

Guidance from Luxembourg: First ECJ Judgment Clarifying the Relationship between the 1980 Hague Convention and Brussels II Revised

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On 11 July 2008, the European Court of Justice (ECJ) gave its first judgment on 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 in Matters of Parental Responsibility (repealing Council Regulation (EC) No 1347/2000) (2003) OJ L 338/1 (Brussels II Revised) as far as its relationship with the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) is concerned (*Rinau* (Case C-195/08) [2008] 2 FLR 1495 (the *Rinau* case)). It is also the first judgment resulting from the new urgent procedure for preliminary rulings (*procédure préjudicielle d'urgence* – PPU) which was only introduced on 1 March 2008 (see further on this new procedure the article by C Kumar, 'A Fast-track to Europe: the Urgent Procedure for Preliminary Rulings' [2008] IFL 180), in particular with a view to accelerating ECJ preliminary rulings concerning international custody conflicts and the European arrest warrant. Although 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 (2000) OJ L 160/19 (Brussels II) entered into force on 1 March 2001, and Brussels II Revised has been applicable since 1 March 2005, the ECJ had so far only given two judgments on references for preliminary rulings: *Re C* (Case C-435/06) [2008] 1 FLR 490 and *Sundelind Lopez v Lopez Lizazo* (Case C-68/07) [2008] 1 FLR 582. While it may be doubted whether this is in fact due to the clarity of Brussels II Revised, it may in part be explained by the average length of proceedings before the ECJ (see the briefing by Kumar, above). Even if they have doubts about the interpretation of Brussels II Revised, family judges are little inclined to suspend proceedings on custody, contact or child abduction for a year or more and wait for a decision from Luxembourg before taking a final decision.

In the *Rinau* case, the reference to the ECJ was made by the Supreme Court of Lithuania on 14 May 2008. On 21 May 2008 – rumours say upon suggestion by the ECJ – the Supreme Court furthermore requested the case to be dealt with under the new urgent procedure. The oral hearing in Luxembourg took place on 26 and 27 June 2008, and then on 11 July – only 51 days after receipt of

the request for the urgent procedure by the ECJ – the judgment was given. The expectations as to speed have therefore been more than fulfilled. But also the content of the judgment is to be welcomed, as the discussion below will show.

History of the case

The *Rinau* judgment concerns the interpretation of Art 11(6)–(8) of Brussels II Revised in a case of wrongful retention of a child in Lithuania. The Lithuanian mother, Inga Rinau, had been married to the German Michael Rinau since 2003, and in January 2005 their daughter Luisa was born. The family lived in Germany, but shortly after Luisa's birth, in March 2005, the marriage broke down and the parents separated. Luisa remained with her mother and a step-brother from her mother's previous relationship. Proceedings for divorce and custody were brought before the competent German family court in Oranienburg. On 21 July 2006, Mrs Rinau travelled to Lithuania with her two children after having obtained Mr Rinau's consent for a fortnight's holiday there. She has remained there ever since.

In the German custody proceedings which were still pending, on 14 August 2006 the Family Court of Oranienburg, by way of interim measure, granted Mr Rinau the sole right to determine Luisa's residence. Mrs Rinau's appeal was rejected on 11 October 2006 by the Brandenburg Higher Regional Court. Furthermore, at the end of October 2006 Mr Rinau instituted Hague Convention return proceedings concerning Luisa before the Lithuanian courts, and on 22 December 2006 the Klaipeda District Court rejected his application under the grave risk exception in Art 13(1)(b) of the Hague Convention. This decision was reversed by the Lithuanian Court of Appeal, which ordered Luisa's return to Germany on 15 March 2007. However, until the decision of the ECJ in July 2008, the Lithuanian return order of March 2007 could not be enforced because Mrs Rinau and the Public Prosecutor General of Lithuania had brought proceedings for suspension of enforcement of the return order and for reopening the Hague Convention return case on the merits due to a change of circumstances. Each of these applications was heard at three instances, from the Klaipeda District Court via the Court of Appeal up to the Supreme Court. The Supreme Court referred the

application for reopening the return proceedings back to the Klaipeda District Court, and after decisions of the latter of 21 March 2008 and the Court of Appeal of 30 April 2008, both rejecting the reopening, the issue once again came before the Supreme Court.

