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RIGHTS OF THE CHILD

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JUDGMENT OF THE COURT (Third Chamber)

5 October 2010 *

In Case C-400/10 PPU,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 30 July 2010, received at the Court on 6 August 2010, in the proceedings

J. McB.

v

L. E.,

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, R. Silva de Lapuerta, E. Juhász, T. von Danwitz and D. Šváby, Judges,

* Language of the case: English.

Advocate General: N. Jääskinen,
Registrar: L. Hewlett, Principal Administrator,

having regard to the request by the national court that the reference for a preliminary ruling be dealt with under an urgent procedure, in accordance with Article 104b of the Rules of Procedure,

having regard to the decision of 11 August 2010 of the Third Chamber granting that request,

having regard to the written procedure and further to the hearing on 20 September 2010,

after considering the observations submitted on behalf of:

— Mr McB., by D. Browne SC and D. Quinn BL, instructed by J. McDaid, Solicitor,

— Ms E., by G. Durcan SC, and by N. Jackson BL and S. Fennell BL, instructed by M. Quirke, Solicitor,

— Ireland, by D. O'Hagan, acting as Agent, and by M. MacGrath SC and N. Travers BL,

— the German Government, by J. Kemper, acting as Agent,

— the European Commission, by A.-M. Rouchaud-Joët and M. Wilderspin, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).

2 The reference has been made in proceedings between Mr McB., who is the father of three children, and Ms E., who is the mother of those children, concerning the return to Ireland of those children, who are currently in England with their mother.

Legal context

The 1980 Hague Convention

3 Article 1 of the Hague Convention of 25 October 1980 on the civil aspects of international child abduction ('the 1980 Hague Convention') provides:

'The objects of the present Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.'

4 Article 3 of that convention is worded as follows:

'The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

5 Article 15 of the 1980 Hague Convention is worded as follows:

'The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.'

European Union law

6 Recital 17 in the preamble to Regulation No 2201/2003 states:

'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. …'

7 Under recital 33 in the preamble to that regulation:

'This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union ["the Charter"]. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of [the Charter].'

8 Article 2(9) of that regulation defines 'rights of custody' as covering 'rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence'.

9 Article 2(11) of Regulation No 2201/2003 provides that the 'removal or retention … of a child' is wrongful where:

'(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention

and

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental

responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.'

10 Article 11 of that regulation, headed 'Return of the child', provides:

'1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the [1980 Hague Convention] in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

…

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

…

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately, either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

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, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time-limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.'

11 Article 60 of Regulation No 2201/2003, headed 'Relations with certain multilateral conventions', is worded as follows:

'In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

…

(e) the [1980 Hague Convention].'

12 Article 62(2) of that regulation, headed 'Scope of effects', provides:

'The conventions mentioned in Article 60, in particular the 1980 Hague Convention, continue to produce effects between the Member States which are party thereto, in compliance with Article 60.'

National law

13 It is apparent from the order for reference that, under Irish law, the natural father of children does not, by operation of law, have rights of custody. Moreover, the fact that unmarried parents have cohabited and that the father has been actively engaged in the upbringing of the child does not, by itself, give such rights to the father.

14 However, under Section 6A of the Guardianship of Infants Act 1964, as inserted by Section 12 of the Status of Children Act 1987, 'where the father and mother have not married each other, the court may, on the application of the father, by order appoint him to be a guardian of the infant.'

15 Section 11(4) of the Guardianship of Infants Act 1964, as amended by Section 13 of the Status of Children Act 1987, provides:

'In the case of an infant whose father and mother have not married each other, the right to make an application under this section regarding the custody of the infant and the right of access thereto of his father or mother shall extend to the father who is not a guardian of the infant, and for this purpose references in this section to the father or parent of an infant shall be construed as including him.'

16 Section 15 of the Child Abduction and Enforcement of Custody Orders Act 1991, as amended by the European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005, is worded as follows:

'The Court may, on an application made for the purposes of Article 15 of the [1980 Hague Convention], by any person appearing to the Court to have an interest in the matter, make a declaration that the removal of any child from, or his retention outside, the State was:

(a) in the case of a removal or retention in a Member State, a wrongful removal or retention within the meaning of Article 2 of [the regulation], or

(b) in any other case, wrongful within the meaning of Article 3 of [the 1980 Hague Convention].'

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

The facts which gave rise to the dispute

17 It is apparent from the documents submitted to the Court that the applicant in the main proceedings, Mr McB., who is of Irish nationality, and the defendant in those proceedings, Ms E., who is of British nationality, lived together as an unmarried couple for more than 10 years in England, Australia, Northern Ireland and, from November 2008, Ireland. They had three children together, namely J., born in England on 21 December 2000, E., born in Northern Ireland on 20 November 2002, and J.C., born in Northern Ireland on 22 July 2007.

18 After the couple's relationship deteriorated in late 2008 and early 2009, the mother, alleging aggressive behaviour on the part of the father, fled on several occasions, with her children, to a women's refuge. In April 2009 the couple were reconciled and they decided to marry on 10 October 2009. However, on 11 July 2009 the father discovered, on returning from a work-related journey to Northern Ireland, that the mother had again left the family home with her children and was living at the women's refuge.

19 On 15 July 2009 the father's lawyers prepared, on his instructions, an application to initiate proceedings before the Irish court with jurisdiction, namely the District Court, in order to obtain rights of custody in respect of his three children. However,

on 25 July 2009 the mother took a flight to England, taking with her the abovementioned three children, and her other, older, child from a previous relationship. At that date, the abovementioned application had not been served on the mother, with the result that, in accordance with Irish procedural law, the action had not been validly brought and the Irish court had therefore not been seised.

The proceedings brought by the father in England

20 On 2 November 2009 Mr McB. brought an action before the High Court of Justice of England and Wales (Family Division) (United Kingdom) seeking the return of the children to Ireland, in accordance with the provisions of the 1980 Hague Convention and Regulation No 2201/2003. By order of 20 November 2009 that court requested that the father, pursuant to Article 15 of that convention, obtain a decision or a determination from the Irish authorities declaring that the removal of the children was wrongful within the meaning of Article 3 of that convention.

The proceedings brought by the father in Ireland

21 On 22 December 2009 Mr McB. brought an action before the High Court (Ireland) seeking, first, a decision or a determination declaring that the removal of his three children on 25 July 2009 had been wrongful within the meaning of Article 3 of the 1980 Hague Convention and, secondly, rights of custody.

22 By a judgment of 28 April 2010 the High Court dismissed the first of those claims, on the ground that the father had no rights of custody in respect of the children at the time of their removal, and consequently the removal was not wrongful within the meaning of either the 1980 Hague Convention or Regulation No 2201/2003.

23 The father brought an appeal against that decision before the referring court. In its reference for a preliminary ruling, that court states that on 25 July 2009 the father had no rights of custody, within the meaning of the provisions of the 1980 Hague Convention, in respect of his children. However, the referring court considers that the definition of 'rights of custody', for the purposes of an application to obtain the return of children from one Member State to another on the basis of the 1980 Hague Convention, is now to be found in Article 2(9) of the above regulation.

24 The referring court considers that neither the provisions of Regulation No 2201/2003 nor Article 7 of the Charter mean that the natural father of a child must necessarily be recognised as having rights of custody in respect of that child, for the purposes of determining whether or not the removal of the child is wrongful, in the absence of a court judgment awarding such rights to him. However, the court accepts that the interpretation of those provisions of European Union law falls within the jurisdiction of the Court of Justice.

25 In those circumstances, the Supreme Court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does [Regulation No 2201/2003], whether interpreted pursuant to Article 7 of [the Charter] or otherwise, preclude a Member State from requiring by its law that the father of a child who is not married to the mother shall have obtained an order of a court of competent jurisdiction granting him custody in order to qualify as having

"custody rights" which render the removal of that child from its country of habitual residence wrongful for the purposes of Article 2(11) of that Regulation?'

The urgent procedure

26 The referring court requested that this reference for a preliminary ruling be dealt with under the urgent procedure provided for in Article 104b of the Court's Rules of Procedure.

27 The reason stated by the referring court for that request is that, according to recital 17 in the preamble to Regulation No 2201/2003, in cases of wrongful removal of a child, the return of the child should be obtained without delay.

28 In that regard, it must be observed that, according to the order for reference, the present case concerns three children aged three, seven and nine years old who have been separated from their father for more than a year. Given that the children concerned, and especially the youngest, are young children, the continuation of the current situation might seriously harm their relationships with their father.

29 In those circumstances, on 11 August 2010 the Third Chamber of the Court decided, on the Judge-Rapporteur's proposal and after hearing the Advocate General, to grant the referring court's request that the reference for a preliminary ruling be dealt with under the urgent procedure.

Consideration of the question referred

Admissibility

30 The European Commission raises doubts as to the admissibility of the reference for a preliminary ruling and the German Government argues that it is inadmissible. They state, in essence, that the dispute in the main proceedings concerns not the return of children, pursuant to Article 11 of Regulation No 2201/2003, but the obtaining, prior to return, of a decision declaring that the removal of the children was wrongful under Article 15 of the 1980 Hague Convention. What is therefore at issue in those proceedings is whether the removal of the children is lawful, not within the meaning of Article 2(11) of the regulation, but within the meaning of Articles 1 and 3 of the Convention. Their argument is that the applicant in the main proceedings brought, before the appropriate Irish courts, an application seeking from them a decision or a determination declaring that the removal or retention of his children was wrongful within the meaning of Article 3 of the Convention. The applicant made that application because the High Court of Justice of England and Wales (Family Division) had requested that he obtain such a decision or determination, in accordance with Article 15 of that convention.

31 However, Regulation No 2201/2003, and in particular Article 11 thereof, is concerned not with the procedure laid down in Article 15 of the 1980 Hague Convention, relating to the determination that the removal of a child is wrongful, but solely with the procedure relating to that child's return. Accordingly, Article 11 of that regulation becomes relevant only when the procedure relating to Article 15 of the convention has come to an end and when the procedure relating to the return of the children has commenced. Consequently the question referred for a preliminary ruling is premature.

32 In that regard, it must be recalled that, according to the Court's case-law, it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court (Joined Cases C-376/05 and C-377/05 *Brünsteiner and Autohaus Hilgert* [2006] ECR I-11383, paragraph 26 and case-law cited).

33 Consequently, where the questions submitted by the national court concern the interpretation of European Union law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38, and Case C-103/08 *Gottwald* [2009] ECR I-9117, paragraph 16).

34 It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, in particular where it is quite obvious that the interpretation which is sought of the provisions of European Union law referred to in those questions bears no relation to the actual facts of the main action or to its purpose (see, inter alia, *Gottwald*, paragraph 17, and Case C-82/09 *Dimos Agios Nikolaos* [2010] ECR I-3649, paragraph 15).

35 In the present case, the referring court considers that it needs an interpretation of Regulation No 2201/2003, and in particular Article 2(11), in order to give a ruling on the application before it, which seeks from that court a decision or a determination declaring that the removal or retention of the children concerned in the dispute in the main proceedings was wrongful. It is evident moreover from the relevant national legislation, namely Section 15 of the Child Abduction and Enforcement of Custody Orders Act 1991, as amended by the European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005, that, in cases of removal of a child to another Member State, the issue on which the national court must rule, when an applicant requests that it deliver such a decision or determination

in accordance with Article 15 of the 1980 Hague Convention, is whether the removal is lawful under Article 2 of Regulation No 2201/2003.

36 Furthermore, it must be observed that, pursuant to Article 60 of Regulation No 2201/2003, in relations between Member States that regulation is to take precedence over the 1980 Hague Convention in so far as the latter concerns matters governed by that regulation. Subject to the primacy of that regulation, the Convention is to continue to produce effects between the Member States which are party thereto, in compliance with Article 60, pursuant to Article 62(2) of Regulation No 2201/2003, as stated in recital 17 in its preamble. Consequently, abductions of children from one Member State to another are now subject to a body of rules consisting of the provisions of the 1980 Hague Convention as complemented by those of Regulation No 2201/2003, though the latter take precedence on matters within the scope of that regulation.

37 In those circumstances, it is not obvious that the interpretation sought by the referring court is of no relevance to the decision which that court is called upon to make.

38 Consequently, the reference for a preliminary ruling must be declared to be admissible.

Substance

39 The referring court asks, in essence, whether Regulation No 2201/2003 must be interpreted as precluding a Member State from providing by its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court with

jurisdiction awarding such rights of custody to him, on the basis of which the removal of the child by its mother or the retention of that child may be considered wrongful, within the meaning of Article 2(11) of that regulation.

40 In that regard, it must be recalled that Article 2(9) of that regulation defines 'rights of custody' as covering 'rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence'.

41 Since 'rights of custody' is thus defined by Regulation No 2201/2003, it is an autonomous concept which is independent of the law of Member States. It follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of that law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question (C-66/08 *Kozłowski* [2008] ECR I-6041, paragraph 42 and case-law cited). Accordingly, for the purposes of applying Regulation No 2201/2003, rights of custody include, in any event, the right of the person with such rights to determine the child's place of residence.

42 An entirely separate matter is the identity of the person who has rights of custody. In that regard, it is apparent from Article 2(11)(a) of that regulation that whether or not a child's removal is wrongful depends on the existence of 'rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention'.

43 It follows that Regulation No 2201/2003 does not determine which person must have such rights of custody as may render a child's removal wrongful within the meaning of Article 2(11), but refers to the law of the Member State where the child was habitually resident immediately before its removal or retention the question of who has such rights of custody. Accordingly, it is the law of that Member State which determines the conditions under which the natural father acquires rights of custody in respect of his child, within the meaning of Article 2(9) of that regulation, and which may provide that his acquisition of such rights is dependent on his obtaining a judgment from the national court with jurisdiction awarding such rights to him.

44 In the light of the foregoing, Regulation No 2201/2003 must be interpreted as meaning that whether a child's removal is wrongful for the purposes of applying that regulation is entirely dependent on the existence of rights of custody, conferred by the relevant national law, in breach of which that removal has taken place.

45 However, the referring court asks whether the Charter, and in particular Article 7 thereof, affects this interpretation of Regulation No 2201/2003.

46 The applicant in the main proceedings does not accept that the removal of a child by its mother without the knowledge of its natural father is not wrongful under the 1980 Hague Convention and Regulation No 2201/2003, even though the father lived with his child, and with the child's mother though not married to her, and played an active part in bringing up that child.

47 In the applicant's opinion, the interpretation of that regulation set out in paragraph 44 of this judgment can lead to a situation which would not be compatible either with his right to respect for private and family life, established in Article 7 of the Charter and in Article 8 of the European Convention for the Protection of Human Rights and

Fundamental Freedoms ('the ECHR'), or with the rights of the child, set out in Article 24 of the Charter. For the purposes of Regulation No 2201/2003, 'rights of custody' should be interpreted as meaning that such rights are acquired by a natural father by operation of law in a situation where he and his children have a family life which is the same as that of a family based on marriage. If that interpretation were to be rejected, the 'inchoate' right of the father, enabling him to submit an application to the national court with jurisdiction and, where appropriate, obtain rights of custody, could be deprived of all effect by acts carried out by the mother unilaterally and without the knowledge of the father. The effectiveness of the right to submit such an application should be adequately protected.

48 The referring court states that, under Irish law, the natural father does not have rights of custody in respect of his child, unless those rights are conferred on him by an agreement entered into by the parents or by a court judgment, whereas such rights of custody automatically belong to the mother, and no attribution of them to her is necessary.

49 In those circumstances, the Court must examine whether respect for the fundamental rights of the natural father and his children precludes the interpretation of Regulation No 2201/2003 set out in paragraph 44 of this judgment.

