Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 4 June 2020 [1]

Case C-454/19

Staatsanwaltschaft Heilbronn
v
ZW

(Request for a preliminary ruling from the Amtsgericht Heilbronn (Heilbronn Local Court, Germany))

(Request for a preliminary ruling — Article 18 TFEU — Article 21 TFEU — Citizenship of the Union — Right of Union citizens to move and reside freely in the territory of the Member States — Directive 2004/38/EC — Article 27 — Criminal offence of child abduction — Child under the guardianship of a legal guardian — Parent deprived of part of his or her parental authority transferring the child abroad without the prior consent of the legal guardian)

I. Introduction

1. The present request for a preliminary ruling concerns the interpretation of Articles 18 and 21 TFEU, and 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. [2]

2. This request was made in the context of proceedings against ZW, who is facing prosecution as a co-offender in respect of a criminal offence consisting in the abduction of a minor who is her son.

3. The questions asked by the referring court once again concern the scope of the right to free movement of citizens of the Union. The answer provided by the Court will also serve to clarify, in the specific context of child abduction, the scope of Article 27 of Directive 2004/38, which authorises Member States to restrict the freedom of movement on grounds of public policy.

1 Original language: English.

2 OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34.

II. Legal context

A. International law

4. Article 12 of the Convention on the Civil Aspects of International Child Abduction, concluded at The Hague on 25 October 1980 ('the 1980 Hague Convention') provides:

'Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

…'

B. EU law

1. Directive 2004/38

5. Article 27 of Directive 2004/38 is the first provision of Chapter VI, entitled 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health'. That provision states that:

'1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

…'

2. Regulation (EC) No 2201/2003

6. Recitals 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[3] are worded as follows:

'(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

3 OJ 2003 L 338, p. 1.

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.'

7. Article 42 of Regulation No 2201/2003 falls within the sphere of Section 4, entitled 'Enforceability of certain judgments concerning rights of access and of certain judgments which require the return of the child'. According to that article:

'1. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article [11(8)], the court of origin may declare the judgment enforceable.

2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:

(a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;

(b) the parties were given an opportunity to be heard; and

(c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)).

The certificate shall be completed in the language of the judgment.'

C. German Law

8. Paragraph 25 of the Strafgesetzbuch (German Criminal Code, 'the StGB') 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).'

9. Paragraph 235 of the StGB states:

'(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[.]

(3) An attempt in the case of point 2 under subparagraph (1) or point 1 of subparagraph (2) above shall be a punishable offence.

(4) A penalty of between one year's and 10 years' imprisonment shall be imposed if the person

1. by the offence places the victim in danger of death or serious injury or of a significant impairment of his physical or mental development, or

2. commits the offence for material gain or with the intent of benefiting financially himself or a third person.

(5) If, by the offence, the person causes the death of the victim, the penalty shall be imprisonment of not less than three years.

(6) In less serious cases under subparagraph (4), a penalty of not less than six months' and not exceeding five years' imprisonment shall be imposed; in less serious cases, under subparagraph (5), a penalty of not less than one year's and not exceeding 10 years' imprisonment shall be imposed.

(7) In cases under subparagraphs (1) to (3), the abduction of the child shall be prosecuted only upon request where the prosecuting authority itself considers an intervention necessary because of the particular public interest in such a prosecution.'

III. The facts of the main proceedings

10. The present case has its origin in criminal proceedings brought in Germany against ZW, a Romanian national resident in Germany, in respect of the international abduction of her own child, AW.

11. AW, a Romanian national, has resided with his mother in Germany since 2009. AW's parents are separated and his Romanian father lives in Romania. Due to the child's behavioural problems, he was placed, with the parents' agreement, in a youth welfare facility in March 2013. By order of a German judge in 2014, the right, inter alia, to determine the child's residence was withdrawn from the parents and instead was entrusted to a guardian called an 'Ergänzungspfleger' ('the carer') under a partial delegation of parental authority called 'Ergänzungspflegschaft' (guardianship for additional protection).