Parallel to the Lithuanian Hague Convention return proceedings, the divorce and custody proceedings before the German courts continued (with Mrs Rinau's participation). On 20 June 2007, the Family Court of Oranienburg pronounced divorce and granted sole custody for Luisa to her father Michael Rinau. The court furthermore ordered Luisa's return to her father in Germany and issued a certificate under Arts 40(1)(b) and 42 of Brussels II Revised. On 20 February 2008, the Brandenburg Higher Regional Court rejected Mrs Rinau's appeal.

Interestingly enough, Mr Rinau did not take any steps to enforce the German custody and return order in Lithuania, although the return order was accompanied by the certificate and was therefore immediately enforceable in Lithuania without any need for exequatur proceedings. It was Mrs Rinau who, in parallel with appealing against the return order in Germany, seised the Lithuanian courts with an application for declaration of non-recognition of the German return order under Art 21(3) of Brussels II Revised. Her application was rejected by the Court of Appeal on 14 September 2007 as inadmissible because of the certificate. Mrs Rinau then lodged an appeal on a point of law with the Supreme Court to have that order set aside and a fresh decision adopted granting her application for non-recognition of the judgment of the Family Court of Oranienburg of 20 June 2007, insofar as that judgment awarded custody of Luisa to Mr Rinau and ordered Mrs Rinau to return the child to her father and to leave her in his custody.

Moreover, on 12 May 2008, Mrs Rinau applied to the Supreme Court of Lithuania to adjudicate in cassation on the issue of reopening the Lithuanian Hague Convention return proceedings and to suspend the enforcement of the Hague Convention return order.

It was at this time in early May 2008 that the two parallel proceedings conducted separately so far – in Germany under Brussels II Revised and domestic family law, and in Lithuania under the Hague Convention – coincided before the same court, namely the Lithuanian Supreme Court. Both proceedings had eventually resulted in decisions ordering the return of Luisa to her father in Germany. The Lithuanian Supreme Court was thus faced with the question whether, in case it suspended the enforcement of the Lithuanian Hague Convention return order, the German return order made under Brussels II Revised would nonetheless claim immediate enforceability in Lithuania because of Arts 40(1)(b) and 42 of Brussels II Revised.

The Supreme Court of Lithuania therefore stayed the proceedings for non-recognition of the German return order under Brussels II Revised and referred

six questions to the ECJ, the substance of which will be discussed below. A few days later, at the end of May 2008, the Lithuanian Supreme Court decided to adjudicate in cassation on the issue of reopening the Hague Convention return proceedings and suspended the enforcement of the Lithuanian Hague Convention return order until a final decision on the reopening.

The issues before the ECJ

Although phrased in different terms and split into six questions, the legal problems referred to the ECJ by the Supreme Court of Lithuania in essence concern three issues:

- (1) Does the refusal pursuant to Art 13 of the Hague Convention to return a child, pronounced by a court of the State where the child is being retained, have to be final and not subject to further ordinary challenge in order to trigger the procedure set out in Art 11(6)–(8) of Brussels II Revised, which might result in a return order made by the court of the (former) habitual residence of the child in custody proceedings and equipped with immediate cross-border enforceability due to the certificate under Art 42 of Brussels II Revised?
- (2) Does the court of the EU Member State where enforcement of that latter order is sought have any power to review it if the court of the Member State of origin has issued a certificate under Art 42 of Brussels II Revised and, in the affirmative, how far does this power of review go?
- (3) Is the enforcement debtor (ie in terms of the Hague Convention the abducting parent) entitled to apply for a declaration of non-recognition under Art 21(3) of Brussels II Revised concerning a judgment from another EU Member State the recognition and registration for enforcement of which has not (yet) been applied for?

The responses given by the ECJ

- (1) While Art 11 of Brussels II Revised is aimed at harmonising the application of the Hague Convention in EU Member States by setting out details of procedure that are immediately binding upon the courts, it remains silent on some important practical and legal issues. Article 11(6) requires that within 1 month following the date of a non-return order under Art 13 of the Hague Convention, the court which has issued the order has to transmit a copy of it and other relevant documents to the competent court of the EU Member State where the child was habitually resident immediately before the wrongful removal or retention. However, the provision does not specify whether a first instance refusal to return the child under Art 13 of the Hague Convention which is still subject to legal challenge already triggers this obligation (and the subsequent procedure under Art 11(6)–(8) of Brussels II Revised)

or whether a final – negative – decision in the Hague Convention proceedings which is no longer subject to ordinary legal challenge is required.