50 In that regard, it must be recalled that, in accordance with the first subparagraph of Article 6(1) TEU, the Union recognises the rights, freedoms and principles set out in the Charter, 'which shall have the same legal value as the Treaties'.

51 First, according to Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not e.xtend the field of application of European Union law beyond the powers of the Union, and it does not 'establish any new power or task for

the Union, or modify powers and tasks as defined in the Treaties'. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it.

52 It follows that, in the context of this case, the Charter should be taken into consideration solely for the purposes of interpreting Regulation No 2201/2003, and there should be no assessment of national law as such. More specifically, the question is whether the provisions of the Charter preclude the interpretation of that regulation set out in paragraph 44 of this judgment, taking into account, in particular, the reference to national law which that interpretation involves.

53 Moreover, it follows from Article 52(3) of the Charter that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. However, that provision does not preclude the grant of wider protection by European Union law. Under Article 7 of the Charter, '[e]veryone has the right to respect for his or her private and family life, home and communications'. The wording of Article 8(1) of the ECHR is identical to that of the said Article 7, except that it uses the expression 'correspondence' instead of 'communications'. That being so, it is clear that the said Article 7 contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights (see, by analogy, Case C-450/06 *Varec* [2008] ECR I-581, paragraph 48).

54 The European Court of Human Rights has already considered a case in which the facts were comparable to those of the case in the main proceedings, where the child of an unmarried couple was taken to another State by its mother, who was the only person with parental responsibility for that child. In that regard, that court ruled, in

essence, that national legislation granting, by operation of law, parental responsibility for such a child solely to the child's mother is not contrary to Article 8 of the ECHR, interpreted in the light of the 1980 Hague Convention, provided that it permits the child's father, not vested with parental responsibility, to ask the national court with jurisdiction to vary the award of that responsibility (*Guichard v. France* ECHR 2003-X 714; see also, to that effect, *Balbontin v. United Kingdom*, no.39067/97, 14 September 1999).

55 It follows that, for the purposes of applying Regulation No 2201/2003 in order to determine whether the removal of a child, taken to another Member State by its mother, is lawful, that child's natural father must have the right to apply to the national court with jurisdiction, before the removal, in order to request that rights of custody in respect of his child be awarded to him, which, in such a context, constitutes the very essence of the right of a natural father to a private and family life.

56 The European Court of Human Rights has also ruled that national legislation which does not allow the natural father any possibility of obtaining rights of custody in respect of his child in the absence of the mother's agreement constitutes unjustified discrimination against the father and is therefore a breach of Article 14 of the ECHR, taken together with Article 8 of the ECHR (*Zaunegger v. Germany*, no. 22028/04, § 63 and 64, 3 December 2009).

57 On the other hand, the fact that, unlike the mother, the natural father is not a person who automatically possesses rights of custody in respect of his child within the meaning of Article 2 of Regulation No 2201/2003 does not affect the essence of his right to private and family life, provided that the right described in paragraph 55 of this judgment is safeguarded.

58 That finding is not invalidated by the fact that, if steps are not taken by such a father in good time to obtain rights of custody, he finds himself unable, if the child is removed to another Member State by its mother, to obtain the return of that child to the Member State where the child previously had its habitual residence. Such a removal represents the legitimate exercise, by the mother with custody of the child, of her own right of freedom of movement, established in Article 20(2)(a) TFEU and Article 21(1) TFEU, and of her right to determine the child's place of residence, and that does not deprive the natural father of the possibility of exercising his right to submit an application to obtain rights of custody thereafter in respect of that child or rights of access to that child.

59 Accordingly, to admit the possibility that a natural father has rights of custody in respect of his child, under Article 2(11) of Regulation No 2201/2003, notwithstanding that no such rights are accorded to him under national law, would be incompatible with the requirements of legal certainty and with the need to protect the rights and freedoms of others, within the meaning of Article 52(1) of the Charter, in this case those of the mother. Such an outcome might, moreover, infringe Article 51(2) of the Charter.

60 It must also be borne in mind that Article 7 of the Charter, mentioned by the referring court in its question, must be read in a way which respects the obligation to take into consideration the child's best interests, recognised in Article 24(2) of that Charter, and taking into account the fundamental right of a child to maintain on a regular basis personal relationships and direct contact with both of his or her parents, stated in Article 24(3) (see, to that effect, Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 58). Moreover, it is apparent from recital 33 in the preamble to Regulation No 2201/2003 that that regulation recognises the fundamental rights and observes the principles of the Charter, while, in particular, seeking to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter. Accordingly, the provisions of that regulation cannot be interpreted in such a way that they disregard that fundamental right of the child, the respect for which undeniably

merges into the best interests of the child (see, to that effect, Case C-403/09 PPU *Detiček* [2009] ECR I-12193, paragraphs 53 to 55).

61 In those circumstances, it remains to be determined whether Article 24 of the Charter, respect for which is ensured by the Court, precludes the interpretation of Regulation No 2201/2003 which is set out in paragraph 44 of this judgment.

62 It is necessary to take into account, in this regard, the great variety of extra-marital relationships and consequent parent-child relationships, a variety referred to by the referring court in its order for reference, which is reflected in the variation among Member States of the extent of parental responsibilities and their attribution. Accordingly, Article 24 of the Charter must be interpreted as not precluding a situation where, for the purposes of applying Regulation No 2201/2003, rights of custody are granted, as a general rule, exclusively to the mother and a natural father possesses rights of custody only as the result of a court judgment. Such a requirement enables the national court with jurisdiction to take a decision on custody of the child, and on rights of access to that child, while taking into account all the relevant facts, such as those mentioned by the referring court, and in particular the circumstances surrounding the birth of the child, the nature of the parents' relationship, the relationship of the child with each parent, and the capacity of each parent to take the responsibility of caring for the child. The taking into account of those facts is apt to protect the child's best interests, in accordance with Article 24(2) of the Charter.

63 It follows from the foregoing that Articles 7 and 24 of the Charter do not preclude the interpretation of the regulation set out in paragraph 44 of this judgment.

64 In those circumstances, the answer to the question referred is that Regulation No 2201/2003 must be interpreted as not precluding a Member State from providing

by its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court with jurisdiction awarding such rights to him, on the basis of which the removal of the child by its mother or the retention of that child may be considered wrongful, within the meaning of Article 2(11) of that regulation.

Costs

65 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 these grounds, the Court (Third Chamber) hereby rules:

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, must be interpreted as not precluding a Member State from providing by its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court with jurisdiction awarding such rights to him, on the basis of which the removal of the child by its mother or the retention of that child may be considered wrongful, within the meaning of Article 2(11) of that regulation.

[Signatures]

JUDGMENT OF THE COURT (First Chamber)

22 December 2010 *

In Case C-491/10 PPU,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Celle (Germany), made by decision of 30 September 2010, received at the Court on 15 October 2010, in the proceedings

Joseba Andoni Aguirre Zarraga

v

Simone Pelz,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, J.-J. Kasel, M. Ilešič, E. Levits and M. Safjan, Judges,

* Language of the case: German.

Advocate General: Y. Bot,
Registrar: K. Malacek, Administrator,

having regard to the request by the President of the Court dated 19 October 2010, in accordance with the third subparagraph of Article 104b(1) of the Court's Rules of Procedure, that it be considered whether it was necessary to deal with this reference for a preliminary ruling under the urgent procedure,

having regard to the decision of the First Chamber of 28 October 2010 to deal with this reference under that procedure,

having regard to the written procedure and further to the hearing on 6 December 2010,

after considering the observations submitted on behalf of:

— Mr Aguirre Zarraga, represented by the Bundesamt für Justiz, by A. Schulz, acting as Agent,

— Ms Pelz, by K. Niethammer-Jürgens, Rechtsanwältin,

— the German Government, by T. Henze and J. Kemper, acting as Agents,

— the Greek Government, by T. Papadopoulou, acting as Agent,

— the Spanish Government, by J.M. Rodríguez Cárcamo, acting as Agent,

— the French Government, by B. Beaupère-Manokha, acting as Agent,

— the Latvian Government, by M. Borkoveca and D. Palcevska, acting as Agents,

— the European Commission, by A.-M. Rouchaud-Joët and W. Bogensberger, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).

2 The reference was made in proceedings between Mr Aguirre Zarraga and Ms Pelz where the issue is the return to Spain of their daughter Andrea, who is currently in Germany with her mother.

Legal context

Regulation No 2201/2003

3 Recital 17 in the preamble to Regulation No 2201/2003 states:

'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 Hague Convention of 25 October 1980 [on the civil aspects of international child abduction ("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.'

4 Recital 19 in the preamble to that regulation is worded as follows:

'The hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable.'

5 Recital 21 in the preamble to Regulation No 2201/2003 states:

'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.'

6 Recital 24 in the preamble to that regulation states:

'The certificate issued to facilitate enforcement of the judgment should not be subject to appeal. It should be rectified only where there is a material error, i.e. where it does not correctly reflect the judgment.'

7 Recital 33 in the preamble to that regulation reads as follows:

'This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union[, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1; "the Charter of Fundamental Rights")]. In

particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights …'

8 Article 11 of Regulation No 2201/2003, headed 'Return of the child', provides:

'1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of [the 1980 Hague Convention] in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

…

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.'

9 As regards the recognition of a judgment, Article 21 of the regulation provides:

‘1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

…

3. Without prejudice to Section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised.

…’

10 Under Article 23 of the regulation:

‘A judgment relating to parental responsibility shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

…'

11 Article 42 of the regulation, headed 'Return of the child', provides:

'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.'

12 Article 43 of Regulation No 2201/2003, headed 'Rectification of the certificate', provides:

'1. The law of the Member State of origin shall be applicable to any rectification of the certificate.

2. No appeal shall lie against the issuing of a certificate pursuant to Articles 41(1) or 42(1).'

13 Article 60 of Regulation No 2201/2003, headed 'Relations with certain multilateral conventions', provides that, in relations between Member States, the regulation is to take precedence over, inter alia, the 1980 Hague Convention.

Regulation No 1206/2001

14 Article 10(4) of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ 2001 L 174, p. 1) contains the following provision on the use of communications technology:

'The requesting court may ask the requested court to use communications technology at the performance of the taking of evidence, in particular by using videoconference and teleconference.

The requested court shall comply with such a requirement unless this is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties.

…'

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

15 On the basis of the order for reference and the procedural file sent to the Court by the referring court, the background to the dispute in the main proceedings and the various proceedings in which the parties to the main proceedings are involved can be summarised as follows.

Background to the dispute in the main proceedings

16 Mr Aguirre Zarraga, of Spanish nationality, and Ms Pelz, of German nationality, were married on 25 September 1998 at Erandio (Spain). That marriage produced a daughter named Andrea who was born on 31 January 2000. The family's habitual place of residence was Sondika (Spain).

17 When, towards the end of 2007, the relationship of Ms Pelz and Mr Aguirre Zarraga deteriorated, they separated, and thereafter both parties brought divorce proceedings before the Spanish courts.

Proceedings before the Spanish courts

18 Both Ms Pelz and Mr Aguirre Zarraga sought sole rights of custody in respect of the child of the marriage. By judgment of 12 May 2008 the Juzgado de Primera Instancia e Instrucción No 5 de Bilbao (Court of First Instance and Preliminary Investigations No 5 of Bilbao) provisionally awarded rights of custody to Mr Aguirre Zarraga, while

Ms Pelz was granted rights of access. Following that judgment, Andrea went to her father's home.

19 That judgment was based on, inter alia, the recommendations made by the Equipo Psicosocial Judicial (a body providing psychosocial services to the courts) in a report prepared at the request of the judge concerned. That report stated that custody should be awarded to the father, since he was best placed to ensure that the family, school and social environment of the child was maintained. Since Ms Pelz had repeatedly expressed her wish to settle in Germany with her new partner and her daughter, the court considered that the award of custody to the mother would have been contrary to the conclusions of that report and would also have been detrimental to the child's welfare.

20 In June 2008 Ms Pelz moved to Germany and settled there, and now lives there with her new partner. In August 2008, at the end of the summer holidays which she had spent with her mother, Andrea remained with her mother in Germany. Since then, Andrea has not returned to her father in Spain.

21 Since the Juzgado de Primera Instancia e Instrucción No 5 de Bilbao considered that from 15 August 2008 Andrea had been living with her mother in Germany in breach of its judgment of 12 May 2008, on 15 October 2008 that court handed down a fresh judgment in respect of provisional measures requested by Mr Aguirre Zarraga, which included prohibiting Andrea from leaving Spanish territory in the company of her mother, any member of her mother's family or any person close to Ms Pelz. Further, that judgment suspended until final judgment the rights of access previously granted to Ms Pelz.

22 In July 2009 the proceedings in relation to rights of custody in respect of Andrea were continued before the same court. The court considered that it was necessary both to obtain a fresh expert report and to hear Andrea personally and fixed dates for both in

Bilbao. However, neither Andrea nor her mother attended on those dates. According to the referring court, the Spanish court rejected Ms Pelz's application that she and her daughter be permitted to leave Spanish territory freely after the expert report and Andrea's hearing. Nor did that court agree to Ms Pelz's express request that Andrea be heard via video conference.

23 By judgment of 16 December 2009 the Juzgado de Primera Instancia e Instrucción No 5 de Bilbao awarded sole rights of custody in respect of Andrea to her father. Ms Pelz brought before the Audiencia Provincial de Bizkaya (Biscay Provincial Court) an appeal against that judgment which included the request that Andrea be heard.

24 By judgment of 21 April 2010 the Audiencia Provincial dismissed that request on the ground that, according to Spanish rules of procedure, the production of evidence on appeal is possible only in certain circumstances expressly defined by legislation. The failure by a duly notified party to attend voluntarily a first instance hearing is not one of those circumstances. For the rest, the proceedings are still pending before the Audiencia Provincial.

The proceedings before the German courts

25 There have been two sets of proceedings in Germany.

26 The first concerned Mr Aguirre Zarraga's application for the return of his daughter to Spain, brought on the basis of the 1980 Hague Convention. That application was initially upheld by the Amtsgericht Celle (Celle Local Court) by judgment of 30 January 2009.

27 Ms Pelz brought an appeal against that judgment. By judgment of 1 July 2009 the Oberlandesgericht Celle (Celle Higher Regional Court) upheld that appeal, consequently set aside the judgment of 30 January 2009 and dismissed Mr Aguirre Zarraga's application on the basis of the second paragraph of Article 13 of the 1980 Hague Convention.

28 The Oberlandesgericht Celle stated in particular that, when Andrea was heard by that court, it had been shown that she was resolutely opposed to the return requested by her father; she refused categorically to return to Spain. The expert instructed by that court concluded following the hearing that Andrea's opinion should be taken into account in the light of both her age and her maturity.

29 The second set of proceedings before the German courts was initiated by the issue of a certificate on 5 February 2010 by the Juzgado de Primera Instancia e Instrucción No 5 de Bilbao pursuant to Article 42 of Regulation No 2201/2003 on the basis of the divorce order which it had issued on 16 December 2009, when that court had also made an order relating to rights of custody in respect of Andrea.

30 By letter of 26 March 2010 the Bundesamt für Justiz (Federal Office of Justice) sent to the court with jurisdiction in the Federal Republic of Germany, namely the Amtsgericht Celle, that judgment and certificate. That authority drew the court's attention to the fact that, under Article 44(3) of the law on the enforcement and application of certain legal instruments in matters of international family law (Gesetz zur Aus- und Durchführung bestimmter Rechtsinstrumente auf dem Gebiet des internationalen

Familienrechts), the judgment of the Spanish court ordering the return of the child fell to be enforced by operation of law.

