Judge Lars Bay Larsen, CJEU
E-mail: baylarsen@curia.europa.eu
Phone: +352-4303-2286 (CJEU)

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"Mutual Recognition in Civil Law Cooperation – The case of child abduction in the light of the jurisprudence of the CJEU (the Brussels II Bis Regulation)"

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DRAFT BEFORE DELIVERY

Introduction and a Quick Historical Overview

It is a real pleasure for me to address you here today on the jurisprudence of my court – the Court of Justice of Justice of the European Union – on mutual recognition in Civil law cooperation, with a particular view on child abductions and some aspects of the Brussels II Bis Regulation the EAW.

Civil law cooperation and child abduction are subjects that I have worked a little with, also well before I arrived as a judge at the ECJ in Luxembourg.[1]

1 Please note that the views expressed in this note are mine and do not necessarily reflect those of my colleagues or my Court.

I have in fact – although in slightly different functions – followed these subjects completing their travel from;

- A point completely **outside the scope of the Treaties**,
- **EPC** (1985), (Single European Act), (WG on Civil Law Cooperation under EPC) Internal Market
- Palma di Mallorca (1989), (listing the necessary compensatory measures to accompany the free movement of persons),
- Schengen (1985), (CISA 1990),
- **Maastricht Treaty** (1992), establishing the three pillar structure,
- **Amsterdam Treaty** (1998), Transferring inter alia Civil Law Cooperation from the Third Pillar to the First Pillar. (And integrating Schengen)
- The Special European Council in **Tampere** (1999), concerning the Principle of Mutual Recognition and the drawing up of the Charter of Fundamental Rights,
- Past the Treaty of Nice (2000) and,
- The failed [Constitutional Treaty],
- Into an even more complete integration by the **Lisbon Treaty (2009)**, including the Charter as a source of Primary Union Law.

The Principle of Mutual Recognition Based on Mutual Trust

Today, it is perhaps worth recalling that the very **Principle of Mutual Recognition** as the **general approach** in EU Law in the **AFSJ** was **not** something that "Brussels" pressed the Member States to accept. In fact, it was almost the other way around.

I remember it fairly well, as I had to step in for the Danish Minister for Justice – something which is quite an uncomfortable situation for a non-political senior official – at a three ministers' press conference called in the margins of an informal JHA council in Turku 1999 to prepare the Tampere European Council. In Turku, the then British Home Secretary, **Jack Straw** – flanked by the Swedish Minister for Justice, **Laila Freivalds,** and myself, as a poor substitute for the then Danish Minister for Justice, Frank Jensen – **presented and explained** the Principle of Mutual Recognition. This implies, basically, that a requested Member State should apply and carry out a judicial decision from another Member State in pretty much the same way as a decision stemming from a national authority in the requested Member State – without adding further procedures of scrutinizing, double-checking and validating the decision of the requesting Member State.

We explained how applying this principle, **based on mutual trust,** would lead to **much quicker improvements** in European cooperation in this area, while allowing the Member States not to go through the cumbersome and politically sensitive process of harmonizing their national civil and penal laws and procedures

through the normal Community method (of harmonizing the national laws slice by slice).

Reality demonstrated, after the subsequent **Tampere** European Council endorsed the Principle of Mutual Recognition as the way forward, that, after all, it was not always so easy to apply the Principle of Mutual Recognition based on Mutual Trust in the European legislative process in the AFSJ.

The main reason for this is that we here find ourselves in very **sensitive areas of law**,

- penal law, including procedural aspects such as extradition
- law enforcement, including counter-terrorism
- asylum law, immigration and border control
- **family law**

These subjects are regarded as highly sensitive both by **our citizens** and by **national politicians**. And this is perhaps not completely by chance ☺.

If we just stick to family law and our selected "case", child abductions, then it is perhaps justified to remind ourselves just how sensitive these issues are for each of us when our family, our children might be concerned. And even when we act in a professional capacity, say as judges, these are amongst the worst cases.

Because reality is that courts in cases concerning the custody of children, as a very experienced Danish colleague once stated, are very good at **"making clear, short and wrong decisions"**. Because the relation between the parents in many of the cases that ends before a court does not leave any room for a "happy ending". It is a small comfort for us, as judges, to remember that a large proportion of divorces, separations and other forms of break-ups of families actually are perhaps not "happy", but handled more skillfully by the parents. However, that will probably give **no comfort to the children** in the **cases that do end before the courts**.