Central Authority practice in many EU Member States is to transmit to the Central Authority of the other EU Member State concerned (in incoming abduction cases) or to the domestic court having jurisdiction for custody (in outgoing abduction cases) a refusal to return the child which is based on Art 13 of the Hague Convention, even if that decision is still subject to legal challenge. The ECJ has now confirmed this practice. The court held that a first instance refusal to return a child under the Hague Convention triggers the procedure set out in Art 11(6)–(8) of Brussels II Revised, even if the Hague Convention proceedings equally continue and the higher court possibly orders the return of the child later. Although the response given might be a bit surprising to some, the ECJ has answered this first question with a lot of pragmatism and – most important for family judges – in line with the best interest of the child.

As the discussion below will show, only this interpretation is in line with the spirit of Brussels II Revised, the Hague Convention and, in particular, the best interests of the child. The Hague Convention is based on the assumption that the courts in the State of the (former) habitual residence of the child are best placed to make a custody order which reflects the child's best interest. Moreover, the return proceedings should possibly be fast-tracked summary proceedings in order to restore the previous factual situation and to prevent further harm to the child. Brussels II Revised picks up on these aspects and elaborates further on them. On the one hand, it further accelerates the return proceedings (eg by making the 6-week deadline recommended in the Hague Convention mandatory). It also regulates the interplay between the custody proceedings which, in line with the spirit of the Hague Convention, supposedly take place in the State of the (former) habitual residence of the child following his or her return under the Hague Convention. While the Hague Convention contains provisions aimed at a quick clarification of the *factual* situation (return of the child), Brussels II Revised is further aimed at a quick clarification of the *legal* situation (enabling a final custody decision to be taken by the courts of the State of the (former) habitual residence of the child), even if the child is not being returned under the Hague Convention.

Brussels II Revised accepts the parallel continuation of return and custody proceedings in two different Member States, regardless of the ultimate outcome of the Hague Convention return proceedings. The Regulation's rule on *lis alibi pendens* in Art 19(2) does not apply to the relation between Hague Convention return proceedings and substantive custody proceedings because their cause of action is not the same. The examples below will show that, although normally parallel proceedings are not considered an efficient administration of justice, in this particular type of case it is indeed in

line with the best interest of the child to conduct the two sets of proceedings in parallel:

Assuming that the court seised with the custody proceedings grants sole custody or at least the right to determine the child's residence to the abducting parent while the Hague Convention return proceedings are still pending at the appeal stage, in many jurisdictions, including, for example, Germany and The Netherlands, this has the same effect upon the wrongfulness of the removal or retention as subsequent acquiescence under Art 13(1)(a) of the Hague Convention. The application for return becomes unfounded. The child can remain in the State he or she has been abducted to, and the custody situation from that moment on corresponds to this factual situation. It is obvious that in this case it is in line with the child's best interest to conduct both proceedings in parallel because this might save the child from having to return to his or her former State of habitual residence following a Hague Convention return order given at the appeal stage, followed by a second – this time lawful – relocation to the State the child had earlier been abducted to.

Assuming that the court seised with the custody proceedings grants custody or at least the right to determine the child's residence to the left-behind parent and orders the return of the child, under Art 11(8) of Brussels II Revised, this return order trumps the non-return order made under the Hague Convention – even in the State where the latter was made and without *exequatur*. The aim of Art 11(6)–(8) of Brussels II Revised is the speedy solution not only of the factual situation (physical return of the child) but also of the custody situation. In order to achieve this aim, Brussels II Revised attributes priority to the return order made by the court having jurisdiction over custody issues as compared to the non-return order under the Hague Convention. This is justified by the fact that the former order was given by the court having international jurisdiction on the merits of custody, resulting from ordinary proceedings with full evidence, as compared to the summary proceedings used for Hague Convention return applications in many Contracting States to the Hague Convention. Here, it is even more important for the well being of the child to obtain a quick decision in the custody proceedings in order to avoid further harm by allowing the child to become settled into the new environment due to the lapse of time and then nevertheless enforcing a return order of the custody court under Art 11(8) of Brussels II Revised. Such quick decision can be obtained more easily if the custody proceedings start as early as possible, ie following a first instance order of non-return under the Hague Convention. This is