31 Ms Pelz objected to the enforcement of that certified judgment, requesting that it not be recognised.

32 By judgment of 28 April 2010 the Amtsgericht Celle held that the judgment of the Juzgado de Primera Instancia e Instrucción No 5 de Bilbao was neither to be recognised nor enforced, on the ground that the Spanish court had not heard Andrea before handing down its judgment.

33 On 18 June 2010 Mr Aguirre Zarraga brought an appeal against that judgment before the Oberlandesgericht Celle, requesting that the judgment be set aside, that the claims of Ms Pelz be dismissed and that the judgment of the Juzgado de Primera Instancia e Instrucción No 5 de Bilbao of 16 December 2009 be enforced by operation of law as an order to return Andrea to her father.

34 Although the Oberlandesgericht Celle accepts that the court of the Member State of enforcement of a certificate issued in accordance with Article 42 of Regulation No 2201/2003 has, as a general rule, no power of review itself under Article 21 of that regulation, the Oberlandesgericht Celle none the less considers that it should be otherwise where there is a particularly serious infringement of a fundamental right.

35 In that regard, the referring court makes two observations: that the Juzgado de Primera Instancia e Instrucción No 5 de Bilbao did not obtain Andrea's current views and was therefore unable to take account of those views in its judgment of 16 December 2009 concerning, inter alia, rights of custody in respect of that child; and that

the efforts made by the Spanish court to hear Andrea were inadequate given the importance attached to taking into account the child's views in Article 24(1) of the Charter of Fundamental Rights.

36 Further, the Oberlandesgericht Celle wonders whether, in a case where, notwithstanding such an infringement of a fundamental right, the court of the Member State of enforcement lacks any power of review, that Member State can be bound by a certificate, issued under Article 42 of Regulation No 2201/2003, the contents of which are manifestly false. According to the referring court, the certificate of the Juzgado de Primera Instancia e Instrucción No 5 de Bilbao of 5 February 2010 contains a declaration which is manifestly false in that it states that Andrea was heard by that Spanish court, whereas she was not.

37 In those circumstances, the Oberlandesgericht Celle decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Where the judgment to be enforced issued in the Member State of origin contains a serious infringement of fundamental rights, does the court of the Member State of enforcement exceptionally itself enjoy a power of review, pursuant to an interpretation of Article 42 of [Regulation No 2201/2003] in conformity with the Charter of Fundamental Rights?

2. Is the court of the Member State of enforcement obliged to enforce the judgment of the court of the Member State of origin notwithstanding the fact that, according to the case-file, the certificate issued by the court of the Member State of origin under Article 42 of [Regulation No 2201/2003] contains a declaration which is manifestly inaccurate?'

The urgent procedure

38 By memorandum dated 19 October 2010 the President of the Court, in accordance with the third subparagraph of Article 104b(1) of the Court's Rules of Procedure, requested the First Chamber to consider whether it was necessary to deal with this reference for a preliminary ruling under the urgent procedure.

39 In that regard, it must be observed that it is apparent from the case-law that the Court recognises the urgency of ruling in cases of child removal in particular where the separation of a child from the parent to whom, as in the main proceedings, custody had previously been awarded, even if only provisionally, would be likely to bring about a deterioration of their relationship, or harm that relationship, and to cause psychological damage (see, to that effect, Case C-195/08 PPU *Rinau* [2008] ECR I-5271, paragraph 44; Case C-403/09 PPU *Detiček* [2009] ECR I-12193, paragraph 30; Case C-211/10 PPU *Povse* [2010] ECR I-6673, paragraph 35; and Case C-400/10 PPU *McB.* [2010] ECR I-8965, paragraph 28).

40 It is apparent from the order for reference that Andrea has been separated from her father for more than two years and that, given the distance between the parties to the main proceedings and their strained relationship, there is a real and serious risk that Andrea and her father will have absolutely no contact for the duration of the proceedings pending before the referring court. In those circumstances, the use of the ordinary procedure to deal with this reference for a preliminary ruling might cause serious, and perhaps irreparable, harm to the relationship of Mr Aguirre Zarraga and his daughter and also further jeopardise her integration into his family and social environment in the event of any return to Spain.

41 In those circumstances, on 28 October 2010 the First Chamber of the Court decided, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, that the reference for a preliminary ruling should be dealt with under the urgent procedure.

Consideration of the questions referred for a preliminary ruling

42 By the questions referred for a preliminary ruling, which should be dealt with together, the referring court asks, in essence, whether, in circumstances such as those in the main proceedings, the court with jurisdiction in the Member State of enforcement can exceptionally oppose the enforcement of a judgment ordering the return of a child, which has been certified on the basis of Article 42 of Regulation No 2201/2003 by the court of the Member State of origin, on the ground that the latter court stated, in the certificate, that it had fulfilled its obligation to hear the child before handing down its judgment, in the context of divorce proceedings, on the award of rights of custody in respect of that child, although that hearing did not take place, which is contrary to the said Article 42, interpreted in accordance with Article 24 of the Charter of Fundamental Rights.

43 In order to answer those questions, it must first be recognised that what is at issue, in a context such as that of the main proceedings, is wrongful retention of a child within the meaning of Article 2(11) of Regulation No 2201/2003.

44 As observed by the Advocate General in points 120 and 121 of his view, Regulation No 2201/2003 starts from the assumption that the wrongful removal or retention of a child in breach of a court judgment handed down in another Member State is seriously prejudicial to the interests of that child and it therefore lays down measures to enable the return of the child to the place where he or she is habitually resident as quickly as possible. In that regard, that regulation set up a system whereby, in the event that there is a difference of opinion between the court where the child

is habitually resident and the court where the child is wrongfully present, the former retains exclusive jurisdiction to decide whether the child is to be returned.

45 The result of the requirement of rapid action which underlies such a system is that, in such circumstances, the national courts seised of an application for return of the child must make their decision expeditiously. It is moreover to that end that Article 11(3) of Regulation No 2201/2003 requires those courts to use the most expeditious procedures available in national law and, except where exceptional circumstances make it impossible, to issue their judgments no later than six weeks after the application is lodged.

46 It should also be added that, in order to achieve that objective, the system established by Regulation No 2201/2003 is based on the allocation of a central role to the court which has jurisdiction to rule on the substance of the case pursuant to the provisions of that regulation and that, as distinct from recital 21 in the preamble to the regulation, in accordance with which the recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and grounds for non-recognition should be kept to the minimum required, recital 17 in the preamble to the regulation provides that, in a case of wrongful retention of a child, the execution of a judgment entailing the return of the child must take place without any special procedure being required for the recognition or enforcement of that judgment in the Member State where the child is to be found.

47 With the aim therefore of ensuring expeditious enforcement of judgments, Articles 40 to 45 of Regulation No 2201/2003 provide for specific procedures to ensure that those judgments are enforceable in the Member State where they are to take effect, in particular where the judgments concerned order the return of a child and are handed down, as in the main proceedings, in the circumstances specified in Article 11(8) of that regulation.

48 Accordingly, it is apparent from Articles 42(1) and 43(2) of Regulation No 2201/2003, interpreted in the light of recitals 17 and 24 in the preamble to that regulation, that a judgment ordering the return of a child handed down by the court with jurisdiction pursuant to that regulation, where it is enforceable and has given rise to the issue of the certificate referred to in the said Article 42(1) in the Member State of origin, is to be recognised and is to be automatically enforceable in another Member State, there being no possibility of opposing its recognition (see, to that effect, *Rinau*, paragraph 84, and *Povse*, paragraph 70).

49 Consequently, the court of the Member State of enforcement can do no more than declare that a judgment thus certified is enforceable.

50 Furthermore, only in accordance with the legal rules of the Member State of origin can an action seeking rectification of the certificate issued by the court of origin be brought or questions raised as to the authenticity of that certificate (see, to that effect, *Povse*, paragraph 73 and case-law cited). Moreover, in order to secure the expeditious enforcement of the judgments concerned and to ensure that the effectiveness of the provisions of Regulation No 2201/2003 is not undermined by abuse of the procedure, any appeal against the issuing of a certificate pursuant to Article 42 of that regulation, other than an action seeking rectification within the meaning of Article 43(1) of the regulation, is excluded, even in the Member State of origin (see, to that effect, *Rinau*, paragraph 85).

51 In addition, it is also clear from the case-law that, in the context of the clear division of jurisdiction between the courts of the Member State of origin and those of the Member State of enforcement established by Regulation No 2201/2003 and intended to secure the expeditious return of the child, questions concerning the lawfulness of the judgment ordering return as such, and in particular the question whether the necessary conditions enabling the court with jurisdiction to hand down that judgment

are satisfied, must be raised before the courts of the Member State of origin, in accordance with the rules of its legal system (*Povse*, paragraph 74).

52 Those are the principles which must guide the interpretation of the first subparagraph of Article 42(2) of Regulation No 2201/2003, which provides that the court of the Member State of origin is to issue the certificate referred to in paragraph 1 of that article only if the child was given the opportunity to be heard, unless a hearing has been considered inappropriate having regard to the child's age or degree of maturity (Article 42(2)(a)), if the parties were given the opportunity to be heard (Article 42(2)(b)) and if that court has in handing down its judgment taken into account the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention (Article 42(2)(c)).

53 It must be observed at the outset that the first subparagraph of Article 42(2) of that regulation has no purpose other than to inform the courts of the Member State of origin of the minimum content required in the judgment on the basis of which the certificate provided for in Article 42(1) is to be issued.

54 Moreover, having regard to the case-law cited in paragraphs 48, 50 and 51 of this judgment, it must be held that the first subparagraph of Article 42(2) in no way empowers the court of the Member State of enforcement to review the conditions for the issue of that certificate as stated therein.

55 Such a power could undermine the effectiveness of the system set up by Regulation No 2201/2003, as described in paragraphs 44 to 51 of this judgment.

56 It follows that, where a court of a Member State issues the certificate referred to in Article 42, the court of the Member State of enforcement is obliged to enforce the judgment which is so certified, and it has no power to oppose either the recognition or the enforceability of that judgment.

57 Support for that interpretation can be found in the fact that the grounds laid down in Articles 23 and 31 of Regulation No 2201/2003 which justify the court of the Member State of enforcement not recognising or declaring not enforceable a judgment on matters of parental responsibility, which include a manifest conflict with the public policy of that Member State and the violation of fundamental principles of procedure of that Member State which require that the child be given the opportunity to be heard, were not repeated as grounds capable of justifying opposition by the courts of the Member State of enforcement in the proceedings covered by the provisions of Chapter III, Section 4 of that regulation (see, to that effect, *Rinau*, paragraphs 91, 97 and 99).

58 None the less, the referring court asks, by its first question, whether that interpretation also holds where the judgment of the Member State of origin which must be enforced by reason of the fact that it has been certified is vitiated by a serious infringement of fundamental rights.

59 In that regard, it must be observed that the clear division of jurisdiction between the courts of the Member State of origin and those of the Member State of enforcement established by the provisions of Chapter III, Section 4 of Regulation No 2201/2003 (see, to that effect, *Povse*, paragraph 73) rests on the premiss that those courts respect, within their respective areas of jurisdiction, the obligations which that regulation imposes on them, in accordance with the Charter of Fundamental Rights.

60 In that regard, since Regulation No 2201/2003 may not be contrary to the Charter of Fundamental Rights, Article 42 of that regulation, the provisions of which give effect to the child's right to be heard, must be interpreted in the light of Article 24 of that charter (see, to that effect, *McB.*, paragraph 60).

61 Moreover, recital 19 in the preamble to that regulation states that the hearing of the child plays an important role in the application of the regulation and recital 33 emphasises, more generally, that the regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights, ensuring, in particular, respect for the fundamental rights of the child as set out in Article 24 of the charter.

62 In that regard, it must first be observed that it is clear from Article 24 of that charter and from Article 42(2)(a) of Regulation No 2201/2003 that those provisions refer not to the hearing of the child per se, but to the child's having the opportunity to be heard.

63 First, it is a requirement of Article 24(1) of the Charter that children should be able to express their views freely and that the views expressed should be taken into consideration on matters which concern the children, solely 'in accordance with their age and maturity', and of Article 24(2) of the Charter that, in all actions relating to children, account be taken of the best interests of the child, since those interests may then justify a decision not to hear the child. Secondly, it is a requirement of Article 42(2)(a) of the regulation that the child be given the opportunity to be heard 'unless a hearing was considered inappropriate having regard to his or her age or degree of maturity'.

64 Consequently, it is for the court which has to rule on the return of a child to assess whether such a hearing is appropriate, since the conflicts which make necessary a judgment awarding custody of a child to one of the parents, and the associated tensions, create situations in which the hearing of the child, particularly when, as may be the case, the physical presence of the child before the court is required, may prove to be inappropriate, and even harmful to the psychological health of the child, who is often exposed to such tensions and adversely affected by them. Accordingly, while remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2) of the Charter of Fundamental Rights.

65 It follows that, as provided for in Article 24 of the Charter of Fundamental Rights and the first subparagraph of Article 42(2) of Regulation No 2201/2003, it is not a necessary consequence of the right of the child to be heard that a hearing before the court of the Member State of origin take place, but that right does require that there are made available to that child the legal procedures and conditions which enable the child to express his or her views freely and that those views are obtained by the court.

66 In other words, whilst it is not a requirement of Article 24 of the Charter of Fundamental Rights and Article 42(2)(a) of Regulation No 2201/2003 that the court of the Member State of origin obtain the views of the child in every case by means of a hearing, and that that court thus retains a degree of discretion, the fact remains that, where that court decides to hear the child, those provisions require the court to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child's best interests and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express his or her views.

67 With the same aim, the court of the Member State of origin must, in so far as possible and always taking into consideration the child's best interests, use all means available to it under national law as well as the specific instruments of international judicial cooperation, including, when appropriate, those provided for by Regulation No 1206/2001.

68 It follows that, before a court of the Member State of origin can issue a certificate which accords with the requirements of Article 42 of Regulation No 2201/2003, that court must ensure that, having regard to the child's best interests and all the circumstances of the individual case, the judgement to be certified was made with due regard to the child's right freely to express his or her views and that a genuine and effective opportunity to express those views was offered to the child, taking into account the procedural means of national law and the instruments of international judicial cooperation.

69 However, as stated in paragraph 51 of this judgment, it is solely for the national courts of the Member State of origin to examine the lawfulness of that judgment with reference to the requirements imposed, in particular, by Article 24 of the Charter of Fundamental Rights and Article 42 of Regulation No 2201/2003.

70 As was emphasised in paragraph 46 of this judgment, the systems for recognition and enforcement of judgments handed down in a Member State which are established by that regulation are based on the principle of mutual trust between Member States in the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights.

71 That being the case, as stated by the Advocate General in point 135 of his view, it is therefore within the legal system of the Member State of origin that the parties concerned must pursue legal remedies which allow the lawfulness of a judgment certified pursuant to Article 42 of Regulation No 2201/2003 to be challenged.

72 As regards the dispute in the main proceedings, it is apparent from the documents submitted to the Court that appeal proceedings are still pending before the Audiencia Provincial de Bizkaya. Further, the Spanish Government stated at the oral hearing that the judgment of the Audiencia Provincial will itself be open to appeal under domestic law, namely, at the very least, a 'recurso de amparo' before the Constitutional Court, the grounds of which appeal may include any infringements of fundamental rights, including the child's right to be heard.

73 It is therefore for those courts of the Member State of origin to determine whether the judgment certified pursuant to Article 42 of Regulation No 2201/2003 is vitiated by an infringement of the child's right to be heard.