12. In December 2017, AW, having returned to his mother's home due to several failed placements at various youth welfare facilities, was taken to Romania by his father, with his mother's consent. He now lives there. As the parents had failed to inform the carer, who has the right to determine the child's residence, the carer filed a criminal complaint against the parents, as co-offenders in the international abduction of a child. The mother is the defendant in the main proceedings.

13. The referring court explains that, under Paragraph 235(2) of the StGB, international child abduction (in disregard of the carer's right to determine the child's residence), is punishable by a custodial sentence of up to five years' imprisonment or a fine, irrespective of whether the child is being held in another Member State of the Union or in a third State. On the other hand, if the abduction is committed within the national territory, then the abduction is punishable under the StGB only if the person concerned removes or retains the child by force, threat of serious harm or deception.

14. In that context, the referring court asks, first, whether a criminal rule such as this falls within the scope of EU law and, if so, whether it is then compatible with EU law.

IV. The request for a preliminary ruling and the procedure before the Court

15. It is in those circumstances that, by decision of 11 June 2019, received at the Court on 14 June 2019, the Amtsgericht Heilbronn (Heilbronn Local Court, Germany) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is primary and/or secondary European 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 European 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?'

16. Written observations were submitted by the German Government and by the European Commission. Due to the Covid-19 pandemic, the hearing scheduled for 25 March 2020 was cancelled. Instead, by decision of 17 March 2020, the questions for oral response sent to the parties in advance of the hearing were converted into questions for written response. ZW, the German Government and the Commission acceded to that request and replied to those questions within the timeframe set by the Court. They all were therefore given the opportunity to express their views on all the issues raised by the preliminary reference.

V. Analysis

A. Admissibility of the request for a preliminary ruling

17. In its written observations, the German Government submits that the questions referred for a preliminary ruling by the national court are inadmissible. According to the German Government, the questions have no real and direct connection with the subject matter of the dispute to be decided by the national court. I consider, however, that the request for a preliminary ruling is admissible.

18. In this regard, one might first observe that, according to settled case-law, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them. 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. 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. [4]

19. In the present case, it is not contested that ZW, a national of a Member State, namely Romania, who moved to another Member State, namely Germany, made use of her right to move freely. Her situation consequently falls within the scope of EU law and, at the very least Articles 18 and 21 TFEU. [5]

20. In addition, the referring court has fully explained why it considers that, in order to rule on the dispute before it, it is necessary to analyse whether EU law precludes the application of a criminal provision such as the rule on the basis of which the case is brought before it.

21. In those circumstances, I consider that the request for a preliminary ruling must be considered admissible.

B. The first question

22. By its first question, the referring court asks, in essence, if national criminal provisions can be covered by EU law and, in particular, Directive 2004/38.

23. This question must be answered in the affirmative. Indeed, although in principle criminal legislation and the rules of criminal procedure are, to a large extent, matters for which the Member States are responsible, the Court has consistently held that EU law sets certain limits to the power of Member States in such matters. Indeed, that power of the Member States must be exercised in line with not only the fundamental freedoms guaranteed by EU law, but also EU law as a whole, in particular primary EU law. [6] Such legislative provisions in the field of criminal law may therefore not discriminate against persons to whom EU law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by EU law. [7]

C. The second question

24. By its second question, the referring court asks, in essence, whether EU law, and more precisely the principle of non-discrimination and the freedom of movement enshrined in Articles 18 and 21 TFEU and specified by Directive 2004/38, precludes the application of a provision of national criminal law which penalises the retention abroad of a child from his carer where that provision does not differentiate between Member States of the European Union and third countries.

4 See, to that effect, judgments of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraphs 18 to 20), and of 23 January 2019, *M.A. and Others* (C-661/17, EU:C:2019:53, paragraphs 48 to 50).

5 See, to that effect, judgment of 13 November 2018, *Raugevicius* (C-247/17, EU:C:2018:898, paragraph 27).

6 See, to that effect, judgment of 26 February 2019, *Rimšēvičs and ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2019:139, paragraph 57).

7 See, to that effect, judgments of 2 February 1989, *Cowan* (186/87, EU:C:1989:47, paragraph 19); of 24 November 1998, *Bickel and Franz* (C-274/96, EU:C:1998:563, paragraph 17); and of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraphs 53 and 54).