particularly important where in the other State we are faced with very slow appeal procedures in Hague Convention cases. If custody proceedings in the State of (former) habitual residence of the child could only be conducted following the final conclusion of the Hague Convention return proceedings, this might take years – and yet a custody and return order then made by the custody court, if accompanied by a certificate, would be immediately enforceable in the State where the child has now lived for such a long time.

These considerations therefore apply regardless of whether the return order of the custody court was made before or after final conclusion of the Hague Convention return proceedings and their ultimate outcome. If one accepts that under Art 11(6) of Brussels II Revised custody proceedings can already be instituted following a first instance refusal to return the child under the Hague Convention which has not yet become final, one also has to accept that further developments in the Hague Convention return proceedings will not have any impact on the fact that a return order resulting from the custody proceedings enjoys the privilege of immediate enforceability under Art 11(8) of Brussels II Revised if it is accompanied by a certificate under Art 42 of Brussels II Revised. Other provisions of Brussels II Revised establishing bases of jurisdiction, for example Arts 8 and 12(3)(b), also rely on the time that the court is seised. A subsequent change of the facts that jurisdiction was based on is irrelevant. Consequently, the ECJ has made clear that the somewhat ambiguous wording of Art 11(8) of Brussels II Revised has to be interpreted in light of the other provisions in Art 11 and the purposes of Brussels II Revised as set out in the recitals.

According to the ECJ, Art 11(8) does not require the Hague Convention non-return order still to exist at the time that the custody court issues a return order, as long as the child has not yet been returned. In other words, even if higher instances in the State the child was taken to overturn the first instance non-return order and order the return of the child under the Hague Convention, this does not prevent the court in the State of the child's previous habitual residence to order return and issue a certificate under Art 11(8) of Brussels II Revised. This is in fact the only interpretation that makes sense because it would be absurd if it were to the detriment of the applicant if the courts of *both* States ultimately ordered the return of the child.

The ECJ judgment further makes clear that the privilege of immediate enforceability is also granted to the return order made by the custody court in cases where custody proceedings were *already pending* before that court at the time of wrongful removal or retention or were brought later but still before the first instance order of non-return under the Hague Convention. According to the ECJ, Art 11(8) of Brussels II Revised covers return orders made by courts in custody proceedings instituted

pursuant to Art 11(6) and (7) of Brussels II Revised and in custody proceedings that were drawn under the regime of these provisions later, at the time a Hague Convention non-return order from the other State was brought to the attention of the custody court (see Art 11(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'; and para 8 which only requires 'a' judgment of non-return pursuant to Art 13 of the Hague Convention and 'any subsequent' judgment requiring the return of the child issued by a court having jurisdiction under Brussels II Revised).

(2) According to the ECJ, the courts of the Member State where enforcement of the return order resulting from the custody proceedings in the other Member State is sought are not entitled to any review of the decision if a certificate pursuant to Arts 40(1)(b) and 42 was drawn up in accordance with the standard form set out in Annex IV to Brussels II Revised. Furthermore, it is not for the requested court to review whether the court issuing the certificate was entitled to do so. The requested court is only entitled to declare the enforceability of the certified decision and to allow the immediate return of the child.

(3) Where a certificate pursuant to Arts 40–42 of Brussels II Revised was issued, the enforcement *creditor* has a choice between: (a) proceedings for a declaration of enforceability or registration for enforcement under Arts 28 et seq; (b) proceedings aimed at a decision that recognition of the judgment be declared under Art 21(3); and (c) proceeding directly to enforcement, relying on the certificate. If the creditor chooses the latter, the judgment *debtor* may not bring proceedings for a declaration of non-recognition pursuant to Art 21(3) of Brussels II Revised. If no certificate pursuant to Arts 40–42 was issued, proceedings under Art 21(3) aimed at a decision that the judgment be not recognised remain possible and do not require an application for recognition already filed by the judgment creditor.