74 It follows from all of the foregoing that, in circumstances such as those of the main proceedings, the issue of whether the court of the Member State of origin which handed down the certified judgment may have infringed Article 42(2)(a) of Regulation No 2201/2003 falls solely within the jurisdiction of the courts of that Member State and that the court with jurisdiction in the Member State of enforcement cannot oppose the recognition and enforcement of that judgment, having regard to the certificate issued by the court concerned of the Member State of origin.

75 Taking all of the foregoing considerations into account, the answer to the questions referred is that, in circumstances such as those of the main proceedings, the court with jurisdiction in the Member State of enforcement cannot oppose the enforcement of a certified judgment, ordering the return of a child who has been wrongfully removed, on the ground that the court of the Member State of origin which handed

down that judgment may have infringed Article 42 of Regulation No 2201/2003, interpreted in accordance with Article 24 of the Charter of Fundamental Rights, since the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (First Chamber) hereby rules:

In circumstances such as those of the main proceedings, the court with jurisdiction in the Member State of enforcement cannot oppose the enforcement of a certified judgment, ordering the return of a child who has been wrongfully removed, on the ground that the court of the Member State of origin which handed down that judgment may have infringed Article 42 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, interpreted in accordance with Article 24 of the Charter of Fundamental Rights of the European Union, since the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin.

[Signatures]

Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

6 December 2012*

(Citizenship of the Union — Article 20 TFEU — Directive 2003/86/EC — Right to family reunification — Union citizens who are minor children living with their mothers, who are third country nationals, in the territory of the Member State of which the children are nationals — Permanent right of residence in that Member State of the mothers who have been granted sole custody of the Union citizens — Change in composition of the families following the mothers' remarriage to third country nationals and the birth of children of those marriages who are also third country nationals — Applications for family reunification in the Member State of origin of the Union citizens — Refusal of the right of residence to the new spouses on the ground of lack of sufficient resources — Right to respect for family life — Taking into consideration of the children's best interests)

In Joined Cases C-356/11 and C-357/11,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Finland), made by decisions of 5 July 2011, received at the Court on 7 July 2011, in the proceedings

O,

S

v

Maahanmuuttovirasto (C-356/11),

and

Maahanmuuttovirasto

v

L (C-357/11),

THE COURT (Second Chamber),

composed of A. Rosas, acting as the President of the Second Chamber, U. Lõhmus, A. Ó Caoimh (Rapporteur), A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: Y. Bot,

Registrar: V. Tourrès, Administrator,

* Language of the case: Finnish.

having regard to the written procedure and further to the hearing on 12 September 2012,

after considering the observations submitted on behalf of:

— L, by J. Streng, asianajaja,

— the Finnish Government, by J. Heliskoski, acting as Agent,

— the Danish Government, by V. Pasternak Jørgensen and C. Vang, acting as Agents,

— the German Government, by T. Henze and A. Wiedmann, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, and W. Ferrante, avvocato dello Stato,

— the Netherlands Government, by C. Wissels and B. Koopman, acting as Agents,

— the Polish Government, by M. Szpunar, acting as Agent,

— the European Commission, by D. Maidani and E. Paasivirta, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 September 2012,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 20 TFEU.

2 The references have been made in proceedings, first, between Mr O and Ms S, who are third country nationals, and the Maahanmuuttovirasto (Immigration Office) (Case C-356/11) and, secondly, between the Maahanmuuttovirasto and Ms L, also a third country national (Case C-357/11), concerning the rejection of their applications for residence permits on the basis of family reunification.

Legal context

European Union law

Directive 2003/86/EC

3 Recitals 2, 4, 6 and 9 in the preamble to Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12) read as follows:

‘(2) Measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. This Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [signed in Rome on 4 November 1950] and in the Charter of Fundamental Rights of the European Union [“the Charter”].

…

(4) Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental [European] Community objective stated in the [EC] Treaty.

…

(6) To protect the family and establish or preserve family life, the material conditions for exercising the right to family reunification should be determined on the basis of common criteria.

…

(9) Family reunification should apply in any case to members of the nuclear family, that is to say the spouse and the minor children.'

4 In accordance with Article 1 of that directive, its purpose is 'to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States'.

5 Under Article 2 of that directive:

'For the purposes of this Directive:

(a) "third country national" means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty;

…

(c) "sponsor" means a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her;

(d) "family reunification" means the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry.'

6 In accordance with Article 3(1) and (3) of the directive:

'1. This Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status.

…

3. This Directive shall not apply to members of the family of a Union citizen.'

7 Article 4(1) of the directive provides:

'The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:

(a) the sponsor's spouse;

(b) the minor children of the sponsor and of his/her spouse …

(c) the minor children … of the sponsor where the sponsor has custody and the children are dependent on him or her. …

(d) the minor children … of the spouse where the spouse has custody and the children are dependent on him or her.'

8 When examining an application for entry and residence, the Member States must, in accordance with Article 5(5) of the directive, have due regard to the best interests of minor children.

9 Article 7(1) of the directive provides:

'When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has:

…

(c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.'

10 Article 17 of the directive reads as follows:

'Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.'

Directive 2004/38/EC

11 Article 1 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) provides:

'This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

…'

12 Article 2 of that directive, 'Definitions', provides:

'For the purposes of this Directive:

1. "Union citizen" means any person having the nationality of a Member State;

2. "family member" means:

   (a) the spouse;

   …

   (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse …

   (d) the dependent direct relatives in the ascending line and those of the spouse …

3. "host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.'

13 Article 3 of the directive, 'Beneficiaries', provides in paragraph 1:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

Finnish law

14 Paragraph 37(1) of the Law on foreigners (Ulkomaalaislaki) provides:

'For the application of this law, the spouse of a person living in Finland is regarded as a family member, as is an unmarried child under the age of 18 who is in the custody of a person living in Finland or that person's spouse. If the person living in Finland is a minor, the person having custody of him/her is a family member. …'

15 Paragraph 39(1) of that law provides:

'The grant of a residence permit requires that the foreigner has secure means of subsistence, unless provided otherwise in this law. An exception may be made to the subsistence requirement in an individual case if there is an exceptionally serious reason for this or the best interests of the child demand it. …'

16 Paragraph 47(3) of that law provides:

'If a foreigner has been granted a continuous or permanent residence permit, his family members are granted a continuous residence permit. …'

17 Paragraph 66a of that law provides:

'If a residence permit has been applied for on the basis of family ties, account must be taken, when considering whether to refuse the permit, of the nature and solidity of the foreigner's family ties, the duration of his residence in the country, and his family, cultural and social ties to his home country. …'

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

Case C-356/11

18 Ms S, a national of Ghana who lives in Finland on the basis of a permanent residence permit, married on 4 July 2001 a Finnish national, with whom she had a child, born on 11 July 2003. The child has Finnish nationality and has always lived in Finland. Ms S has had sole custody of the child since 2 June 2005. The spouses divorced on 19 October 2005. The child's father lives in Finland.

19 According to the order for reference, during her stay in Finland Ms S has studied, taken maternity leave, qualified for a trade, and been gainfully employed.

20 On 26 June 2008 Ms S married Mr O, a national of Côte d'Ivoire. On 3 July 2008 Mr O applied to the Maahanmuuttovirasto for a residence permit on the basis of the marriage. On 21 November 2009 a child of the marriage was born in Finland. The child has Ghanaian nationality and the spouses have joint custody of the child. Mr O lives with Ms S and her two children.

21 According to the order for reference, Mr O entered into a contract of employment on 1 January 2010 for a period of one year, under which he was to work eight hours a day and be paid EUR 7.50 an hour. He has not, however, produced documents to show that he worked in accordance with the contract.

22 By decision of 21 January 2009, the Maahanmuuttovirasto refused Mr O's application for a residence permit on the ground that he did not have secure means of subsistence. It also considered that in the present case there was no reason to make an exception to the requirement of means of subsistence, as permitted by Paragraph 39(1) of the Law on foreigners where there is an exceptionally serious reason or where the best interests of the child demand it.

23 By judgment of 27 August 2009, the Helsingin hallinto-oikeus (Administrative Court, Helsinki) dismissed the action brought by Mr O for the decision of the Maahanmuuttovirasto to be annulled.

24 Ms S and Mr O therefore appealed against that judgment to the Korkein hallinto-oikeus (Supreme Administrative Court).

Case C-357/11

25 Ms L, a national of Algeria, has resided lawfully in Finland since 2003. She obtained a permanent residence permit there following her marriage to a Finnish national. A child was born of that marriage in 2004. The child has dual Finnish and Algerian nationality and has always lived in Finland. The spouses divorced on 10 December 2004 and Ms L was granted sole custody of their child. The child's father lives in Finland.

26 On 19 October 2006 Ms L married Mr M, a national of Algeria, who arrived lawfully in Finland in March 2006 and sought asylum there. According to his statement, he lived with Ms L from April of that year. Mr M was returned to his country of origin in October 2006.

27 On 29 November 2006 Ms L applied to the Maahanmuuttovirasto for her spouse to be granted a residence permit in Finland on the basis of their marriage.

28 On 14 January 2007 a child of the marriage was born in Finland. The child has Algerian nationality and is in the joint custody of both parents. It is not established whether Mr M has had contact with his child.

29 According to the order for reference, Ms L has never been in gainful employment during her stay in Finland. Her means of subsistence come from subsistence support and other benefits. Her husband is not known to have been gainfully employed in Finland, although he has said that he believes he will be able to work in Finland because of his linguistic knowledge.

30 By decision of 15 August 2008 the Maahanmuuttovirasto rejected the application for a residence permit for Mr M on the ground that he did not have secure means of subsistence.

31 The Helsingin hallinto-oikeus allowed Ms L's application for that decision to be annulled, by judgment of 21 April 2009. The Maahanmuuttovirasto appealed against that judgment to the referring court.

32 In its references for preliminary rulings the Korkein hallinto-oikeus states that, because Mr O and Mr M have been refused residence permits, it is possible that their spouses and the children in the custody of those spouses, including those who are citizens of the Union, may be forced to leave the territory of the European Union in order to be able to live as a family. It raises the question of the applicability of the principles set out by the Court in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

33 In those circumstances, the Korkein hallinto-oikeus decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

Case C-356/11

'1. Does Article 20 TFEU preclude a third country national from being refused a residence permit because of lack of means of subsistence in a family situation in which his spouse has custody of a child who is a citizen of the Union and the third country national is not the child's parent and does not have custody of the child?

2. If the answer to Question 1 is in the negative, must the effect of Article 20 TFEU be assessed differently if the third country national who does not have a residence permit, his spouse, and the child who is in the custody of the spouse and has Union citizenship live together?'

Case C-357/11

'1. Does Article 20 TFEU preclude a third country national from being refused a residence permit because of lack of means of subsistence in a family situation in which his spouse has custody of a child who is a citizen of the Union and the third country national is not the child's parent, does not have custody of the child, and does not live with his spouse or with the child?

2. If the answer to Question 1 is in the negative, must the effect of Article 20 TFEU be assessed differently if the third country national who does not have a residence permit, and does not live in Finland, and his spouse have a child, in their joint custody and living in Finland, who is a third country national?'

34 By order of the President of the Court of 8 September 2011, the references for preliminary rulings in Cases C-356/11 and C-357/11 were joined for the purposes of the written and oral procedure and the judgment. The referring court's request for the accelerated procedure provided for in Article 23a of the Statute of the Court of Justice of the European Union and the first paragraph of Article 104a of the Rules of Procedure of the Court, in the version in force at the time, to be applied to the two cases was rejected.

Consideration of the questions referred

35 By its questions, which should be examined together, the referring court essentially asks whether the provisions of European Union law on citizenship of the Union must be interpreted as precluding a Member State from refusing to grant a third country national a residence permit on the basis of family reunification where that national seeks to reside with his spouse, who is also a third country national and resides lawfully in that Member State and is the mother of a child from a previous marriage who is a Union citizen, and with the child of their own marriage, who is also a third country national.

36 The referring court asks whether the fact that the applicant for a residence permit lives together with his spouse, is not the biological father of the child who is a Union citizen, and does not have custody of the child may affect the interpretation to be given to the provisions on citizenship of the Union.

37 The Finnish, Danish, German, Italian, Netherlands and Polish Governments and the European Commission consider that Article 20 TFEU does not preclude a Member State from refusing a right of residence to a third country national who is in a situation such as those at issue in the main proceedings.

38 Those governments and the Commission submit essentially that the principles stated by the Court in *Ruiz Zambrano* relate to altogether exceptional situations in which the application of a national measure would lead to the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union. In this case, however, the facts of the disputes in the main proceedings differ substantially from those of the *Ruiz Zambrano* case. Mr O and Mr M are not the biological fathers of the minors who are Union citizens from whom they seek to derive their right to a residence permit. They do not have custody of those children. Furthermore, as the children's mothers themselves have a permanent right of residence in Finland, their children who are Union citizens would not be obliged to leave the territory of the European Union, in contrast to the children concerned in *Ruiz Zambrano*. If the mothers of those Union citizens were to decide to leave the territory of the European Union in order to preserve the family unit, that would not be an inevitable consequence of the refusal to grant their spouses a right of residence.

39 The German and Italian Governments emphasise that Mr O and Mr M do not form part of the nuclear families of the Union citizens concerned, since they are not the biological fathers of the children and the children are not dependent on them.

40 It should be observed, as a preliminary point, that regardless of which persons are the applicants in the main proceedings in accordance with the provisions of national law, it is clear from the documents before the Court that the applications for residence permits for Mr O and Mr M submitted on the basis of family reunification concern Ms S and Ms L, who are lawfully resident in Finland, as sponsors, that is, persons in respect of whom reunification has been sought.

The provisions of European Union law on citizenship of the Union

41 With respect, first, to Directive 2004/38, it must be recalled that it is not all third country nationals who are family members of a Union citizen who derive rights of entry into and residence in a Member State from that directive, but only those who are family members of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national (Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 73, and Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 56).

42 In the present case, as the Union citizens concerned, both of whom are minors, have never made use of their right of freedom of movement and have always lived in the Member State of which they are nationals, they are not covered by the concept of 'beneficiary' within the meaning of Article 3(1) of Directive 2004/38, so that that directive does not apply either to them or to their family members (*Dereci and Others*, paragraph 57).

43 With respect, next, to Article 20 TFEU, the Court has previously had occasion to hold that the situation of a Union citizen who, like the children of Finnish nationality concerned in the main proceedings, has not made use of the right of freedom of movement cannot for that reason alone be assimilated to a purely internal situation, that is, a situation which has no factor linking it with any of the situations governed by European Union law (see *Ruiz Zambrano*; Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 46; and *Dereci and Others*, paragraph 61).

44 Since citizenship of the Union is intended to be the fundamental status of nationals of the Member States, the children of the previous marriages of Ms S and Ms L, as nationals of a Member State, enjoy the status of Union citizens under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against the Member State of which they are nationals (see *McCarthy*, paragraph 48, and *Dereci and Others*, paragraph 63).

45 On that basis the Court has held that Article 20 TFEU precludes national measures, including refusals to grant rights of residence to family members of a Union citizen, which have the effect of denying Union citizens the genuine enjoyment of the substance of the rights conferred by their status (see *Ruiz Zambrano*, paragraph 42).

46 With respect, finally, to the right of residence of a person who is a third country national in the Member State of residence of his minor children, nationals of that Member State, who are dependant on him and of whom he and his spouse have joint custody, the Court has held that the refusal to grant a right of residence would have the consequence that those children, who are citizens of the Union, would have to leave the territory of the Union in order to accompany their parents, and that those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred by their status (*Ruiz Zambrano*, paragraphs 43 and 44).

