Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

19 November 2020 *

(Reference for a preliminary ruling – Citizenship of the Union – Article 21 TFEU – Right to move and reside freely in the territory of the Member States – Criminal offence specifically concerning international child abduction – Restriction – Justification – Child protection – Proportionality)

In Case C-454/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Amtsgericht Heilbronn (Heilbronn Local Court, Germany), made by decision of 11 June 2019, received at the Court on 14 June 2019, in the criminal proceedings against

ZW,

intervener

Staatsanwaltschaft Heilbronn

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby, S. Rodin and K. Jürimäe (Rapporteur), Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– ZW, by M. Ehninger, Rechtsanwalt,

– the German Government, by J. Möller, M. Hellmann, U. Bartl and D. Klebs, acting as Agents,

– the European Commission, by E. Montaguti and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 June 2020,

* Language of the case: German.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 21 TFEU and of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

2 The request has been made in criminal proceedings brought against ZW for child abduction.

Legal context

The 1980 Hague Convention

3 The aim of the Convention on the Civil Aspects of International Child Abduction, concluded at The Hague on 25 October 1980 ('the 1980 Hague Convention'), is, inter alia, in accordance with Article 1(a) thereof, 'to secure the prompt return of children wrongfully removed to or retained in any Contracting State'.

4 Articles 12 and 13 of that convention lay down the applicable rules when a child has been wrongfully removed or retained which are intended to secure the child's prompt return.

5 The 1980 Hague Convention entered into force on 1 December 1983. All Member States of the European Union are parties to that convention.

EU law

6 Recitals 2, 17 and 21 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1), state:

'(2) The Tampere European Council endorsed the principle of mutual recognition of judicial decisions as the cornerstone for the creation of a genuine judicial area, and identified visiting rights as a priority.

…

(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 [1980 Hague Convention] would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases.

However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.

…

(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.'

German law

7 Paragraph 25 of the Strafgesetzbuch (German Criminal Code), entitled 'Determination of the principal', provides that:

'(1) Any person who commits the offence himself or through another shall be liable as a principal.

(2) Where the offence is committed jointly by more than one person, each shall be liable as a principal (joint principals).'

8 Paragraph 235 of the German Criminal Code, entitled 'Child abduction', states, in subparagraphs 1 and 2:

'(1) A term of imprisonment not exceeding five years or a fine shall be imposed on a person who removes or retains

1. a person under 18 years of age by force, threat of serious harm or deception, or

2. a child, who is not a relative,

from one or both of his parents or his guardian or carer.

(2) The same penalty shall be imposed on a person who

1. removes a child in order to take him abroad, or

2. having brought him there or the child having gone there, retains a child from one or both of his parents or his guardian or carer.'

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

9 ZW, a Romanian national, is the mother of AW, a minor born in Romania. ZW is separated from the child's father, a Romanian national living in Romania. Under Romanian law, both parents have joint parental authority over the child.

10 In 2009, ZW moved to Germany, where she was subsequently joined by AW.

11 In March 2013, due to behavioural problems, the child was placed in a youth welfare facility with his parents' agreement.

12 By order of 14 November 2014, the Amtsgericht Heilbronn (Heilbronn Local Court, Germany) withdrew the parents' right, inter alia, to determine the child's residence and entrusted that right to a carer under a partial delegation of parental authority known as 'guardianship for additional protection' (*Ergänzungspflegschaft*). Following a succession of failed placements at various welfare facilities, the child returned to ZW's home with the carer's consent.

13 By letter of 3 August 2017, the Jugendamt Heilbronn (youth welfare office of Heilbronn, Germany) applied for parental authority to be restored to ZW. For reasons which remain unclear, that has not yet occurred.

14 At the beginning of December 2017, AW's father took him to Romania, where they both now live. ZW agreed to that removal, although it has not been established whether that agreement related to a single visit during the 2017 Christmas period or to the permanent return of the child to Romania. Neither the Jugendamt Heilbronn (youth welfare office of Heilbronn) nor the carer was given advance notice of the removal.

15 The carer filed a criminal complaint against the child's parents on account of his removal, as a result of which criminal proceedings were brought against ZW before the Amtsgericht Heilbronn (Heilbronn Local Court) for the joint commission of the offence of child abduction, as provided for in Paragraph 25(2) and point 2 of Paragraph 235(2) of the German Criminal Code.