25. I should like to make clear, as a preliminary point, that the particular circumstances of the case in the main proceedings — namely, the fact that the right to determine the child's residence is exercised by a third party and that the criminal proceedings are therefore potentially directed against both parents — have no influence on the exercise of the interpretation of EU law requested. Indeed, as regards the conditions for the application of the criminal provision, the situation of the persons prosecuted is identical.

1. Is there a difference in treatment and/or a restriction to the freedom of movement?

26. First of all, it is clear that the national legislation at issue differentiates between the situation occurring on national territory and that involving the removal of a minor to another country. In the latter case, the mere fact of removing or retaining a child abroad from one or both parents or his or her guardian or carer is sufficient to give rise to a criminal sanction.

27. In those circumstances, it seems to me that it is not the mere decision in respect of parental authority but rather the risk of criminal prosecution that is actually likely to dissuade a Union citizen from leaving the host Member State where he or she is resident and returning to his or her Member State of origin with his or her child when that person does not have the right to determine the child's place of residence. As such, this difference in treatment as well as its effects are likely to affect or even restrict the freedom of movement of the Union citizens concerned within the meaning of Article 21 TFEU. [8]

28. According to settled case-law, such a restriction can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions. [9] Nevertheless, for the sake of completeness and since the Commission relies on the argument, I propose first to examine whether the measure at issue can be justified on the basis of the derogation on public policy grounds provided for in Article 27 of Directive 2004/38.

2. Article 27 of Directive 2004/38 and the derogation based on public policy

29. Article 27 of Directive 2004/38 authorises Member States to restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. Irrespective of whether the fight against child abduction underlying the national rule in question can be considered as a ground relating to public policy, I do not think that a national rule such as that at issue in the main proceedings falls within the scope of Article 27 of Directive 2004/38.

30. Indeed, both a contextual and teleological interpretation confirm that the scope of Article 27 of Directive 2004/38 is limited, on the one hand, to restrictions on the right of entry *stricto sensu* and, on the other hand, to measures of expulsion.

31. With regard to the contextual interpretation, namely the normative context in which the provision is placed, it must be noted that Article 27 of Directive 2004/38 is the first provision of Chapter VI of that directive entitled '*Restrictions on the right of entry and the right of residence* on grounds of public policy, public security or public health'. [10] Moreover, Article 27 is itself entitled 'General principles', which means that such principles are developed by the provisions which follow. However, all those

8 See, to that effect, judgments of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraphs 32 and 33); of 13 November 2018, *Raugevicius* (C-247/17, EU:C:2018:898, paragraphs 28 and 30); and of 13 June 2019, *TopFit and Biffi* (C-22/18, EU:C:2019:497, paragraphs 44 and 47).

9 See, to that effect, judgments of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraph 34); of 13 November 2018, *Raugevicius* (C-247/17, EU:C:2018:898, paragraph 31); and of 13 June 2019, *TopFit and Biffi* (C-22/18, EU:C:2019:497, paragraph 48).

10 Emphasis added.

provisions of Chapter VI deal only with protection against expulsion (Article 28 — Protection against expulsion; Article 32 — Duration of exclusion orders, and Article 33 — Expulsion as a penalty or legal consequence), the type of diseases which may prevent entry into the territory of a Member State or justify expulsion (Article 29) and procedural safeguards against any decision taken on the basis of Article 27 of the directive (Article 30 — Notification of decisions, and Article 31 — Procedural safeguards). Most — if not all — of those procedural provisions expressly relate only to expulsion decisions.

32. So far as the issue of any teleological interpretation is concerned, recitals 22 to 27 of Directive 2004/38 are particularly enlightening. First, after recalling that the Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health, recital 22 provides that 'in order to ensure a tighter definition of the circumstances and procedural safeguards subject to which Union citizens and their family members *may be denied leave to enter or may be expelled*, this Directive should replace Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public health',[11] which actually dealt only with expulsion. Second, all of the other recitals relating to Chapter VI of Directive 2004/38 refer only to expulsion (recitals 23, 24 and 27) or refusal of entry to another Member State (recitals 25 and 26).