47 The criterion of the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union referred, in the *Ruiz Zambrano* and *Dereci and Others* cases, to situations characterised by the circumstance that the Union citizen had, in fact, to leave not only the territory of the Member State of which he was a national but also that of the European Union as a whole.

48 That criterion is therefore specific in character inasmuch as it relates to situations in which a right of residence, exceptionally, may not be refused to a third country national who is a family member of a national of a Member State, as the effectiveness of the Union citizenship enjoyed by that national would otherwise be undermined (*Dereci and Others*, paragraph 67).

49 In the present case, it is for the referring court to establish whether the refusal of the applications for residence permits submitted on the basis of family reunification in circumstances such as those at issue in the main proceedings entails, for the Union citizens concerned, a denial of the genuine enjoyment of the substance of the rights conferred by their status.

50 When making that assessment, it must be taken into account that the mothers of the Union citizens hold permanent residence permits in the Member State in question, so that, in law, there is no obligation either for them or for the Union citizens dependent on them to leave the territory of that Member State or of the European Union as a whole.

51 For the purpose of examining whether the Union citizens concerned would be unable, in fact, to exercise the substance of the rights conferred by their status, the question of the custody of the sponsors' children and the fact that the children are part of reconstituted families are also relevant. First, since Ms S and Ms L have sole custody of the Union citizens concerned who are minors, a decision by them to leave the territory of the Member State of which those children are nationals, in order to preserve the family unit, would have the effect of depriving those Union citizens of all contact with their biological fathers, should such contact have been maintained up to the present. Secondly, any decision to stay in the territory of that Member State in order to preserve the relationship, if any, of the Union citizens who are minors with their biological fathers would have the effect of harming the relationship of the other children, who are third country nationals, with their biological fathers.

52 However, the mere fact that it might appear desirable, for economic reasons or in order to preserve the family unit in the territory of the Union, for members of a family consisting of third country nationals and a Union citizen who is a minor to be able to reside with that citizen in the territory of the Union in the Member State of which he is a national is not sufficient in itself to support the view that the Union citizen would be forced to leave the territory of the Union if such a right of residence were not granted (see, to that effect, *Dereci and Others*, paragraph 68).

53 In connection with the assessment, mentioned in paragraph 49 above, which it is for the referring court to carry out, that court must examine all the circumstances of the case in order to determine whether, in fact, the decisions refusing residence permits at issue in the main proceedings are liable to undermine the effectiveness of the Union citizenship enjoyed by the Union citizens concerned.

54 Whether the person for whom a right of residence is sought on the basis of family reunification lives together with the sponsor and the other family members is not decisive in that assessment, since it cannot be ruled out that some family members who are the subject of an application for family reunification may arrive in the Member State concerned separately from the rest of the family.

55 It should also be noted that, contrary to the submissions of the German and Italian Governments, while the principles stated in the *Ruiz Zambrano* judgment apply only in exceptional circumstances, it does not follow from the Court's case-law that their application is confined to situations in which there is a blood relationship between the third country national for whom a right of residence is sought and the Union citizen who is a minor from whom that right of residence might be derived.

56 On the other hand, both the permanent right of residence of the mothers of the Union citizens concerned who are minors and the fact that the third country nationals for whom a right of residence is sought are not persons on whom those citizens are legally, financially or emotionally dependent must be taken into consideration when examining the question whether, as a result of the refusal of a right of residence, those citizens would be unable to exercise the substance of the rights conferred by their status. As the Advocate General observes in point 44 of his Opinion, it is the relationship of dependency between the Union citizen who is a minor and the third country national who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in fact, to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole, as a consequence of such a refusal (see *Ruiz Zambrano*, paragraphs 43 and 45, and *Dereci and Others*, paragraphs 65 to 67).

57 Subject to the verification which it is for the referring court to carry out, the information available to the Court appears to suggest that there might be no such dependency in the cases in the main proceedings.

58 In the light of the foregoing, it must be stated that Article 20 TFEU must be interpreted as not precluding a Member State from refusing to grant a third country national a residence permit on the basis of family reunification where that national seeks to reside with his spouse, who is also a third country national and resides lawfully in that Member State and is the mother of a child from a previous marriage who is a Union citizen, and with the child of their own marriage, who is also a third country national, provided that such a refusal does not entail, for the Union citizen concerned, the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union, that being for the referring court to ascertain.

59 Should that court find that, in the circumstances of the cases before it, such a denial does not follow from the refusals of residence permits at issue in the main proceedings, that would be without prejudice to the question whether, on the basis of other criteria, inter alia by virtue of the right to the protection of family life, Mr O and Mr M could not be refused a right of residence. That question must be addressed in the framework of the provisions on the protection of fundamental rights which are applicable in each case (see *Dereci and Others*, paragraph 69).

60 In this respect, it must be recalled that, in accordance with the case-law of the Court, the Court may find it necessary to consider rules of European Union law which the national court has not referred to in its question but which may be of use in giving judgment in the case pending before it (see, inter alia, Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 64).

Directive 2003/86

61 In the present case, the referring court mentioned Directive 2003/86 in its orders for reference, without, however, putting a question concerning that directive.

62 Similarly, the Finnish Government in part, and the Italian, Netherlands and Polish Governments and the Commission submit that the right of residence of Mr O and Mr M and the situation of their families have been or should be examined in the light of the provisions of Directive 2003/86.

63 On this point, it should be recalled that in accordance with Article 1 of that directive its purpose is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

64 The definition of family members in Article 4(1) of that directive includes the sponsor's spouse, the children of the sponsor and the spouse, and the minor children of the sponsor or of the spouse where that person has custody and the children are dependent on him or her.

65 It follows that the nuclear family referred to in recital 9 in the preamble to that directive was conceived broadly by the European Union legislature.

66 However, in accordance with Article 3(3) of that directive, the directive does not apply to the family members of a Union citizen.

67 In paragraph 48 of the judgment in *Dereci and Others*, the Court took the view that, in so far as the disputes in the main proceedings concerned Union citizens who resided in a Member State and their family members who were third country nationals who wished to enter and reside in that Member State for the purposes of living as a family with those citizens, Directive 2003/86 was not applicable to those third country nationals.

68 However, in contrast to the circumstances of the cases at issue in *Dereci and Others*, Ms S and Ms L are third country nationals residing lawfully in a Member State and seeking to benefit from family reunification. They must therefore be recognised as being 'sponsors' within the meaning of

Article 2(c) of Directive 2003/86. Moreover, the children they have with their spouses are themselves third country nationals, and do not therefore have the status of citizens of the Union conferred by Article 20 TFEU.

69 In view of the purpose of Directive 2003/86, which is to promote family reunification (Case C-578/08 *Chakroun* [2010] ECR I-1839, paragraph 43), and the protection it aims to give to third country nationals, in particular minors, the application of that directive cannot be excluded solely because one of the parents of a minor third country national is also the parent of a Union citizen, born of a previous marriage.

70 Article 4(1) of Directive 2003/86 imposes on the Member States precise positive obligations, with corresponding clearly defined individual rights. It requires them, in the cases determined by that directive, to authorise the family reunification of certain members of the sponsor's family, without being left a margin of appreciation (see Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 60).

71 That provision is, however, subject to compliance with the conditions laid down in particular in Chapter IV of Directive 2003/86. Article 7(1)(c) of that directive forms part of those conditions and allows the Member States to require evidence that the sponsor has stable and regular resources which are sufficient to maintain himself and the members of his family without recourse to the social assistance system of the Member State concerned. That provision also states that Member States are to evaluate those resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members (*Chakroun*, paragraph 42).

72 With respect to Article 4(1) of Directive 2003/86, it must be stressed, first, that, in principle, it is the resources of the sponsor that are the subject of the individual examination of applications for reunification required by that directive, not the resources of the third country national for whom a right of residence is sought on the basis of family reunification (see *Chakroun*, paragraphs 46 and 47).

73 Moreover, as regards those resources, the expression 'recourse to the social assistance system' in Article 7(1)(c) of Directive 2003/86 does not allow a Member State to refuse family reunification to a sponsor who proves that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs or income support measures (see *Chakroun*, paragraph 52).

74 Next, since authorisation of family reunification is the general rule, the Court has held that the faculty provided for in Article 7(1)(c) of Directive 2003/86 must be interpreted strictly. The margin which the Member States are recognised as having must therefore not be used by them in a manner which would undermine the objective and the effectiveness of that directive (*Chakroun*, paragraph 43).

75 Finally, it must be recalled that, as may be seen from recital 2 in the preamble to Directive 2003/86, the directive respects the fundamental rights and observes the principles enshrined in the Charter.

76 Article 7 of the Charter, which contains rights corresponding to those guaranteed by Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, recognises the right to respect for private and family life. That provision of the Charter must also be read in conjunction with the obligation to have regard to the child's best interests, recognised in Article 24(2) of the Charter, and with account being taken of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both parents (see *Parliament* v *Council*, paragraph 58, and Case C-403/09 PPU *Detiček* [2009] ECR I-12193, paragraph 54).

77 Article 7(1)(c) of Directive 2003/86 cannot be interpreted and applied in such a manner that its application would disregard the fundamental rights set out in those provisions of the Charter.

78 The Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the legal order of the European Union (see *Parliament* v *Council*, paragraph 105, and *Detiček*, paragraph 34).

79 It is true that Articles 7 and 24 of the Charter, while emphasising the importance for children of family life, cannot be interpreted as depriving the Member States of their margin of appreciation when examining applications for family reunification (see, to that effect, *Parliament* v *Council*, paragraph 59).

80 However, in the course of such an examination and when determining in particular whether the conditions laid down in Article 7(1) of Directive 2003/86 are satisfied, the provisions of that directive must be interpreted and applied in the light of Articles 7 and 24(2) and (3) of the Charter, as is moreover apparent from recital 2 in the preamble to and Article 5(5) of that directive, which require the Member States to examine the applications for reunification in question in the interests of the children concerned and with a view to promoting family life.

81 It is for the competent national authorities, when implementing Directive 2003/86 and examining applications for family reunification, to make a balanced and reasonable assessment of all the interests in play, taking particular account of the interests of the children concerned.

82 In the light of the foregoing, the answer to the questions referred must be:

— Article 20 TFEU must be interpreted as not precluding a Member State from refusing to grant a third country national a residence permit on the basis of family reunification where that national seeks to reside with his spouse, who is also a third country national and resides lawfully in that Member State and is the mother of a child from a previous marriage who is a Union citizen, and with the child of their own marriage, who is also a third country national, provided that such a refusal does not entail, for the Union citizen concerned, the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union, that being for the referring court to ascertain.

— Applications for residence permits on the basis of family reunification such as those at issue in the main proceedings are covered by Directive 2003/86. Article 7(1)(c) of that directive must be interpreted as meaning that, while Member States have the faculty of requiring proof that the sponsor has stable and regular resources which are sufficient to maintain himself and the members of his family, that faculty must be exercised in the light of Articles 7 and 24(2) and (3) of the Charter, which require the Member States to examine applications for family reunification in the interests of the children concerned and also with a view to promoting family life, and avoiding any undermining of the objective and the effectiveness of that directive. It is for the referring court to ascertain whether the decisions refusing residence permits at issue in the main proceedings were taken in compliance with those requirements.

Costs

83 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Second Chamber) hereby rules:

Article 20 TFEU must be interpreted as not precluding a Member State from refusing to grant a third country national a residence permit on the basis of family reunification where that national seeks to reside with his spouse, who is also a third country national and resides lawfully in that Member State and is the mother of a child from a previous marriage who is a Union citizen, and with the child of their own marriage, who is also a third country national, provided that such a refusal does not entail, for the Union citizen concerned, the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union, that being for the referring court to ascertain.

Applications for residence permits on the basis of family reunification such as those at issue in the main proceedings are covered by Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. Article 7(1)(c) of that directive must be interpreted as meaning that, while Member States have the faculty of requiring proof that the sponsor has stable and regular resources which are sufficient to maintain himself and the members of his family, that faculty must be exercised in the light of Articles 7 and 24(2) and (3) of the Charter of Fundamental Rights of the European Union, which require the Member States to examine applications for family reunification in the interests of the children concerned and also with a view to promoting family life, and avoiding any undermining of the objective and the effectiveness of that directive. It is for the referring court to ascertain whether the decisions refusing residence permits at issue in the main proceedings were taken in compliance with those requirements.

[Signatures]

Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

6 June 2013*

(Regulation (EC) No 343/2003 — Determining the Member State responsible — Unaccompanied minor — Successive applications for asylum lodged in two Member States — Absence of a member of the family of the minor in the territory of a Member State — Second paragraph of Article 6 of Regulation No 343/2003 — Transfer of the minor to the Member State in which he lodged his first application — Compatibility — Child's best interests — Article 24(2) of the Charter)

In Case C-648/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), made by decision of 14 December 2011, received at the Court on 19 December 2011, in the proceedings

The Queen, on the application of:

MA,

BT,

DA

v

Secretary of State for the Home Department,

intervener

The AIRE Centre (Advice on Individual Rights in Europe) (UK),

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the Fourth Chamber, U. Lõhmus, M. Safjan and A. Prechal, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 5 November 2012,

* Language of the case: English.

after considering the observations submitted on behalf of:

— MA and BT, by S. Knafler QC, K. Cronin, Barrister, and L. Barratt, Solicitor,

— DA, by S. Knafler QC, B. Poynor, Barrister, and D. Sheahan, Solicitor,

— The AIRE Centre (Advice on Individual Rights in Europe) (UK), by D. Das, Solicitor, R. Hussain QC and C. Meredith, Barrister,

— the United Kingdom Government, by C. Murrell, acting as Agent, and by S. Lee, Barrister,

— the Belgian Government, by T. Materne, acting as Agent,

— the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

— the Greek Government, by M. Michelogiannaki, acting as Agent,

— the Hungarian Government, by K. Szíjjártó, acting as Agent,

— the Netherlands Government, by C. Wissels, M. Noort and C. Schillemans, acting as Agents,

— the Swedish Government, by A. Falk, acting as Agent,

— the Swiss Government, by O. Kjelsen, acting as Agent,

— the European Commission, by M. Condou-Durande and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the second paragraph of Article 6 of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

2 The request has been made in proceedings between MA, BT and DA, three children who are third-country nationals, and the Secretary of State for the Home Department ('the Secretary of State') concerning the Secretary of State's decision not to examine their asylum applications which had been lodged in the United Kingdom and to propose that they be transferred to the Member State in which they had first lodged an application for asylum.

Legal context

The Charter of Fundamental Rights of the European Union

3 Article 24 of the Charter of Fundamental Rights of the European Union ('the Charter'), which, as is apparent from the explanations relating to that provision, is based on the Convention on the Rights of the Child concluded in New York on 20 November 1989 and ratified by all the Member States, provides in paragraph 2:

'In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.'

Regulation No 343/2003

4 Recitals 3 and 4 in the preamble to Regulation No 343/2003 read as follows:

'(3) The … conclusions [of the European Council, at its special meeting in Tampere on 15 and 16 October 1999,] ... stated that [the Common European Asylum System] should include, in the short term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.

(4) Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications.'

5 As is evident from recital 15 in the preamble to Regulation No 343/2003, read in the light of Article 6(1) TEU, that regulation observes the rights, freedoms and principles which are acknowledged in particular in the Charter. In particular, it seeks to guarantee, on the basis of Articles 1 and 18 of the Charter, full observance of asylum seekers' human dignity and their right to asylum.