16 That court is unsure whether Paragraph 235 of the German Criminal Code is compatible with EU law. First, the application of that provision might be regarded as an unjustified restriction on the freedom of movement of Union citizens. Second, that provision treats German nationals differently from nationals of other Member States, who are treated in the same way as third-country nationals. In that regard, the criminal offence set out in point 2 of Paragraph 235(2) of the German Criminal Code, which punishes international child abduction, is broader than the criminal offence set out in point 1 of Paragraph 235(1) of that code, which punishes the abduction of children retained in Germany, and is liable to have a greater effect on Union citizens who are nationals of Member States other than the Federal Republic of Germany.

17 Lastly, the national court asks whether, if Paragraph 235 of the German Criminal Code is incompatible with EU law, it would be required to set aside that provision in the main proceedings due to the primacy of EU law.

18 In those circumstances, the national court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is primary and/or secondary [EU] law, in particular [Directive 2004/38], in the sense of a full right of EU citizens to move and reside freely within the territory of the Member States, to be interpreted as meaning that it also covers national criminal provisions?

(2) If the question is answered in the affirmative: does the interpretation of primary and/or secondary [EU] law preclude the application of a national criminal provision which penalises the retention of a child from his guardian abroad where the provision does not differentiate between Member States of the European Union and third countries?'

Consideration of the questions referred

Admissibility

19 The German Government contends that the questions referred for a preliminary ruling are inadmissible because they are not relevant to the outcome of the main proceedings. It argues that the acts alleged against ZW, who is the only accused in the main proceedings, are entirely unrelated to the exercise of her right to move freely, since ZW has neither left nor even attempted to leave Germany. Inasmuch as the national court's doubts concerning the compatibility of Paragraph 235 of the German Criminal Code with EU law are based on factual situations presupposing that ZW moved to another Member State, they derive from considerations which are hypothetical and extraneous to the dispute in the main proceedings.

20 It should be noted that, in accordance with settled case-law, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts, by means of which the Court provides national courts with the points of interpretation of EU law which they need in order to decide the disputes before them (judgment of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraph 18 and the case-law cited).

21 In the context of that cooperation, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraph 19 and the case-law cited).

22 It follows that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraph 20 and the case-law cited).

23 In the present case, it should be recalled that a Union citizen, such as ZW, a national of a Member State, who moved to another Member State, made use of her right to move freely, so that her situation falls within the scope of EU law (see, to that effect, judgments of 26 February 2015, *Martens*, C-359/13, EU:C:2015:118, paragraph 22, and of 13 November 2018, *Raugevicius*, C-247/17, EU:C:2018:898, paragraph 27 and the case-law cited).

24 Furthermore, it is patently clear from the material submitted by the national court that point 2 of Paragraph 235(2) of the German Criminal Code, the compatibility of which with EU law is questioned by that court, is the legal basis for the prosecution brought in the main proceedings against ZW as joint principal in the offence of international child abduction. In that regard, as is apparent from paragraph 16 of this judgment, the national court has given a detailed explanation as to why it needs an answer to the questions referred for a preliminary ruling to be able to decide on the dispute in the main proceedings.

25 In those circumstances, it is not obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose. The request for a preliminary ruling is therefore admissible.

Substance

26 By the questions it refers for a preliminary ruling, which should be dealt with together, the national court asks, in essence, whether EU law must be interpreted as precluding the application of a Member State's legislation under which the retention by a parent of a child from his appointed carer in another Member State attracts criminal penalties even in the absence of force, threat of serious harm or deception, whereas where such retention takes place in the territory of the first Member State, the same act is punishable only if recourse is had to force, threat of serious harm or deception.

Preliminary observations

27 In so far as the national court raises the question of the compatibility with EU law of a provision of national criminal law, it should be recalled that although, in principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, the Court has consistently held that EU law imposes certain limits on their powers in such matters. National criminal provisions may not discriminate against persons to whom EU law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by EU law (see, to that effect, judgments of 2 February 1989, *Cowan*, 186/87, EU:C:1989:47, paragraph 19, and of 26 February 2019, *Rimšēvičs and ECB* v *Latvia*, C-202/18 and C-238/18, EU:C:2019:139, paragraph 57). Where such a provision is incompatible with the principle of equal treatment or with one of the fundamental freedoms guaranteed by EU law, it will be for the national court, which is called upon, within the exercise of its jurisdiction, to apply and give full effect to provisions of EU law, to disapply that provision (see, to that effect, judgment of 28 April 2011, *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraph 61 and the case-law cited).

