habitual residence of a child for the purposes of Regulation No 2201/2003.

35. The cases referred to concern a specific point of the law concerning officials, namely the conditions for granting an expatriation allowance. An official of the European Communities is only entitled to that allowance if on being appointed he has transferred his habitual residence to the place of service, but not if he was already resident there.

36. Apart from the fact that this background of the law of officials has nothing in common with the family law context in the present case, the definition is also unsuitable for transposition to the present case, since it places too much emphasis on the intention of the person concerned. That may be possible in the case of adults. Thus it is no coincidence that the Borrás report refers to those cases in connection with jurisdiction for divorce. At least in the case of younger children, however, it is not the child's own will that is decisive but that of the parents, who as part of the right of custody also have the right to determine the child's place of residence. But precisely in the context of disputes over custody, the ideas of the persons entitled to custody as to where the child is to reside may well diverge. The intention of the father and/or mother to reside with the child in a particular place can therefore be only an indication of the child's habitual residence, not a sole deciding condition.

37. The United Kingdom Government is also correct in submitting that the definition of residence which the Court has developed when interpreting provisions of social law [19] should not be transferred to Regulation No 2201/2003, since the various provisions pursue completely different aims. The provisions on the application of social security schemes to migrant workers aim to delimit jurisdiction for the provision of certain benefits between the State of residence and the State of employment. Unlike in the case of

18 — A. Borrás, Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, OJ 1998 C 221, p. 27, point 32. The passage cited may be found inter alia in Case C-452/93 P *Magdalena Fernández* v *Commission* [1994] ECR I-4295, paragraph 22, and was subsequently made use of in the settled case-law of the Court of First Instance (see, for example, Case T-298/02 *Herrero Romeu* v *Commission* [2005] ECR II-4599, paragraph 51).

19 — See Case 76/76 *Di Paolo* [1977] ECR 315, paragraphs 17 to 22; Case C-102/91 *Knoch* [1992] ECR I-4341, paragraphs 21 to 23; Case C-90/97 *Swaddling* [1999] ECR I-1075, paragraphs 29 and 30; and Case C-372/02 *Adanez-Vega* [2004] ECR I-10761, paragraph 37.

jurisdiction for decisions on custody, the principal concern is not the welfare of the person concerned but the division of burdens among the Member States.

4. Consequences for the interpretation of the concept of habitual residence within the meaning of Regulation No 2201/2003

38. Having regard to the wording and objectives of Regulation No 2201/2003 and the relevant multilateral conventions, the concept of habitual residence in Article 8(1) of the regulation should therefore be understood as corresponding to the actual centre of interests of the child.

39. In order to ascertain the actual centre of interests, the referring court must take account of all factors present 'at the time the court is seised'. It is unclear, however, what is to be regarded as becoming seised in a case such as the present in which the authorities have clearly acted on their own authority. [20] The relevant act could in particular be the taking into care on 16 November 2005, since it was by that measure that the authorities first acted with external effect. [21]

40. In this case the duration and regularity of residence and the child's familial and social integration may in particular be significant for determining the place of habitual residence.

— Duration and regularity of residence

41. To distinguish habitual residence from mere temporary presence, residence must normally be of a certain duration. Regulation No 2201/2003 does not prescribe a particular time-limit in this connection. When residence is sufficiently permanent depends instead on the circumstances of the individual case. Important factors here may be in particular the age of the child and the familial and social circumstances described below.

42. Residence does not have to be uninterrupted. Thus a temporary absence of the child, for instance during the holidays, does not call

20 — On the concept of the 'institution of proceedings' for the purposes of Article 64(2) of Regulation No 2201/2003, see my Opinion in *C*, cited in footnote 8, points 67 and 68.

21 — Concerning the institution of proceedings for the purposes of Article 64(2) of Regulation No 2201/2003, the Court seems to focus on an even earlier date, namely the start of the authorities' internal investigations (see *C*, cited in footnote 2, paragraph 72).

into question the continuation of habitual residence. Habitual residence can no longer be assumed, however, if a return to the original place of residence is not foreseeable in view of the actual circumstances.