6 It is apparent from recital 17 in the preamble to Regulation No 343/2003 that, in accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the EU Treaty and to the FEU Treaty, the United Kingdom of Great Britain and Northern Ireland gave notice, by letter of 30 October 2001, of its wish to take part in the adoption and application of that regulation.

7 Under Article 2(c), (d) and (h) of Regulation No 343/2003,

'(c) "application for asylum" means the application made by a third-country national which can be understood as a request for international protection from a Member State, under the … Convention [relating to the status of refugees, signed at Geneva on 28 July 1951]. …

(d) "applicant" or "asylum seeker" means a third country national who has made an application for asylum in respect of which a final decision has not yet been taken;

...

(h) "unaccompanied minor" means unmarried persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person ...'

8 Article 3(1) and (2) of Regulation No 343/2003, in Chapter II thereof, headed 'General Principles', states:

'1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. …'

9 In order to determine the 'Member State responsible' for the purposes of Article 3(1) of Regulation No 343/2003, Articles 6 to 14, in Chapter III of that regulation, list objective criteria set out in hierarchical order.

10 Article 5 of Regulation No 343/2003 states:

'1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.

2. The Member State responsible in accordance with the criteria shall be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State.'

11 Article 6 of that regulation provides:

'Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.

In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.'

12 Article 13 of Regulation No 343/2003 is worded as follows:

'Where no Member State responsible for examining the application for asylum can be designated on the basis of the criteria listed in this Regulation, the first Member State with which the application for asylum was lodged shall be responsible for examining it.'

Directive 2005/85/EC

13 Article 25 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13), headed 'Inadmissible applications', provides:

'1. In addition to cases in which an application is not examined in accordance with [Regulation No 343/2003], Member States are not required to examine whether the applicant qualifies as a refugee in accordance with [Council] Directive 2004/83/EC [of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12)] where an application is considered inadmissible pursuant to this Article.

2. Member States may consider an application for asylum as inadmissible pursuant to this Article if:

(a) another Member State has granted refugee status;

...

(f) the applicant has lodged an identical application after a final decision;

...'

The dispute in the main proceedings

MA's case

14 MA is an Eritrean national, born on 24 May 1993, who arrived in the United Kingdom on 25 July 2008, where she lodged an application for asylum on arrival.

15 Having established that MA had already lodged an application for asylum in Italy, the United Kingdom authorities requested the Italian authorities to take her back in accordance with the relevant provisions of Regulation No 343/2003, which, on 13 October 2008, the Italian authorities agreed to do.

16 The transfer to Italy, which was to have taken place on 26 February 2009, was not carried out. MA brought an action before the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) to challenge the legality of the transfer ordered.

17 On 25 March 2010 the Secretary of State decided, pursuant to Article 3(2) of Regulation No 343/2003, to examine MA's application for asylum. MA was subsequently granted refugee status.

18 The Secretary of State invited MA to withdraw her action, which she declined to do.

BT's case

19 BT, who was born on 20 January 1993, is also an Eritrean national. She arrived in the United Kingdom on 12 August 2009, where, on the following day, she lodged an application for asylum.

20 Having established that BT had already lodged an application for asylum in Italy, the United Kingdom authorities requested the Italian authorities to take her back, which, on 28 September 2009, they agreed to do.

21 On 4 December 2009 BT was transferred to Italy.

22 BT brought an action before the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) to challenge the legality of her transfer to Italy. Following a decision taken by that court on 18 February 2010, BT was able to return to the United Kingdom on 26 February 2010.

23 On 25 March 2010 the Secretary of State decided, pursuant to Article 3(2) of Regulation No 343/2003, to examine the application for asylum lodged by BT. BT was granted refugee status, but declined to withdraw her action.

DA's case

24 DA, an Iraqi national, arrived in the United Kingdom on 20 November 2009, where he claimed asylum on 8 December 2009. Since DA had acknowledged that he had already lodged an asylum application in the Netherlands, the Netherlands authorities were requested to take him back, which, on 2 February 2010, they agreed to do.

25 On 14 July 2010 the Secretary of State ordered that DA be transferred to the Netherlands. However, after DA brought an action before the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) on 26 July 2010, it was decided not to carry out the transfer. The Secretary of State has since agreed to examine DA's application for asylum on the basis of Article 3(2) of Regulation No 343/2003.

The main proceedings and the question referred for a preliminary ruling

26 The three cases were heard together before the national court.

27 By judgment of 21 December 2010, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) dismissed the claims of the claimants (now the appellants) in the main proceedings and held that, by virtue of the second paragraph of Article 6 of Regulation No 343/2003, an unaccompanied minor claiming asylum and having no family member legally present in the territory of one of the Member States is liable to be removed to the Member State where he first made an asylum application.

28 MA, BT and DA appealed to the Court of Appeal (England and Wales) (Civil Division) against that judgment.

29 In its order for reference, the referring court notes that none of the appellants in the main proceedings has a family member within the meaning of Regulation No 343/2003 legally present in the territory of one of the Member States.

30 Their claims were heard together because all three had claimed asylum in the United Kingdom as unaccompanied minors and in each case the Secretary of State had initially certified the claim on the grounds that the two Member States to which she intended to return them were safe countries.

31 The referring court considers that there is significance in the use of the wording 'first lodged his application' in Article 5(2) of Regulation No 343/2003 not being repeated in the second paragraph of Article 6 of that regulation where the wording is simply 'has lodged his or her application'. It also points out that, in the hierarchy of criteria set out in Chapter III of that regulation, unaccompanied minors have first place.

32 As regards the admissibility of its question, the referring court states inter alia that there is still a live issue between the parties in the form of a claim for damages in the case of BT.

33 In those circumstances, the Court of Appeal (England and Wales) (Civil Division) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In Regulation [No 343/2003], where an applicant for asylum who is an unaccompanied minor with no member of his or her family legally present in another Member State has lodged claims for asylum in more than one Member State, which Member State does the second paragraph of Article 6 make responsible for determining the application for asylum?'

Consideration of the question referred

Admissibility

34 The Belgian Government submits, principally, that the request for a preliminary ruling is inadmissible.

35 It claims in particular that, since the Secretary of State has agreed to examine the asylum applications lodged by the appellants in the main proceedings, there is actually no longer a dispute in the main proceedings. The question whether the criterion laid down in the second paragraph of Article 6 of Regulation No 343/2003 designates the United Kingdom or the first Member State with which the appellants in the main proceedings lodged an asylum application the 'Member State responsible' has become merely academic in respect of those appellants, and an answer would be useful only in other cases which are or which might come before the national courts.

36 It should be borne in mind in that regard that it has consistently been held that the procedure provided for in Article 267 TFEU is an instrument for 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 European Union law which they need in order to decide the disputes before them (see, inter alia, Case C-314/96 *Djabali* [1998] ECR I-1149, paragraph 17; Case C-225/02 *García Blanco* [2005] ECR I-523, paragraph 26; and Case C-197/10 *Unió de Pagesos de Catalunya* [2011] ECR I-8495, paragraph 16).

37 Questions on the interpretation of European Union 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 for a preliminary ruling from a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, 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 (Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraph 33 and the case-law cited).

38 In the present case it must be noted that the referring court has stated in its order for reference that it has to determine BT's claim for damages.

39 The award of any damages to BT would be affected by the answer to the question referred.

40 In the light of that claim for damages, which is an integral part of the main proceedings, the question referred for a preliminary ruling remains relevant to the outcome of the dispute before the referring court.

41 That being the case, the question referred is not hypothetical and the request for a preliminary ruling is therefore admissible.

Substance

42 By its question the referring court asks, in essence, whether the second paragraph of Article 6 of Regulation No 343/2003 must be interpreted as meaning that, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State to be designated the 'Member State responsible' is that with which that minor lodged his first application, or that in which the minor is present after having lodged his most recent asylum application there.

43 It must be recalled at the outset that, under Article 3(1) of Regulation No 343/2003, the asylum application is to be examined by a single Member State, which is to be the one which the criteria set out in Chapter III indicate is responsible.

44 Article 5(1) of Regulation No 343/2003 provides that the criteria for determining the Member State responsible are to be applied in the order in which they are set out in Chapter III.

45 It is evident from Article 5(2) of Regulation No 343/2003 that the Member State responsible in accordance with the criteria established under Articles 6 to 14 of that regulation is to be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State. Article 5(2) cannot be intended to alter the meaning of those criteria. As the Advocate General noted at point 56 of his Opinion, Article 5(2) is intended only to determine the framework in which those criteria must be applied in order to determine the Member State responsible.

46 The first of the criteria established in Chapter III of Regulation No 343/2003 is that laid down in Article 6, which serves to determine the Member State responsible for examining an application lodged by an unaccompanied minor within the meaning of Article 2(h) of that regulation.

47 As provided in the first paragraph of Article 6, the Member State responsible for examining an application lodged by an unaccompanied minor is to be that where a member of his family is legally present, provided that this is in the best interest of the minor.

48 In the present case it is apparent from the order for reference that no member of the families of the appellants in the main proceedings is legally present in a Member State, and the Member State responsible must therefore be designated on the basis of the second paragraph of Article 6 of Regulation No 343/2003, which provides that responsibility is to lie with the Member State 'where the minor has lodged his or her application for asylum'.

49 On their own those words do not establish whether the application for asylum referred to is the first asylum application that the minor has lodged in a Member State or the most recent application that he has lodged in another Member State.

50 It must be borne in mind however that, according to settled case-law, in interpreting a provision of European Union law it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by rules of which it is part (see, inter alia, Case C-19/08 *Petrosian* [2009] ECR I-495, paragraph 34, and Case C-403/09 PPU *Detiček* [2009] ECR I-12193, paragraph 33).

51 With regard to the context of the second paragraph of Article 6 of Regulation No 343/2003, it must be noted that the expression 'first lodged his application' used in Article 5(2) of that regulation has not been repeated in the second paragraph of Article 6. Moreover, Article 6 refers to the Member State 'where the minor has lodged his or her application for asylum', whereas Article 13 of that regulation expressly states that 'the first Member State with which the application for asylum was lodged shall be responsible for examining it'.

52 Assuming that the European Union legislature had intended to designate, in the second paragraph of Article 6 of Regulation No 343/2003, 'the first Member State' as responsible, that would have been expressed in the same precise terms as in Article 13 of that regulation.

53 Accordingly, the expression, 'the Member State … where the minor has lodged his or her application for asylum', cannot be construed as meaning 'the first Member State where the minor has lodged his or her application for asylum'.

54 Furthermore, the second paragraph of Article 6 of Regulation No 343/2003 must also be interpreted in the light of its objective, which is to focus particularly on unaccompanied minors, as well as in the light of the main objective of the regulation, which, as stated in recitals 3 and 4 in the preamble thereto, is to guarantee effective access to an assessment of the applicant's refugee status.

55 Since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State.

56 The above considerations are supported by the requirements arising from recital 15 in the preamble to Regulation No 343/2003, according to which the regulation observes the fundamental rights and principles which are acknowledged in particular in the Charter.

57 Those fundamental rights include, in particular, that set out in Article 24(2) of the Charter, whereby in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests are to be a primary consideration.

58 Thus, the second paragraph of Article 6 of Regulation No 343/2003 cannot be interpreted in such a way that it disregards that fundamental right (see, by analogy, *Detiček*, paragraphs 54 and 55, and Case C-400/10 PPU *McB*. [2010] ECR I-8965, paragraph 60).

59 Consequently, although express mention of the best interest of the minor is made only in the first paragraph of Article 6 of Regulation No 343/2003, the effect of Article 24(2) of the Charter, in conjunction with Article 51(1) thereof, is that the child's best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6 of Regulation No 343/2003.

60 This taking into account of the child's best interests requires, in principle, that, in circumstances such as those relating to the situation of the appellants in the main proceedings, the second paragraph of Article 6 of Regulation No 343/2003 be interpreted as designating as responsible the Member State in which the minor is present after having lodged an application there.

61 In the interest of unaccompanied minors, it is important, as is evident from paragraph 55 of the present judgment, not to prolong unnecessarily the procedure for determining the Member State responsible, and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status.

62 That method of determining the Member State responsible for examining an asylum application lodged by an unaccompanied minor having no member of his family present in the territory of a Member State is based on an objective criterion as stated in recital 4 in the preamble to Regulation No 343/2003.

63 Furthermore, such an interpretation of the second paragraph of Article 6 of Regulation No 343/2003, which designates as responsible the Member State in which the minor is present after having lodged an application there, does not, contrary to the Netherlands Government's contention in its written observations, mean that an unaccompanied minor whose application for asylum is substantively rejected in one Member State can subsequently compel another Member State to examine an application for asylum.

64 It is clear from Article 25 of Directive 2005/85 that, in addition to cases in which an application is not examined in accordance with Regulation No 343/2003, Member States are not required to examine whether the applicant is a refugee where an application is considered inadmissible because, inter alia, the asylum applicant has lodged an identical application after a final decision has been taken against him.

65 Moreover, it must be added that since the asylum application is required to be examined only by a single Member State, the Member State which, in circumstances such as those of the main proceedings, is designated as responsible by virtue of the second paragraph of Article 6 of Regulation No 343/2003 is to inform accordingly the Member State with which the first application has been lodged.

66 In the light of all the above considerations, the answer to the question referred is that the second paragraph of Article 6 of Regulation No 343/2003 must be interpreted as meaning that, in circumstances such as those of the main proceedings, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the 'Member State responsible'.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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:

The second paragraph of Article 6 of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national must be interpreted as meaning that, in circumstances such as those of the main proceedings, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the 'Member State responsible'.

[Signatures]

Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

9 January 2015*

(Reference for a preliminary ruling — Urgent preliminary ruling procedure — Judicial cooperation in civil matters — Jurisdiction, recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility — Child abduction — Regulation (EC) No 2201/2003 — Article 11(7) and (8))

In Case C-498/14 PPU,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour d'appel de Bruxelles (Belgium), made by decision of 7 November 2014, received at the Court on 10 November 2014, in the proceedings

David Bradbrooke

v

Anna Aleksandrowicz,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, K. Jürimaë, J. Malenovský, M. Safjan and A. Prechal, Judges,

Advocate General: N. Jääskinen,

Registrar: V. Tourrès, Administrator,

having regard to the request of 7 November 2014 by the referring court, received at the Court on 10 November 2014, that the reference for a preliminary ruling be dealt with under an urgent procedure, in accordance with Article 107 of the Court's Rules of Procedure,

having regard to the decision of 18 November 2014 of the Fourth Chamber granting that request,

having regard to the written procedure and further to the hearing on 11 December 2014,

after considering the observations submitted on behalf of:

— the Belgian Government, by C. Pochet, J.-C. Halleux and L. Van den Broeck, acting as Agents,

— the European Commission, by M. Wilderspin, acting as Agent,

after hearing the Advocate General,

* Language of the case: French.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 11(7) and (8) 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: 'the Regulation').

2 The request has been made in proceedings between Mr Bradbrooke and Ms Aleksandrowicz concerning parental responsibility for their son Antoni, who has been retained in Poland by Ms Aleksandrowicz.

Legal context

The 1980 Hague Convention

3 Article 3 of the Convention on the Civil Aspects of International Child Abduction concluded at the Hague on 25 October 1980 ('the 1980 Hague Convention') provides:

'The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in subparagraph (a) may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

4 Article 12 of the 1980 Hague Convention is worded as follows:

'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.

...'

5 Article 13 of the 1980 Hague Convention provides:

'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

...'

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

EU law

7 Recitals 12, 17, 18 and 33 in the preamble to the Regulation are worded as follows:

(12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

...

(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.