33. Consequently, in the light of the foregoing considerations, I consider that a provision such as that in question in the main proceedings, which does not prohibit the entry of a citizen of the Union into another Member State or order his expulsion, but which rather has the 'sole' result of affecting or restricting his or her freedom of movement, does not fall within the scope of Article 27 of Directive 2004/38. In other words, it is only the refusal of entry or expulsion (and measures which are *directly discriminatory*) which can be justified on the basis of one of the three express derogations provided for in the Treaty and then specifically enunciated in Chapter VI of Directive 2004/38.[12]

34. In any event, if the Court were not to follow this interpretation of Article 27 of Directive 2004/38, it would, I suggest, have to find that legislation such as the rule in question in the main proceedings does not comply with the requirements of that directive. Indeed, as consistently underlined by the Court, the second subparagraph of Article 27(2) of Directive 2004/38 expressly states that justifications 'that rely on considerations of *general prevention* cannot be accepted'.[13]

35. In my view, the national legislative provision in question in the main proceedings is a measure of general prevention. Indeed, the German Government itself explained in its written observations that Paragraph 235(2) of the StGB contributes *in a preventive fashion* to guaranteeing the principle according to which custody rights should be exercised, as a general rule, at the child's place of initial habitual residence.[14] In that context, it is clear that the national provision in question is an act of general application which applies to objectively determined situations and produces effects with regard to persons envisaged in a general and abstract manner, with a view to deterring them from conduct considered contrary to the interests of society and, in particular, of children. As such, that provision is a measure of general prevention and cannot therefore fall within the scope of Article 27 of Directive 2004/38.

11 OJ, English Special Edition, Series I 1963-1964, p. 117. Directive as last amended by Council Directive 75/35/EEC of 17 December 1974 (OJ 1975 L 14, p. 14). Emphasis added.

12 See, to that effect, Barnard, C., and Peers, S., *European Union Law*, 2nd ed., Oxford University Press, 2017, pp. 402-403.

13 Emphasis added. See, to that effect, judgments of 10 July 2008, *Jipa* (C-33/07, EU:C:2008:396, paragraph 24); of 17 November 2011, *Gaydarov* (C-430/10, EU:C:2011:749, paragraph 34); and of 4 October 2012, *Byankov* (C-249/11, EU:C:2012:608, paragraph 41).

14 Paragraph 76 of the German Government's written observations. In line with this first objective, the German Government also invokes the objective of ensuring that a child abduction does not affect the jurisdiction of the court of the child's habitual residence.

36. Naturally, however, a restriction to the freedom of movement can be justified where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions.[15] It is to that issue which we can now turn.

3. The existence of objective considerations likely to justify the restriction and the proportionality of the national rule in question

37. As indicated above, the German Government argues that its legislation is motivated by the wish to guarantee that custody rights should be exercised, as a general rule, at the child's place of initial habitual residence. In addition, that government states that the legislation seeks more broadly to protect both the rights of parental authority and those of the children.[16] The Commission shares this view, explaining that the objective of the measure in question is to prevent and, ultimately, if necessary, to punish international child abductions, an aim which is legitimate and therefore justifiable in the light of public policy.

38. Given that these objectives are intrinsically linked to the fundamental rights of the child, I am of the opinion that they must be considered to be legitimate objectives from the perspective of EU law.[17]

39. Indeed, as previously recognised by the Court, one of those fundamental rights of the child is the right, set out in Article 24(3) of the Charter of Fundamental Rights of the European Union ('the Charter'), to maintain on a regular basis a personal relationship and direct contact with both parents, respect for that right undeniably merging into the best interests of any child. In this respect, it is clear that the wrongful removal of a child, following a decision taken unilaterally by one of the parents, more often than not deprives the child of the possibility of maintaining a personal relationship and direct contact with the other parent on a regular basis.[18]

40. In line with these observations, it may also be noted that the 1980 Hague Convention, later complemented by Regulation No 2201/2003, was also especially adopted on the basis that the interests of children are of paramount importance in matters relating to their custody. It is accordingly necessary to protect children from the harmful effects of wrongful cross-border removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.[19]

41. In those circumstances, national legislation which seeks, inter alia, to prevent the wrongful removal or retention of children unquestionably pursues a legitimate objective under EU law.