43. In the case of a lawful move, habitual residence can shift to the new State even after a very short period. That is indicated by Article 9(1) of Regulation No 2201/2003. Under that provision, by way of exception to Article 8, the courts of the Member State of the child's former habitual residence retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the parent with access rights continues to live in the former Member State. That provision is thus based on the idea that even before three months have passed there may be habitual residence in the new place of residence, so that a rule on jurisdiction is required, as an exception to Article 8, for the benefit of the courts of the former place of habitual residence.

44. Article 9(1) applies only to a very specific situation, however. In other cases all the circumstances of the individual case must be taken into account where there is a change of place. An indication that the habitual residence has shifted may in particular be the corresponding common intention of the parents to settle permanently with the child in another State. The parents' intention may manifest itself, for example, in external circumstances such as the purchase or lease of a residence in the new State, notifying the authorities of the new address, establishing an employment relationship, and placing the child in a kindergarten or school. As a mirror image, abandoning the old residence and employment and notifying the authorities of departure suggest that habitual residence in the former State is at an end.

45. It is also conceivable in exceptional cases that during a transitional stage there will no longer be habitual residence in the former State while the status in the new State has not yet crystallised into habitual residence. Precisely for such a case, Article 13 of Regulation No 2201/2003 confers a residual jurisdiction on the courts of the Member State in which the child is present.

46. In the case of child abduction, Article 10 provides under certain circumstances for a continuing jurisdiction for the courts of the State of the previous habitual residence before the abduction. However, abduction does not exclude a transfer of habitual residence to the State to which the child has been removed. In that case there can be an immediate change of jurisdiction with the consent of the persons having rights of custody and the competent

authorities (Article 10(a)). Otherwise the transfer of jurisdiction cannot take place until the child has resided in the other Member State for a period of at least one year (Article 10(b)). However, the one-year period is not the sole deciding factor here. The transfer of jurisdiction depends rather on the circumstances listed additionally in points (i) to (iv) of Article 10(b).

— Familial and social situation of the child

47. The stability which distinguishes habitual residence from mere presence also depends on the familial and social integration of a child. It is for the referring court to obtain an overall picture of this, taking account of all factors, whose relevance may vary according to the children's age.

48. The familial situation is characterised by the persons with whom a child lives at the place of residence or is in regular contact, in other words parents, siblings, grandparents or other close relatives. For social integration, circumstances such as school, friends, leisure activities and, above all, command of language are important.

49. Without wishing to anticipate the overall assessment of all the circumstances by the referring court, a number of points in the present case suggest that children C, D and E were not already habitually resident in Finland in November 2005. Thus only a holiday was originally planned, which might suggest that habitual residence in Sweden continued. Further, the moving around from campsite to campsite probably largely excluded the possibility of the children constructing permanent social bonds with persons other than their mother and stepfather. An aggravating factor is that they did not go to school.

50. On the other hand, it may be assumed that the children had a command of at least one of the official languages of Finland. Further, in November the parents had probably abandoned their original intention of only spending the holidays in Finland. That is supported by the fact that in October 2005 the family intended to move into social accommodation in Finland.

51. If the Finnish courts none the less came to the conclusion that C, D and E were not habitually resident in Finland at the material time, so that there is no jurisdiction there under Article 8(1) of Regulation No 2201/2003, jurisdiction of the Finnish courts might derive from Article 13. The condition for that would be that, taking into account the criteria described, no other habitual residence — in particular in Sweden — could be established.

52. The answer to the second question must therefore be: A child is habitually resident under Article 8(1) of Regulation No 2201/2003 in the place in which the child — making an overall assessment of all the relevant factual circumstances, in particular the duration and stability of residence and familial and social integration — has his or her centre of interests. Only if no habitual residence in that sense can be established and if no jurisdiction based on Article 12 exists [22] do the courts of the Member State in which the child is present have jurisdiction under Article 13(1) of the regulation.

C — *The third question*

53. The third question, which is divided into three subquestions, concerns the interpretation of Article 20 of Regulation No 2201/2003. That provision provides that, in urgent cases, the courts of a Member State may take such provisional, including protective, measures as may be available under their law, even if the regulation does not confer jurisdiction on them as to the substance of the matter.