28 In addition, in so far as the national court, by its questions, enquires about the interpretation of EU law, without referring to any specific provision thereof, it should be noted that, in accordance with the Court's settled case-law, Article 21 TFEU contains not only the right to move and reside freely in the territory of the Member States but also a prohibition of any discrimination on grounds of nationality (see, to that effect, judgment of 8 June 2017, *Freitag*, C-541/15, EU:C:2017:432, paragraph 31 and the case-law cited).

29 Consequently, the questions raised by the national court should be examined in the light of that provision alone.

Existence of a restriction on free movement of citizens of the Union

30 National legislation which places certain of the nationals of a Member State at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 21(1) TFEU on every citizen of the Union (see, to that effect, judgments of 14 October 2008, *Grunkin and Paul*, C-353/06,

EU:C:2008:559, paragraph 21; of 26 February 2015, *Martens*, C-359/13, EU:C:2015:118, paragraph 25 and the case-law cited; and of 8 June 2017, *Freitag*, C-541/15, EU:C:2017:432, paragraph 35).

31 In the present case, point 1 of Paragraph 235(1) of the German Criminal Code provides for the imposition of a custodial sentence of up to five years or a fine on any person who removes or retains a person under 18 years of age by force, threat of serious harm or deception from one or both of his parents or his guardian or carer. Point 2 of Paragraph 235(2) provides for the imposition of the same penalty on any person who, having brought a child abroad or the child having gone there, retains the child from one or both of his parents or his guardian or carer.

32 According to the explanations provided by the national court, it follows in particular from Paragraph 235 of the German Criminal Code that the mere retention by a parent of a child from a carer who is empowered to fix the child's place of residence attracts a criminal penalty under point 2 of subparagraph 2 of that paragraph where the parent retains the child in another Member State of the European Union, just as if the parent were to retain the child in a third country, even in the absence of force, threat of serious harm or deception. On the other hand, where the child is retained in Germany, the retention by a parent of a child from his carer attracts a criminal penalty under point 1 of subparagraph 1 of that paragraph only if recourse is had to force, threat of serious harm or deception

33 Paragraph 235 of the German Criminal Code thus draws a distinction depending on whether the child is retained by his parent inside or outside Germany, in particular in another Member State of the European Union. That distinction is based solely on the fact that the child has been removed from German territory to the territory of another Member State of the European Union.

34 In so far as it applies to the case of a child retained in a Member State other than the Federal Republic of Germany, the specific criminal offence set out in point 2 of Paragraph 235(2) of the German Criminal Code is liable to affect, in fact, primarily Union citizens who are nationals of other Member States and who have exercised their right to move and reside freely and reside in Germany. Those citizens are more likely than German nationals to remove or send their children to another Member State, chiefly their Member State of origin, and to retain them there, particularly on their return to the latter State.

35 It follows that, as the Advocate General essentially stated in point 27 of his Opinion, point 2 of Paragraph 235(2) of the German Criminal Code establishes a difference in treatment that is likely to affect or even restrict the freedom of movement of Union citizens within the meaning of Article 21 TFEU.

Justification for the restriction

36 In accordance with the Court's settled case-law, a restriction on the freedom of movement of Union citizens which, as in the case in the main proceedings, is independent of the nationality of the persons concerned, may be justified if it is based on objective considerations of public interest and is proportionate to the legitimate objective pursued by the national legislation in question. A measure is proportionate if, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain that objective (judgments of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 41 and the case-law cited, and of 25 July 2018, *A (Assistance for a disabled person)*, C-679/16, EU:C:2018:601, paragraph 67).

37 In the present case, the German Government stated, in its written observations before the Court, that the specific offence set out in point 2 of Paragraph 235(2) of the German Criminal Code is intended to protect the right of parental responsibility and the rights of the child and to prevent and combat international child abduction in view of the practical difficulties in securing the return of a child retained abroad, including when the child is in another Member State.

38 Specifically, it is apparent from the explanatory memorandum concerning Paragraph 235 of the German Criminal Code, to which the German Government refers, that that offence was introduced because of the difficulties in enforcing, in another State, a German judicial decision on child custody and the seriousness of all international abductions, in particular where the child has been removed to a State belonging to a different cultural zone (*Staat eines anderen Kulturkreises*) and it is not possible to secure his prompt return.

39 Those reasons must therefore be regarded as intrinsically linked to the protection of the child and of the child's fundamental rights.