42. However, measures which restrict a fundamental freedom, such as those laid down in Article 21 TFEU, may be justified by objective considerations only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures.[20]

43. In that context, I frankly doubt whether a measure such as the legislation in question in the main proceedings can be said to be objectively necessary. While this measure was adopted in order to secure its stated objective of addressing cases involving wrongful removal or retention, it is striking that similar conduct occurring within the national territory is not criminalised in the same manner. On the other hand, as mentioned above, the EU legislature itself also adopted Regulation No 2201/2003

15 See the case-law cited in footnote 9.

16 Paragraphs 75 and 76 of the German Government's written observations.

17 Some people even argue, more generally, that anything to do with the protection of the family constitutes a legitimate objective (see, to that effect, Pfeiff, S., *La portabilité du statut personnel dans l'espace européen*, Bruylant, Brussels, 2017, No 258, p. 260).

18 See, to that effect, judgment of 23 December 2009, *Detiček* (C-403/09 PPU, EU:C:2009:810, paragraphs 54 and 56).

19 See, to that effect, judgment of 11 July 2008, *Rinau* (C-195/08 PPU, EU:C:2008:406, paragraphs 48, 51 and 53).

20 See, to that effect, judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraph 38).

in order to deter child abductions between Member States and, in cases of abduction, to obtain the child's return without delay.[21] Moreover, that regulation, adopted on the basis of the idea that the best interests of the child must prevail,[22] establishes the principle of mutual recognition of judgments given in the Member States. This principle is itself based, as follows from recital 21 of Regulation No 2201/2003, on the principle of mutual trust between Member States.[23]

44. It is, of course, now clearly established that this principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. According to settled case-law, that principle requires, particularly with regard to the area of freedom, security and justice, each of those States, 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.[24] Moreover, as regards to Regulation No 2201/2003, it is certainly worth recalling that the Court itself has stressed that the judicial cooperation and mutual trust on which the regulation is based lead to mutual recognition of judicial decisions, which is the *cornerstone* for the creation of a genuine judicial area.[25]

45. It is clear that the international character of cases such as the one in the main proceedings is likely to lead more frequently to difficulties related, *inter alia*, to the linguistic diversity of the proceedings or to distance, but also to the specific need to obtain the certification of the judgment ordering the return of a child under Article 42 of Regulation No 2201/2003. While these difficulties should not be minimised, the principle of mutual trust cannot be compromised by invoking practical difficulties of this kind without also undermining the *effet utile* of instruments based on this principle. Yet, this is precisely what would happen if a Member State were permitted to differentiate in this fashion between child abductions which take place within that Member State on the one hand and child abductions involving another Member State on the other.

46. In those circumstances, it seems to me that national legislation, such as the rule at issue in the main proceedings, does not appear to be necessary to achieve the objective pursued by it where wrongful removal or retention takes place in another Member State and not in a third State.

47. It is therefore the duty of the court seised to refuse to apply the national legislation, which is in conflict with EU law, since it is clear that the provisions of Article 21 TFEU have direct effect[26] and can therefore be invoked to that end by an individual vis-à-vis a Member State.[27]

4. In the alternative, analysis of the proportionality stricto sensu

48. In the event that the Court does not share this analysis and considers that the national legislation in question is necessary in order to achieve the objective pursued by the measure, it would still be necessary to ascertain whether that objective cannot be achieved by less restrictive measures.

49. Regarding that issue, I consider that the automatic imposition of a prison sentence or a fine in the event of the removal or retention of a child abroad without informing the holder(s) of parental authority would be incompatible with the principle of proportionality.

21 See, to that effect, recital 17 of Regulation No 2201/2003. See also judgments of 11 July 2008, *Rinau* (C-195/08 PPU, EU:C:2008:406, paragraph 52), and of 23 December 2009, *Detiček* (C-403/09 PPU, EU:C:2009:810, paragraph 49).

22 See, to that effect, judgment of 11 July 2008, *Rinau* (C-195/08 PPU, EU:C:2008:406, paragraph 51).

23 See, to that effect, judgment of 23 December 2009, *Detiček* (C-403/09 PPU, EU:C:2009:810, paragraph 45).

24 See, to that effect, Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014 (EU:C:2014:2454, paragraph 191); judgments 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); and of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 81).