54. The interpretation of that provision thus matters in the present case only if the referring court concludes, having regard to the answers to the second question, that the Finnish courts do not already have jurisdiction under Article 8 or 13 of the regulation.

1. Subquestion 3(a)

55. By this question the court seeks a determination of the conditions under Article 20(1) of Regulation No 2201/2003 for the taking of provisional measures in relation to parental responsibility, such as, in particular, the immediate taking into care of a child.

56. In interpreting Article 20(1) it must be borne in mind that that provision authorises courts to act which do not have jurisdiction over the substance of the matter under the regulation and would therefore have to decline jurisdiction under Article 17 of the regulation. Article 20(1) must therefore in principle be interpreted narrowly. For all that, the courts must be permitted in urgent cases to take all the measures that are necessary in the interests of the child's welfare.

22 — The priority of Article 12 over Article 13 raises problems, however (see T. Rauscher, in: T. Rauscher (ed), *Europäisches Zivilprozessrecht*, vol. I, 2nd ed., Munich 2006, Article 13, point 5).

57. However, it follows from the wording of the provision, first, that the measures may relate only to children who are present in the Member State of the court seised. The court of the State of presence can, because of its proximity, judge whether and if so what urgent measures are to be taken. It can also ensure that the measures are carried out. To that extent the conditions of Article 20(1) are met. The question debated in legal writing of whether Article 20 then itself creates jurisdiction for the urgent measures or merely refers to jurisdiction under the lex fori does not have to be decided in the present case. [23] The Finnish courts were obviously also entitled under national law to order the children to be taken into care immediately under Paragraph 18 of the Lastensuojelulaki.

58. Second, there must be an *urgent case*. There is always urgency if immediate action is, in the view of the court seised in the State of the child's presence, necessary to preserve the child's welfare.

59. The criterion of urgency in Article 20(1) of the regulation cannot be seen in isolation from Article 20(2). Under Article 20(2) of the regulation, the provisional measures cease to have effect when the court with jurisdiction as to the substance of the matter has taken the measures it considers appropriate. As the United Kingdom Government emphasises, Article 20 thus ensures that there is no gap in jurisdiction, and the court with jurisdiction over the substance of the matter can attract the case to itself at any time. As the German Government correctly states, there is therefore no danger that the system of jurisdiction under the regulation will be undermined by a too wide interpretation of the concept of urgency within the meaning of Article 20(1).

60. Third, Article 20(1) permits only *provisional* measures. The final decision is reserved to the court with jurisdiction over the substance of the matter. Article 20 does not, however, lay down any specific time-limit for the continuation of provisional measures. If the court which has taken the provisional measure has not itself put a time-limit on it or cancelled it, it remains in force under Article 20(2) until the court with jurisdiction over the substance of the matter takes action.

61. The Commission draws attention, however, in connection with the third subquestion, to the case-law on Article 24 of the Brussels Convention, to which Article 31

23 — See, on the state of the debate, M. Andrae, 'Zur Abgrenzung des räumlichen Anwendungsbereichs von KSÜ und autonomem IZPR/IPR', *Praxis des Internationalen Privat- und Verfahrensrechts — IPRax*, 2006, p. 82, 85 ff.

of Regulation No 44/2001 [24] corresponds. According to that case-law, provisional measures are intended to preserve a factual or legal situation so as to safeguard rights whose recognition is otherwise sought from the court having jurisdiction as to the substance of the case. [25] The court must make its authorisation subject to all conditions guaranteeing the provisional or protective character of the measure ordered. [26]

62. The Commission submits that, no application having been made to the Swedish courts which may have jurisdiction over the substance of the matter, there is a risk that the taking into care and placement ordered by the Perusturvalautakunta on 15 December 2005 could, contrary to that case-law, last until the children come of age. Since the regulation also does not provide for the case to be transferred to the court with jurisdiction (on this point, see subquestion 3(c)), on expiry of the provisional measures a lacuna in the care arrangements could arise which would run counter to the objectives of the regulation.