(18) Where a court has decided not to return a child on the basis of Article 13 of the 1980 Hague Convention, it should inform the court having jurisdiction or central authority in the Member State where the child was habitually resident prior to the wrongful removal or retention. Unless the court in the latter Member State has been seised, this court or the central authority should notify the parties. This obligation should not prevent the central authority from also notifying the relevant public authorities in accordance with national law.

...

(33) This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union ['the Charter']. In particular, it seeks to ensure full respect for the fundamental rights of the child as recognised in Article 24 of [the Charter].'

8 Article 1(1) and (2) of the Regulation provide:

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

...

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

2. The matters referred to in paragraph 1(b) may, in particular, deal with:

(a) rights of custody and rights of access;

...'

9 Article 2 of the Regulation provides:

'For the purposes of this Regulation:

1. the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1;

...

7. the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;

8. the term "holder of parental responsibility" shall mean any person having parental responsibility over a child;

9. the term "rights of custody" shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;

10. the term "rights of access" shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time;

11. the term "wrongful removal or retention" shall mean a child's removal or retention where:

(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention;

and

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.'

10 Article 8 of the Regulation, headed 'General jurisdiction', provides:

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

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

11 Article 11 of the Regulation, headed ‘Return of the child’, is worded as follows:

‘1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of [the 1980 Hague Convention], in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

…

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

…

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

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, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time-limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.’

12 Article 15(1) of the Regulation, headed ‘Transfer to a court better placed to hear the case’, provides:

‘By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or

(b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.’

Belgian law

13 Article 1322*i* of the Belgian Judicial Code, as amended by the loi du 30 juillet 2013 portant création du tribunal de la famille [law of 30 July 2013 on the creation of a family court] ('the Judicial Code'), is worded as follows:

'§ 1. An order on the non-return of a child issued by a foreign court, together with all accompanying documents, transmitted to the central Belgian authority in accordance with Article 11(6) of [the Regulation], shall be sent by registered post to the Registry of the court of first instance attached to the court of appeal within whose jurisdiction the child was habitually resident immediately before the wrongful removal or retention.

§ 2. Upon receipt of the documents, and by no later than the third working day after receipt, the Registrar shall, by judicial notification, communicate to the parties and to the office of the public prosecutor the information referred to in Article 11(7) of [the Regulation]. The judicial notification shall contain the following information:

1° the text of Article 11 of [the Regulation];

2° an invitation to the parties to lodge submissions at the Registry within three months of the notification. The lodging of submissions shall constitute the bringing of an action before the family court of first instance.

§ 3. If at least one of the parties lodges submissions, the Registrar shall forthwith invite the parties to attend a hearing on the first available date.

§ 4. The bringing of an action before the family court shall give rise to the suspension of any proceedings commenced before courts or tribunals relating to a dispute regarding matters of parental responsibility or a related dispute.

§ 5. If the parties do not make submissions to the court within the period laid down in § 2(2) the family court shall issue an order recording the absence of submissions, and the Registrar shall give notice of that order to the parties, to the central authority and to the [public prosecutor].

§ 6. A judgment on the question of the custody of the child delivered in accordance with Article 11(8) of [the Regulation] may, at the request of one of the parties, also deal with rights of access in the event that the child's return to Belgium is ordered in that judgment.

§ 7. The Registrar shall serve notice of the judgment referred to in § 6 on the parties, the [public prosecutor] and the Belgian authority by judicial notification.

§ 8. The Belgian central authority has sole responsibility to transmit the judgment and the accompanying documents to the competent authorities of the State in which the order on non-return was delivered.

§ 9. For the application of Article 11(7) and (8) of [the Regulation], the child shall be heard in accordance with Article 42(2)(a) of that regulation and Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.'

The main proceedings and the question referred for a preliminary ruling

14 Antoni is a child born in Poland on 21 December 2011, his parents being Ms Aleksandrowicz, who is Polish, and Mr Bradbrooke, who is British and who resides in Belgium.

15 The mother and the child moved to Brussels (Belgium) in July and August 2012, when the child was seven months old. From that date, the child was living with his mother and was regularly in contact with his father.

16 In August and September 2013 the mother and the father attended local mediation services with a view to agreeing accommodation rights with regard to the child, but no agreement was reached.

17 On 16 October 2013 the mother informed the father that she was taking the child on holiday to Poland.

18 By application lodged on 18 October 2013, the father brought an action before the tribunal de la jeunesse de Bruxelles (the court for young persons in Brussels) seeking a ruling on, inter alia, how parental authority over the child was to be exercised and accommodation rights with respect to the child.

19 By a summons of 23 October 2013, the father brought an action before the judge hearing applications for interim measures claiming provisionally and as a matter of urgency that secondary accommodation rights in respect of the child should be granted to him.

20 When the father learned that the mother had no intention of returning to Belgium with their child, he amended his claims before the judge hearing applications for interim measures and before the tribunal de la jeunesse de Bruxelles and sought, inter alia, the exclusive exercise of parental authority, primary accommodation rights in respect of the child and an order prohibiting the mother from leaving Belgian territory with the child. For her part, the mother challenged the international jurisdiction of the Belgian courts, seeking the application of Article 15 of the Regulation and the transfer of the case to the Polish courts, which are particularly connected to the child's situation, since the child is residing in Poland and has in the interim been registered in a nursery school.

21 By order of 19 December 2013 the judge hearing applications for interim measures declared that he had jurisdiction and, provisionally and in the interests of urgency, upheld the father's claims.

22 By judgment of 26 March 2014, the tribunal de la jeunesse de Bruxelles, after confirming that it had jurisdiction, held that parental authority should be exercised jointly by the parents, granted to the mother primary accommodation rights in respect of the child and temporarily granted to the father secondary accommodation rights on alternate week-ends, it being his responsibility to travel to Poland.

23 Since the father considered that that judgment ratified the wrongful removal of their child to Poland and accorded to that wrongful act a positive legal consequence, the father brought an appeal against that judgment before the cour d'appel de Bruxelles, seeking, principally, the exclusive exercise of parental authority and primary accommodation rights in respect of the child.

24 At the same as bringing proceedings on the substance before the Belgian courts, on 20 November 2013 the father brought an application before the Belgian central authority for the return forthwith of the child to Belgium under the return procedure established by the 1980 Hague Convention.

25 On 13 February 2014 the district court of Płońsk (Poland) declared that the child had been wrongfully removed by his mother and that the child had been habitually resident in Belgium before the removal. The court none the less decided to issue an order on the non-return of the child on the basis of Article 13b of the 1980 Hague Convention.

26 The Belgian central authority, which received from the Polish central authority a copy of that non-return order and the relevant documents, lodged that file, on 10 April 2014, at the registry of the tribunal de première instance francophone de Bruxelles [French language court of first instance, Brussels], which court invited the parties to lodge submissions. The effect of the father's lodging of submissions with that court, on 9 July 2014, was to seise the President of the tribunal de première instance francophone de Bruxelles, which court had jurisdiction, in accordance with Article 1322*i* of the Judicial Code, in the version applicable prior to the entry into force of the loi du 30 juillet 2013 portant création du tribunal de la famille [law of 30 July 2013 on the creation of a family court], to examine the question of custody with respect to the child, pursuant to Article 11(6) and (7) of the Regulation. Under Article 1322*i* of the Judicial Code, the bringing of an action before that court entails that proceedings commenced before courts and tribunals seised of a dispute concerning parental responsibility or a related dispute are to be stayed. After the entry into force of the 2013 legislation, the case was reallocated to the tribunal de la famille de Bruxelles [the family court in Brussels].

27 By an interlocutory judgment of 30 July 2014, delivered in the absence of the mother, the cour d'appel de Bruxelles upheld the judgment delivered by the tribunal de la jeunesse de Bruxelles in that it declared that the Belgian court had international jurisdiction to rule on the substance of questions relating to parental responsibility. On the other hand, holding that an action based on Article 11(6) and (7) of the Regulation had in the interim been brought before the President of the tribunal de première instance francophone de Bruxelles, the cour d'appel stayed its ruling on the substance of the dispute and requested the Belgian central authority to lodge in the court file for the proceedings before it the entire file which that authority had lodged, under Article 1322*i* of the Judicial Code, at the registry of the tribunal de première instance francophone de Bruxelles. Last, pending the outcome, before the latter court, of the procedure set out in Article 11(6) to (8) of the Regulation, the cour d'appel de Bruxelles made a provisional ruling and ordered the mother to disclose to the father the address of her new place of residence with the child and laid down arrangements for the exercise of the father's right of access to the child.

28 Since the mother refuses to disclose the address where she is living with the child, the father has not been able to exercise the right of access granted to him by the cour d'appel de Bruxelles.

29 At the same time as proceedings were brought by the father in Belgium, the mother brought a number of legal actions in Poland relating to parental responsibility. The Polish courts, after finding that the Belgian court had been first seised and had declared that it had international jurisdiction, held that they had no jurisdiction in the matter.

30 By final judgment delivered on 8 October 2014, the tribunal de la famille de Bruxelles referred the case to the cour d'appel de Bruxelles, on the ground that the Belgian courts had been seised by the father before the wrongful removal of the child for the purposes of Article 11(7) of the Regulation and that the substantive proceedings were pending before the cour d'appel.

31 The cour d'appel de Bruxelles considers that, under Belgian law, it cannot regard itself as seised of the procedure set out in Article 11(6) to (8) of the Regulation by the referral judgment delivered by the tribunal de la famille de Bruxelles on 8 October 2014. The cour d'appel considers that it could be seised of that procedure only by an appeal being brought by one of the parties against that judgment.

32 The cour d'appel seeks to ascertain whether, taking into account the requirements of expedition and efficiency which must be met by the procedure set out in Article 11(6) to (8) of the Regulation, Article 11(7) precludes the law of a Member State from allocating to a specialised court exclusive jurisdiction to deal with such a procedure and providing at the same time that all proceedings relating to parental authority commenced before a court or tribunal are to be stayed from the moment when that specialised court is seised.

33 Accordingly, the cour d'appel de Bruxelles considers that it is necessary to refer to the Court of Justice for a preliminary ruling a question on the interpretation of Article 11(7) and (8) of the Regulation, in order to be able to determine which Belgian court has jurisdiction under EU law and, in particular, to decide whether it is for the cour d'appel itself, seised of the substantive proceedings relating to parental responsibility, to give a ruling in accordance with the procedure set out in Article 11(6) to (8) of the Regulation.

34 In those circumstances, the cour d'appel de Bruxelles decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'Are the provisions in Article 11(7) and (8) of the Regulation to be interpreted as precluding a Member State from:

— giving preference to the specialisation of courts in situations of parental child abduction with respect to the procedure provided for in those provisions even where a court or tribunal has already been seised of proceedings concerning the substance of parental responsibility in relation to the child?

— removing, from the court seised of proceedings on the substance of parental responsibility in relation to the child, jurisdiction to give judgment on the custody of the child, even though that court has jurisdiction, under international and national law, to give judgment on questions of parental responsibility in relation to the child?'

The urgent preliminary ruling procedure

35 The cour d'appel de Bruxelles requested that the reference for a preliminary ruling be dealt with under the urgent procedure provided for in Article 107 of the Court's Rules of Procedure, because of the extreme urgency of the main proceedings. Those proceedings relate to the exercise of parental authority and custody with respect to a child in circumstances where there is a risk of irreparable damage to the relationship between the father and his son, the son being currently deprived of any contact with his father.

36 It is clear, first, that the reference for a preliminary ruling concerns the interpretation of the Regulation, which was adopted in particular on the basis of Article 61(c) EC, now Article 67 TFEU, which is in Title V of Part Three of the FEU Treaty, relating to the area of freedom, security and justice, and consequently that reference falls within the scope of the urgent preliminary ruling procedure defined in Article 107 of the Rules of Procedure.

37 Secondly, it is stated in the order for reference that Ms Aleksandrowicz refuses to comply with the judgment delivered by the cour d'appel de Bruxelles on 30 July 2014, whereby that court, first, ordered Ms Aleksandrowicz to disclose to Mr Bradbrooke, within eight days from the date of notification of that judgment, the address where she is now residing with the child, and, second, held that Mr Bradbrooke was to have rights of access to Antoni on alternate weekends, if the parties did not make other arrangements.

38 In that regard, it must be stated that this case concerns a three-year-old child who has been separated from his father for more than a year. Consequently, any continuation of the current situation, an additional feature of which is the significant distance between where the father resides and where the child is living, could seriously harm the child's future relationship with his father.

39 In those circumstances the Fourth Chamber of the Court decided, on the basis of Article 108 of the Rules of Procedure, on the Judge-Rapporteur's proposal and after hearing the Advocate General, to grant the referring court's request that the reference for a preliminary ruling be dealt with under the urgent procedure.

Consideration of the question referred for a preliminary ruling

40 By its question, the referring court seeks, in essence, to ascertain whether Article 11(7) and (8) of the Regulation must be interpreted as precluding a Member State from allocating to a specialised court the jurisdiction to examine questions relating to return or custody of a child in the context of the procedure laid down by those provisions, even where proceedings on the substance of parental responsibility with respect to the child have already been brought before a court or tribunal.

41 It must be recalled that the object of the Regulation is not to unify the rules of substantive law and of procedure of the different Member States. Nevertheless, it is important that the application of those national rules does not impair the Regulation's effectiveness (see, to that effect, the judgment in *Rinau*, C-195/08 PPU, EU:C:2008:406, paragraph 82).

42 In that context, it must also be pointed out that it is stated in recital 33 in the preamble to the Regulation that it recognises the fundamental rights and observes the principles of the Charter. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter, which include the right to maintain on a regular basis personal relationships and direct contact with both of his or her parents (see, to that effect, the judgment in *McB*, C-400/10 PPU, EU:C:2010:582, paragraph 60).

43 Article 11(6) of the Regulation states that if, following the abduction of a child, a court issues an order on non-return pursuant to Article 13 of the 1980 Hague Convention, that court must immediately transmit a copy of the court order on non-return and the relevant documents to the court with jurisdiction or the central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. It must be observed that the explicit reference to national law indicates, inter alia, that it is for the Member State where the child was habitually resident immediately before the removal to determine, with due regard to the objectives of the Regulation, which court has jurisdiction to rule on the issue of the return of the child, after an order on non-return has been issued in the Member State to which the child was removed.

44 As regards Article 11(7) of the Regulation, it provides that, where a court order on non-return has been adopted, unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised, the court or central authority which receives the information relating to that court order must notify it to the parties and invite them to make submissions to the court, so that that court can examine the question of custody of the child. However, neither that provision of the Regulation nor Article 11(6) thereof identifies the national court which has jurisdiction to examine the question of custody of the child after an order on non-return has been issued. The same is true of Article 11(8) of the Regulation.

45 In that regard, while, pursuant to Article 11(7) of the Regulation, that court or central authority must serve on the parties, inter alia, a copy of the order on non-return issued under Article 13 of the 1980 Hague Convention, in order to permit, where appropriate, examination of the question of custody of

the child, unless the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised, the question whether, where those courts have indeed been seised, the court determined by that Member State to have jurisdiction with respect to that examination can be required to cede jurisdiction to other courts in the same Member State is a matter of national law.

46 As stated by the Advocate General in point 60 of his View, Article 11(7) of the Regulation represents not a legal rule designed to determine which court has jurisdiction, but rather a legal rule of a technical nature the primary purpose of which is to determine the arrangements for the notification of information relating to the order on non-return.

47 Further, it may be recalled that, in accordance with the Court's case-law, it cannot be inferred from Article 11(7) of the Regulation that a decision on the custody of the child is a prerequisite for the adoption, where appropriate, of a decision ordering the return of the child. The purpose of the latter decision, an interim measure, is also to contribute to the achievement of the final objective of the administrative and judicial procedures, namely regularisation of the child's situation (see, to that effect, the judgment in *Povse*, C-211/10 PPU, EU:C:2010:400, paragraph 53).