40 The Court has consistently held that the protection of the child is a legitimate interest which, in principle, justifies a restriction on a fundamental freedom guaranteed by the TFEU (see, to that effect, judgment of 14 February 2008, *Dynamic Medien*, C-244/06, EU:C:2008:85, paragraph 42). The same applies to the protection of the fundamental rights of the child, as enshrined in Article 24 of the Charter of Fundamental Rights of the European Union.

41 The reasons put forward by the German Government thus relate to objective considerations of public interest, within the meaning of the case-law referred to in paragraph 36 of this judgment.

42 It is also apparent from the Court's case-law that it is not indispensable that measures laid down by a Member State to protect the rights of the child correspond to a conception shared by all Member States as regards the level of protection and the detailed rules relating to it. As that conception may vary from one Member State to another on the basis of, inter alia, moral or cultural views, Member States must be recognised as having a definite margin of discretion. While it is true that it is for the Member States, in the absence of harmonisation within the European Union, to determine the level at which they intend to protect the interest concerned, the fact remains that that discretion must be exercised in conformity with the obligations arising under EU law and, in particular, the requirements set out in paragraph 36 of this judgment (see, to that effect, judgment of 14 February 2008, *Dynamic Medien*, C-244/06, EU:C:2008:85, paragraphs 44 to 46).

43 In that regard, a criminal offence intended to punish international child abduction, including when perpetrated by a parent, is, in principle, appropriate for ensuring, on account in particular of its deterrent effect, that children are protected against such abductions and that their rights are safeguarded. The application of the provision establishing such a criminal offence also contributes to the objective of combating those abductions in the interests of child protection.

44 However, the criminal offence in question must not go beyond what is necessary to attain the legitimate objective which it pursues.

45 Subject to verification by the national court, it appears that the German legislature considers that the protection of the child and of the child's rights against the risk of abduction does not require abduction by a parent, in principle and in all events, to constitute criminal conduct. While the international abduction of a child by a parent is punishable, as such, by a criminal penalty, on the

basis of point 2 of Paragraph 235(2) of the German Criminal Code, that is not so in the case of abduction of a child by a parent where the child is retained in Germany, since such an act will attract a criminal penalty, under point 1 of Paragraph 235(1) of the Criminal Code, only if recourse is had to force, threat of serious harm or deception.

46 It is true that the documents before the Court show that the specific offence set out in point 2 of Paragraph 235(2) of the German Criminal Code and the enhanced level of child protection afforded by that provision are based on the view that if a child is removed from Germany, his return there to the person with rights of custody will give rise to practical difficulties in the same way as the recognition of German judicial decisions.

47 However, it must be held that a criminal offence which provides that the mere retention by one or both parents of a child from the child's other parent, guardian or carer in another Member State gives rise to criminal penalties even in the absence of force, threat of serious harm or deception goes beyond what is necessary to attain the objective pursued, in circumstances where the retention of a child in the territory of the Member State concerned gives rise to a penalty only if recourse is had to force, threat of serious harm or deception.

48 An argument based, in essence, on the presumption that it is impossible or excessively difficult to obtain recognition, in another Member State, of a judicial decision on child custody and, in the case of the international abduction of a child, to secure the child's prompt return, effectively places Member States on the same footing as third States and is at odds with the rules and spirit of Regulation No 2201/2003.

49 That regulation is based, as is apparent from recitals 2 and 21 thereof, on the principle of mutual recognition of judicial decisions, the cornerstone for the creation of a genuine judicial area, and on the principle of mutual trust. The Court has consistently held that the principle of mutual trust requires each Member State, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, Opinion 2/13 of 18 December 2014, EU:C:2014:2454, paragraph 191, and judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 36).

50 In the light of all the foregoing considerations, the answer to the questions referred is that Article 21 TFEU must be interpreted as precluding the application of a Member State's legislation under which the retention by a parent of a child from his appointed carer in another Member State attracts criminal penalties even in the absence of force, threat of serious harm or deception, whereas where such retention takes place in the territory of the first Member State, the same act is punishable only if recourse is had to force, threat of serious harm or deception.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 21 TFEU must be interpreted as precluding the application of a Member State's legislation under which the retention by a parent of a child from his appointed carer in another Member State attracts criminal penalties even in the absence of force, threat of serious harm or deception, whereas where such retention takes place in the territory of the first Member State, the same act is punishable only if recourse is had to force, threat of serious harm or deception.

Signatures