63. On this point, it should be observed, on the one hand, that there may be problems in applying the case-law on provisional measures under the Brussels Convention to the present context. Provisional measures in a civil or commercial matter within the meaning of the Convention or of Regulation No 44/2001 are intended to preserve the rights of the applicant and in order to do so interfere provisionally with the rights of the defendant. Such provisional measures taken by a court which does not have jurisdiction in the main proceedings must therefore be restricted to what is absolutely necessary.

64. With measures under Article 20(1) of Regulation No 2201/2003, by contrast, the emphasis is on the welfare of the child who cannot protect his interests himself. It is true that protective measures restrict the parents' rights of custody. However, it is easy for them to apply to the court having jurisdiction and thereby, if appropriate, have the protective measures terminated under Article 20(2). That is an essential difference from Article 24 of the Brussels Convention and Article 31 of Regulation No 44/2001, which do not have such a provision.

65. On the other hand, the Commission is right to point out that the children's habitual residence may have transferred to Finland during the period of care and placement ordered by the Finnish authorities. The Finnish courts would then have jurisdiction

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

25 — Case C-261/90 *Reichert and Kockler* [1992] ECR I-2149, paragraph 34; Case C-391/95 *Van Uden* [1998] ECR I-7091, paragraph 37; and Case C-104/03 *St. Paul Dairy Industries* [2005] ECR I-3481, paragraph 13.

26 — Case 125/79 *Denilauler* [1980] ECR 1553, paragraph 15; *Van Uden*, cited in footnote 25, paragraph 38; and *St. Paul Dairy Industries*, cited in footnote 25, paragraph 14.

under Article 8(1) of the regulation for new proceedings subsequently brought on the substance of the matter. At any rate, there is much to suggest that habitual residence in Sweden no longer exists, since the family has left the country quite a long time ago and no longer intends merely to spend a holiday in Finland, and the objective circumstances of fact also make a return to Sweden unlikely. The Finnish courts might therefore have jurisdiction under Article 13 in new proceedings, if no habitual residence in Finland has yet been established. A 'gap in jurisdiction' need not therefore be feared.

2. Subquestion 3(b)

66. By the second subquestion the referring court wishes to know whether protective measures within the meaning of Article 20(1) of the regulation are solely measures which can be ordered under national law, and whether the provisions of national law on those measures are binding when that article is applied.

67. According to its wording, the provision allows the taking of the provisional measures that are available under national law. Apart from the conditions which have just been explained in connection with subquestion 3 (a), Article 20 of the regulation does not contain any further requirements as to the form taken by the applicable national provisions. [27]

68. It must be noted that the concept of provisional measures is an autonomous concept of Community law. As the Finnish Government and the Commission rightly state, Article 20(1) therefore does not preclude measures which national law does not expressly recognise as provisional measures. As follows from the answer to the first subquestion, the provision in fact allows all measures which are necessary for preserving the child's welfare until the court with jurisdiction over the substance of the matter takes action, and which do not have definitive character.

69. Otherwise, it is for the referring court to determine which measures may be taken under national law and whether the provisions of national law are binding.

27 — The national provisions also include the rules of private international law, as the German Government emphasises. Where those rules declare the law of another State to be applicable, Article 20(1) of the regulation does not preclude the application of the foreign provisions referred to by the conflict rules of the State of the court seised.

3. Subquestion 3(c)

70. The referring court also raises the question whether, after the authorities have taken a protective measure on their own initiative, the case must be transferred to the court of the competent Member State.

71. Only the Greek Government argues for such an obligation, while the other parties take the view that there is no such obligation, in the absence of a provision to that effect.

72. Indeed, only Article 15 of Regulation No 2201/2003 provides for a case to be transferred to a court which is better placed to hear it. Under that provision, however, only to a court with jurisdiction over the substance of the matter is empowered to order such a transfer. In relation to a court which has ordered a provisional measure under its own national law in accordance with Article 20(1) of the regulation, there is no provision for transfer to a court with jurisdiction over the substance of the matter.

73. Nor is an obligation to transfer necessary, for the reasons stated in the answer to question 3(b), in order to ensure that there is no gap in jurisdiction for measures in the field of parental responsibility, in the interests of the child's welfare.