Evaluation

This reference to the ECJ also generated a lot of interest in EU Member States not directly concerned with this particular abduction case. While only the parties to the proceedings giving rise to the reference (ie Mr and Ms Rinau), the European Commission and the referring State (Lithuania) were entitled to make written submissions, all of them plus the governments of France, Germany, Latvia, The Netherlands and the UK seised the opportunity to submit oral observations (which amounted to almost 9 hours of pleadings). With regard to the first issue mentioned above, only Germany defended the position now confirmed by the ECJ. The other governments and the Commission required the conclusion of Hague Convention return proceedings by a final decision no longer subject to ordinary challenge in order to trigger the procedure set out in Art 11(6)–(8) of Brussels II Revised. It is interesting

to note that in spite of the decision by Singer J in *Re A (Custody Decision after Maltese Non-Return Order)* [2006] EWHC 3397 (Fam), [2007] 1 FLR 1923, which followed exactly the same reasoning, ie that domestic remedies against the non-return order do not need to be exhausted in order to conduct custody proceedings in the other State and issue a certificate, the UK Government pleaded the opposite in Luxembourg. Some even presented the view that the court in the State of the child's previous habitual residence was not entitled to exercise its jurisdiction over custody issues under Arts 8 and 10 of Brussels II Revised while Hague Convention return proceedings were still pending in the other EU Member State. The ECJ, strongly underlining the importance of the child's best interest and the need for a speedy solution, fortunately rebutted this interpretation. Custody proceedings may always be conducted in the State of the habitual residence having jurisdiction under Arts 8 and 10 of Brussels II Revised, even if the child, following an abduction, is temporarily out of the country. Whether the resulting custody and return order is directly enforceable in the other State depends on whether the mechanism of Art 11(6)–(8) was applied, ie a non-return order was given and the judgment transmitted. If this was not the case, the custody and return order would fall under the ordinary proceedings for recognition and registration for enforcement under Arts 21 and 28 et seq of Brussels II Revised. This has now been clearly stated by the ECJ, which will hopefully assist courts in applying the very complex provisions of Art 11.

If the mechanism of Art 11(6)–(8) was applied, the ECJ has clarified that it is not for the requested State to review whether this mechanism was applied correctly, as long as a certificate pursuant to Arts 40, 42 of Brussels II Revised was issued the authenticity of which has not been challenged. In some of the written observations and oral pleadings, the view was held that a certificate issued in violation of the procedures set out by Brussels II Revised does not have any effect in the Member State where enforcement is sought. This implies, however, that

the courts of the requested State are entitled to examine whether the certificate has been issued correctly. Had this view prevailed, this would have been the final curtain not only for the certificate under Arts 40–42 of Brussels II Revised but also for the European Enforcement Order. Both are based on the Three Steps Programme 2000 of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters ((2001) OJ C 12/1) implementing the conclusions of the European Council held in Tampere in 1999. Its aim is precisely to abolish exequatur in relations between EU Member States, and Arts 40–42 of Brussels II Revised was the first concrete application in a binding instrument which, at the time of adoption of Brussels II Revised, remained almost unnoticed. Just a few months later it was followed by the European Enforcement Order, which raised much more public interest in this respect.

The ECJ's decision in the *Rinau* case is in line with the principle underlying the Tampere Conclusions, namely that ultimately all challenges against the decision on the merits should be brought in the State of origin. In the same vein, Recital 21 of Brussels II Revised recalls that the recognition and enforcement of a judgment given in a Member State should be based on the principle of mutual trust. The only challenge in the requested State that the ECJ decision might still permit is to challenge the authenticity of the certificate. This reassurance, which reinforces the spirit of Brussels II Revised, is to be welcomed.

To sum up it may be said that – to the relief (and perhaps surprise) of many – this first application of the new urgent procedure for preliminary rulings can be considered a success. The wording of Brussels II Revised leaves many doubts, in particular in light of the fact that it has to be applied by judges from almost 30 different legal traditions. One may or may not like the content of some ECJ decisions, but it can now be hoped that clarity and legal certainty with regard to the uniform application of Brussels II Revised have come somewhat closer.