25 See, to that effect, judgment of 16 January 2019, *Liberato* (C-386/17, EU:C:2019:24, paragraph 41).

26 On the direct effect of the freedom of movement, see, judgments of 4 December 1974, *Van Duyn* (41/74, EU:C:1974:133, paragraph 7), and of 17 September 2002, *Baumbast and R* (C-413/99, EU:C:2002:493, paragraphs 84 and 86).

27 See, to that effect, judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 61).

50. Indeed, as stated in Article 49(3) of the Charter, the severity of penalties must not be disproportionate to the criminal offence. As Advocate General Bobek explained in *Link Logistik N&N* (C-384/17, EU:C:2018:494), the proportionality of criminal sanctions is engaged at two levels. First, the penalty imposed must be proportionate to the gravity of the infringement. Second, in setting that penalty, account ought to be taken of the individual circumstances of each case.[28] That is why, in order for a proportionality analysis to be carried out effectively, it is necessary to undertake a *concrete* assessment in light of the specific circumstances of each case.[29]

51. In order to respect this principle, the relevant national legislation must therefore allow an individual examination of the situation in which the facts at issue occurred.[30]

52. In its replies to the questions asked by the Court, the German Government states that the imposition of a prison sentence or a fine is not automatic and that the specific features of each case may be taken into account in the context of sentencing. In the absence of any indication in that regard in the request for a preliminary ruling, it is, nevertheless, for the national court to determine whether the application of Paragraph 235 of the StGB complies with the principle of proportionality by allowing the national court to have regard to the specific and individual features of each case before a criminal sentence – be it a prison sentence or a fine – is actually imposed.[31]

53. To that end, the national court will be able to take account of various factors such as the personal conduct of the parent being prosecuted, the state of relations between the two parents, whether or not the mechanisms provided for by Regulation No 2201/2003 have been used and the outcome of that use, and, where appropriate, the point of view of the child himself or herself, given that Article 24(1) of the Charter states that the views of the children involved must be taken into consideration on matters which concern them in accordance with their age and maturity.

54. If the national law does not allow such an individual examination, it would consequently be the duty of the court seised to refuse to apply the national legislation which is in conflict with EU law.

VI. Conclusion

55. Accordingly, in the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Amtsgericht Heilbronn (Heilbronn Local Court, Germany) as follows:

(1) Member States must exercise their power in criminal matters in line with not only the fundamental freedoms guaranteed by EU law, but also EU law as a whole, in particular primary EU law. Consequently, Articles 18 and 21 TFEU must be interpreted as meaning that national criminal provisions may therefore not discriminate against persons to whom EU law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by EU law.

(2) Articles 18 and 21 TFEU, must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which penalises the wrongful removal or retention of a child differently depending on whether the situation arises on national territory or on the territory of another Member State of the European Union, which is treated for that purpose as a third country.

28 Point 42.

29 See, to that effect, in the context of the European arrest warrant, Opinion of Advocate General Bot in *Bob-Dogi* (C-241/15, EU:C:2016:131, point 93).

30 See, to that effect, judgment of 12 March 2019, *Tjebbes and Others* (C-221/17, EU:C:2019:189, paragraph 41).

31 See, to that effect, judgments of 10 July 2008, *Jipa* (C-33/07, EU:C:2008:396, paragraph 28), and of 12 March 2019, *Tjebbes and Others* (C-221/17, EU:C:2019:189, paragraph 40).

In the alternative, Articles 18 and 21 TFEU, read in the light of Article 24 and Article 49(3) of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which penalises the wrongful removal or retention of a child differently depending on whether the situation arises on national territory or on the territory of another Member State of the European Union, in so far as national courts are in a position to proceed to an individual examination of the situation in which the facts at issue occurred.

In the context of that examination, the courts may in particular take into account the personal conduct of the parent subject to prosecution and the state of relations between the two parents, whether or not the mechanisms provided for by 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 have been applied, and, where appropriate, the point of view of the child himself or herself.