74. However, the regulation does not prevent the court which has taken the provisional measures from informing a court of them which, in its opinion, has jurisdiction over the substance of the matter. For that purpose, it can also involve the central authority, which, in accordance with Article 55(a) of Regulation No 2201/2003, can then contact the central authority of the other State.

D — *The fourth question*

75. Finally, the referring court seeks to know whether a court which, under Regulation No 2201/2003, does not have jurisdiction must dismiss the application as inadmissible or transfer it to the court of another Member State.

76. Under Article 17 of the regulation, the court of a Member State must decline jurisdiction of its own motion if it is seised of a case over which it has no jurisdiction

under the regulation and over which a court of another Member State has jurisdiction by virtue of the regulation. There is no provision in the regulation for a transfer to a court with jurisdiction in another Member State.

77. The Greek Government is right to observe that the regulation aims to ensure that there are no gaps in jurisdiction for measures in the field of parental responsibility. That is ensured in principle by Articles 8 and 13 of the regulation. Where there is no urgency, it is possible to wait until the courts which have jurisdiction under those provisions act of their own motion or on application, after another court has declared that it lacks jurisdiction.

78. The provisions of the regulation cannot, however, guarantee that the court which has jurisdiction learns of what has taken place in the other Member State in the first place. But as the legislature declined to create an obligation to transfer, that obligation cannot be deduced from the objectives of the regulation alone.

79. Moreover, a court which lacked jurisdiction when seised may have jurisdiction over a new procedure if habitual residence has moved to the Member State in question in the course of the earlier proceedings. So an obligation of transfer to the court with jurisdiction at the time when the earlier proceedings are brought might perhaps not be sensible.

80. The regulation does not preclude the court lacking jurisdiction, in any event, from informing the court of another Member State which it considers to have jurisdiction of its decision. The central authorities may be brought in for that purpose, in accordance with Article 55 of the regulation. Such information, not governed by the regulation, which the court lacking jurisdiction passes on to the court of another Member State cannot, however, bind the latter court as regards its jurisdiction. It is for that court itself to examine whether it has jurisdiction.

V — Conclusion

81. On the basis of the above considerations, I propose that the Court give the following answers to the questions referred by the Korkein hallinto-oikeus:

(1) Article 1(1) 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, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, must be interpreted as meaning that a single decision ordering a child to be taken into care immediately and placed outside his or her original home in a childcare unit is covered by the term 'civil matters' for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.

(2) A child is habitually resident under Article 8(1) of Regulation No 2201/2003 in the place in which the child — making an overall assessment of all the relevant factual circumstances, in particular the duration and stability of residence and familial and social integration — has his or her centre of interests. Only if no habitual residence in that sense can be established and if no jurisdiction based on Article 12 exists do the courts of the Member State in which the child is present have jurisdiction under Article 13(1) of the regulation.

(3) (a) Article 20(1) of Regulation No 2201/2003 allows the courts of a Member State in urgent cases to take all provisional measures for the protection of a child who is present in that Member State, even if the courts of another Member State have jurisdiction under the regulation over the substance of the matter. There is urgency if immediate action is, in the view of the court seised in the State of the child's presence, necessary to preserve the child's welfare.

(b) Article 20(1) of the regulation allows the taking of the provisional measures that are available under the law of the Member State of the court seised, and those measures need not be expressly designated as provisional measures under national law. It is otherwise for the referring court to determine which measures may be taken under national law and whether the provisions of national law are binding.

(c) The regulation does not oblige the court which has taken a provisional measure under Article 20(1) to transfer the case to the court of another Member State with jurisdiction over the substance of the matter. However, it does not preclude the court seised from informing the court with jurisdiction, directly or via the central authorities, of the measures taken.

(4) A court which under the regulation lacks jurisdiction over the substance of the matter and does not consider any provisional measures under Article 20(1) of the regulation to be necessary must declare that it lacks jurisdiction, under Article 17 of the regulation. The regulation does not provide for a transfer to the court with jurisdiction. However, it does not preclude the court seised from informing the court with jurisdiction, directly or via the central authorities, of its decision.