Such cases are not made easier to handle and decide when we have parents of different nationalities involved. Neither for parents, nor for judges. Although I cannot fully let go of a suspicion that maybe a few judges (of course not any in my own Member State), and sometimes also a few officials from one or another Member State forget that these children of parents from different Member States, regardless of whether they formally have dual nationality (which is very often the case), in reality have a "double background", being say German AND French, Hungarian AND Spanish, Belgian AND Polish etc.

When we made the Brussels II Bis Regulation, it was basically the idea to set up a framework for mutual recognition of jurisdiction and decisions and to give full effect to the Hague Convention on Child Abductions. Based on the general view that the jurisdiction best suited to decide on the question of custody/parental authority, visiting rights etc. is to be found in the Member State in which **the child**

had its **habitual residence just before** one of the parents abducted the child, normally to the country of origin of the abducting parent. Consequently competing lawsuits, in reality on the same issues, should therefore be avoided as far as possible also with a view to securing the return of the abducted child.

And the regulation **is applied** by national courts, and sometimes such cases give rise to **preliminary rulings** from my court, in which I think it is fair to say that we are **rather faithful to the Principle of Mutual Recognition Based on Mutual Trust**. So there is certainly a jurisprudence which may rather easily be found not only in textbooks, but also on our web-page in the 24 official languages of the European Union.

However, unlike what I often do, I will not go into these individual cases. Instead, I will focus on the need for urgent handling of such cases. This is so at national level, but also at Union level.

For the same reason, the **special urgency procedure**, the so-called PPU-procedure, is often applied to requests for a preliminary ruling in this area of law. The PPU-regime allows us to shorten the normal period for replying to a request for a preliminary ruling from 12-14 months (in average) to approximately 2 months.

Still, I suspect that some lawyers (representing the abducting parent) try to "instrumentalize" national judges (typically in the Member State to where the

abducted child has been taken) – and eventually the CJEU – by arguing that a request for a preliminary ruling should be made. And certainly **not an urgent one** – if it can be avoided.

Why? Because these lawyers know very well that if they manage to **prolong or delay** the procedure for a long enough period, then, at the end of the day, **probably no judge** will transfer a small abducted child, who from his or her, say, third to fifth year has been effectively cut off from any contact with the parent back in the Member State of (former) habitual residence. The interests of the child then plead with force in favor of **upholding status quo**, even if this situation is a result of an unlawful abduction of the child. The **temporary "solution"** – be it unlawful or decided by a court – inevitably tends to **become the final solution** as well.

I believe that one can see the same tendency in some of the cases on child abductions that have been brought before the ECtHR in Strasbourg. In particular if and when this Court decides to temporarily suspend the effects of a decision of a return of an abducted child, while Strasbourg is considering the case. There is then a significant risk that **status quo** (and the abducting parent) will win, almost regardless of what the Court in Strasbourg decides at the end – simply because of the elapsed time.

Finally, allow me to mention another, linked concern: Decisions on the return of abducted children should be **taken and eventually effected rather quickly**. Their **aim** is, insofar as possible, to **reestablish the situation** before the child was

abducted, **not to prejudge** the outcome of the case on long-term custody of the child in the Member State of the habitual residence of the child.

The time aspect implies a **limit as to how profound examinations** the authorities and courts in the Member State, from where the child was abducted, can carry out concerning the situation of the child in the other Member State to which the child was taken.

Mutual Trust is not Blind Trust, as can clearly be seen from the *M.S.S.* judgment from Strasbourg and the following *N.S.*, *Puid* and *Abdullahi* jurisprudence from my Court, all from another area of the AFSJ, namely Asylum Law (Dublin II Regulation), and the requested Member State cannot choose to "turn a blind eye" to clear indications of systemic deficiencies in the requesting Member State. There is, however, a **presumption**, on which the requested Member State should **normally** rely, that fundamental rights have been respected in the issuing/requesting Member State.

Consequently, in accordance with the **Principle of Mutual Trust,** this should in the absence of extraordinary circumstances (like systemic deficiencies) **not be double-checked** in the requested Member State.

In this respect, it is important to note that recent jurisprudence (such as Case 13420/12, *M. R. and L. R. vs. Estonia,* and Case 3592/08, *Rouiller c. Suisse*) from

the ECtHR on child abductions seems to have given more weight, inter alia to some of these considerations that I have mentioned. Thus, at the very least, adding important nuances to past jurisprudence from Strasbourg in this particular field.

Which in a more and more global world will remain a very delicate and difficult, but also growing field. For children, parents and – as a last resort – for judges.

Thank you for your **patience and attention**.