48 While the Belgian Government argues that, under national procedural law, the specialised court seised of the question of return of the child under Article 11(6) to (8) of the Regulation could, at the request of one of the parties, refer the case to the cour d'appel seised of the substantive dispute relating to parental responsibility, so that the latter court could rule on both the question of return and the question of custody with respect to the child, that point concerns the interpretation of national law and is outside the jurisdiction of the Court of Justice. Consequently that point must be decided by the Belgian courts.

49 It follows from the foregoing that the determination of the national court which has jurisdiction to examine questions of return or custody with respect to the child in the context of the procedure set out in Article 11(6) to (8) of the Regulation is a matter of choice by the Member States, even in the situation where, at the time when a decision on the non-return of a child is notified, a court or a tribunal has already been seised of substantive proceedings relating to parental responsibility over that child.

50 However, as stated in paragraph 41 of this judgment, that choice must not impair the effectiveness of the Regulation.

51 The fact that a Member State allocates to a specialised court the jurisdiction to examine questions of return or custody with respect to a child in the context of the procedure set out in Article 11(7) and (8) of the Regulation, even where proceedings on the substance of parental responsibility with respect to the child have already, separately, been brought before a court or tribunal, cannot, as such, impair the effectiveness of the Regulation.

52 However, it must be ensured that, in circumstances such as those of the main proceedings, such an allocation of jurisdiction is compatible with the child's fundamental rights as stated in Article 24 of the Charter and, in particular, with the objective that procedures should be expeditious.

53 As regards the objective of expedition, it must be recalled that when applying the relevant provisions of domestic law, the national court called on to interpret them is bound to do so with due regard to EU law and in particular the Regulation.

54 In the light of the foregoing, the answer to the question referred is that Article 11(7) and (8) of the Regulation must be interpreted as not precluding, as a general rule, a Member State from allocating to a specialised court the jurisdiction to examine questions of return or custody with respect to a

child in the context of the procedure set out in those provisions, even where proceedings on the substance of parental responsibility with respect to the child have already, separately, been brought before a court or tribunal.

Costs

55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 11(7) and (8) 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, must be interpreted as not precluding, as a general rule, a Member State from allocating to a specialised court the jurisdiction to examine questions of return or custody with respect to a child in the context of the procedure set out in those provisions, even where proceedings on the substance of parental responsibility with respect to the child have already, separately, been brought before a court or tribunal.

[Signatures]

Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

13 September 2016*

(Reference for a preliminary ruling — Citizenship of the Union — Articles 20 and 21 TFEU — Directive 2004/38/EC — Right of a third-country national with a criminal record to reside in a Member State — Parent having sole care of two minor children, who are Union citizens — First child possessing the nationality of the Member State of residence — Second child possessing the nationality of another Member State — National legislation precluding grant of a residence permit to the father because of his criminal record — Refusal of residence capable of resulting in the children being obliged to leave the territory of the European Union)

In Case C-165/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decision of 20 March 2014, received at the Court on 7 April 2014, in the proceedings

Alfredo Rendón Marín

v

Administración del Estado,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, C. Toader, D. Šváby, F. Biltgen and C. Lycourgos, Presidents of Chambers, A. Rosas (Rapporteur), E. Juhász, A. Borg Barthet, M. Safjan, M. Berger, A. Prechal and K. Jürimäe, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 June 2015,

after considering the observations submitted on behalf of:

— Mr Rendón Marín, by I. Aránzazu Triguero Hernández and L. De Rossi, abogadas,

— the Spanish Government, by A. Rubio González and L. Banciella Rodríguez-Miñón, acting as Agents,

— the Danish Government, by C. Thorning and M. Wolff, acting as Agents,

* Language of the case: Spanish.

— the Greek Government, by T. Papadopoulou, acting as Agent,

— the French Government, by D. Colas and R. Coesme, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, and L. D'Ascia, avvocato dello Stato,

— the Netherlands Government, by M. Bulterman and B. Koopman, acting as Agents,

— the Polish Government, by B. Majczyna, K. Pawłowska and M. Pawlicka, acting as Agents,

— the United Kingdom Government, by M. Holt and J. Beeko, acting as Agents, and D. Blundell, Barrister,

— the European Commission, by I. Martínez del Peral, C. Tufvesson, F. Castillo de la Torre and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 February 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 20 TFEU.

2 The request has been made in proceedings between Alfredo Rendón Marín — a third-country national and the father of Union citizens who are minors in his sole care who have been resident in Spain since birth — and Administración del Estado (State Administration, Spain) concerning the refusal of the Director General de Inmigración del Ministerio de Trabajo e Inmigración (Director-General of Immigration of the Ministry of Labour and Immigration), on account of Mr Rendón Marín's criminal record, to grant him a residence permit on the basis of exceptional circumstances.

Legal context

EU law

3 As stated in recitals 23 and 24 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 at OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34):

'(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the [EC] Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.

(24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.'

4 Article 2 of Directive 2004/38, headed 'Definitions', states:

'For the purpose of this Directive:

1. "Union citizen" means any person having the nationality of a Member State;

2. "family member" means:

...

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3. "host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.'

5 Article 3 of Directive 2004/38, headed 'Beneficiaries', provides:

'1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence ...;

...

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.'

6 Article 7 of Directive 2004/38, headed 'Right of residence for more than three months', provides in paragraphs 1 and 2:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

...

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).'

7 In Chapter IV of Directive 2004/38, headed 'Right of permanent residence', Article 16, itself headed 'General rule for Union citizens and their family members', provides in paragraphs 1 and 2:

'1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.'

8 In Chapter VI of Directive 2004/38, which is headed 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health', Article 27(1) and (2) provides:

'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.'

9 Article 28 of Directive 2004/38, headed 'Protection against expulsion', provides:

'1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous 10 years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.'

Spanish law

10 Article 31(3) of Ley Orgánica 4/2000 sobre derechos y libertades de los extranjeros en España y su integración social (Basic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration) of 11 January 2000 (BOE No 10 of 12 January 2000, p. 1139) provides for the possibility of granting a temporary residence permit for exceptional reasons, without it being necessary for the third-country national first to be in possession of a visa.

11 Article 31(5) and (7) of that law provides:

'5. In order for a foreign national to be granted temporary residence, he must have no criminal record in Spain or in countries in which he has previously resided, relating to offences which exist in Spanish law, and must not have been proscribed from the territory of any State with which Spain has concluded an agreement to that effect.

...

7. In order for a temporary residence permit to be renewed, the following shall be assessed, where appropriate:

(a) any criminal record, account being taken of any pardon, conditional remission of a sentence or suspension of a custodial sentence;

(b) any failure on the foreign national's part to fulfil obligations in matters of taxation or social security.

For the purposes of such renewal, particular account shall be taken of any efforts at integration which the foreign national has made which militate in favour of renewal, such efforts to be demonstrated by means of a positive report from the autonomous community confirming the individual's attendance at the training sessions referred to in Article 2 *ter* of this law.'

12 Real Decreto 2393/2004 por el que se aprueba el Reglamento de la Ley Orgánica 4/2000 (Royal Decree 2393/2004 approving the rules for the implementation of Basic Law 4/2000) of 30 December 2004 (BOE No 6 of 7 January 2005, p. 485) provided, in paragraph 4 of its First Additional Provision:

'… the Secretary of State for Immigration and Emigration may, acting on a report from the Secretary of State for Security, issue an individual temporary residence permit where exceptional circumstances not provided for in these rules obtain.'

13 Articles 124 and 128 of Real Decreto 557/2011 por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, tras su reforma por Ley Orgánica 2/2009 (Royal Decree 557/2011 approving the rules for the implementation of Basic Law 4/2000, following its amendment by Basic Law 2/2009) of 20 April 2011 (BOE No 103 of 30 April 2011, p. 43821) provide for the possibility of applying for a temporary residence permit on the basis of exceptional circumstances on account of family ties (*arraigo familiar*), provided that the applicant does not have a criminal record in Spain or in countries in which he has previously resided, relating to offences which exist in Spanish law.

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

14 Mr Rendón Marín, a Colombian national, is the father of two minor children born in Malaga (Spain), namely a boy of Spanish nationality and a girl of Polish nationality. The children have always resided in Spain.

15 It is apparent from the documents before the Court that, by decision of the Juzgado de Primera Instancia de Málaga (Court of First Instance, Malaga, Spain) of 13 May 2009, Mr Rendón Marín was granted sole care and custody of his children. The whereabouts of the children's mother, a Polish national, are unknown. According to the order for reference, the two children are receiving appropriate care and schooling.

16 Mr Rendón Marín has a criminal record. In particular, he was sentenced in Spain to a term of nine months' imprisonment. However, he was granted a provisional two-year suspension of that sentence with effect from 13 February 2009. On the date of the order for reference, namely 20 March 2014, he was awaiting a decision on an application for mention of his criminal record to be removed from the register (*cancelación*).

17 On 18 February 2010, Mr Rendón Marín lodged an application with the Director-General of Immigration of the Ministry of Labour and Immigration for a temporary residence permit on the basis of exceptional circumstances, pursuant to paragraph 4 of the First Additional Provision of Royal Decree 2393/2004.

18 By decision of 13 July 2010, Mr Rendón Marín's application was rejected pursuant to Article 31(5) of Law 4/2000 because he had a criminal record.

19 Mr Rendón Marín's appeal against that decision was dismissed by judgment of the Audiencia Nacional (National High Court (Spain)) of 21 March 2012, whereupon he brought an appeal against that judgment before the Tribunal Supremo (Supreme Court, Spain).

20 Mr Rendón Marín based his appeal against the judgment on a single plea in law, alleging (i) misinterpretation of the judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639), and of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), since the case-law resulting from those judgments should, in his submission, have led to him being granted the residence permit sought, and (ii) infringement of Article 31(3) and (7) of Law 4/2000.

21 The referring court states that, leaving aside the specific circumstances of the main proceedings, in this case, as in the cases which gave rise to the judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639), and of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), the refusal in Spain to grant Mr Rendón Marín a residence permit would result in his removal from Spanish territory and, therefore, from the territory of the European Union, which the two minor children, his dependants, would leave as a consequence. That court observes, however, that, in contrast to the situations examined in the judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639), and of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), the applicable national legislation lays down a prohibition on the grant of a residence permit when the applicant has a criminal record in Spain.

22 Consequently, the referring court is uncertain whether national law, which prohibits, without any possibility of derogation, the grant of a residence permit when the applicant has a criminal record in the country where the permit is applied for, even though that has the unavoidable consequence of depriving a minor, a Union citizen who is a dependant of the applicant for a residence permit, of his right to reside in the European Union, is consistent with the Court's case-law, relied on in the case, relating to Article 20 TFEU.

23 It was in those circumstances that the Tribunal Supremo (Supreme Court) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is national legislation which excludes the possibility of granting a residence permit to the parent of a Union citizen who is a minor and a dependant of that parent on the ground that the parent has a criminal record in the country in which the application is made consistent with Article 20 TFEU, interpreted in the light of the judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639), and of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), even if this results in the removal of the child from the territory of the European Union, inasmuch as the child will have to leave with its parent?'

Continuance of the dispute in the main proceedings

24 It is clear from both the wording and the scheme of Article 267 TFEU that the preliminary ruling procedure presupposes that a dispute is actually pending before the national courts in which they are called upon to give a decision which is capable of taking account of the preliminary ruling (judgment of 11 September 2008, *UGT-Rioja and Others*, C-428/06 to C-434/06, EU:C:2008:488, paragraph 39 and the case-law cited). Therefore, the Court may verify of its own motion that the dispute in the main proceedings is continuing.

25 Here, the dispute relates to the refusal to grant Mr Rendón Marín a temporary residence permit in Spain, an appeal having been brought before the Tribunal Supremo (Supreme Court) against the judgment of the Audiencia Nacional (National High Court) of 21 March 2012, which had dismissed Mr Rendón Marín's appeal against the decision rejecting his application for a residence permit.

26 It is apparent from the documents before the Court and the submissions of Mr Rendón Marín and the Spanish Government at the hearing that, after the Tribunal Supremo (Supreme Court) made the present request for a preliminary ruling, the appellant in the main proceedings lodged with the government office in Malaga two fresh applications for a temporary residence permit on grounds of exceptional circumstances, the second of which was granted.

27 At the hearing, the Spanish Government indeed stated that Mr Rendón Marín was granted a temporary residence permit on 18 February 2015 by the Subdelegación del Gobierno en Málaga (Government Office in the Province of Malaga, Spain). It is apparent from Mr Rendón Marín's oral submissions that he obtained that temporary residence permit on grounds of exceptional circumstances founded on family ties to the country of residence, under Articles 124 and 128 of Royal Decree 557/2011, as a result of the removal by the competent Spanish authority of the mention of his criminal record from the register (*cancelación*).

28 In those circumstances, the referring court was requested to inform the Court whether it still needed a reply from the Court in order to give judgment.

29 By letter of 9 March 2016, the referring court stated that the claim set out in the administrative appeal seeking a temporary residence permit had been satisfied by the decision made by the Government Office in the Province of Malaga on 18 February 2015, but that it wished to maintain its request for a preliminary ruling.

30 According to the referring court, the grant of a residence permit to Mr Rendón Marín in February 2015 does not amount to full satisfaction of the claims set out in the context of the main action. It considers that, if the administrative appeal had been upheld, the contested decision of 13 July 2010 rejecting his application for a residence permit would have been declared unlawful and the grant of the resulting residence permit would have produced effects from that date. The nullity of that decision and the grant of a residence permit as at that date could have consequences for the appellant

in the main proceedings going beyond the grant itself, such as compensation for the loss of employment contracts, of social benefits or of social security contributions or even, as the case may be, conferral of the right to acquire Spanish nationality.

31 It must thus be found that the dispute in the main proceedings is still pending before the referring court and that a reply from the Court to the question asked remains useful for deciding that dispute.

32 An answer should therefore be given in response to the request for a preliminary ruling.

Consideration of the question referred

33 In the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts (see, inter alia, judgments of 14 October 2010, *Fuß*, C-243/09, EU:C:2010:609, paragraph 39; of 30 May 2013, *Worten*, C-342/12, EU:C:2013:355, paragraph 30; and of 19 September 2013, *Betriu Montull*, C-5/12, EU:C:2013:571, paragraph 40).

34 Consequently, even though the referring court has limited its question to the interpretation of Article 20 TFEU, that does not prevent the Court from providing it with all the elements of interpretation of EU law that may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its question. It is, in this regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute (see, inter alia, judgments of 14 October 2010, *Fuß*, C-243/09, EU:C:2010:609, paragraph 40; of 30 May 2013, *Worten*, C-342/12, EU:C:2013:355, paragraph 31; and of 19 September 2013, *Betriu Montull*, C-5/12, EU:C:2013:571, paragraph 41).

35 In the light of that case-law and given the information in the order for reference, it is appropriate to reformulate the question submitted, as meaning that the referring court asks, in essence, whether, first, Article 21 TFEU and Directive 2004/38 and, secondly, Article 20 TFEU must be interpreted as precluding national legislation which requires a third-country national to be automatically refused the grant of a permit authorising him to reside on the territory of the Member State concerned when he has a criminal record, even though he has sole responsibility for two minor children who are Union citizens and have been residing with him in that Member State since their birth, without having exercised their right of freedom of movement, and that refusal has the consequence of requiring the children to leave the territory of the European Union.

36 In this connection, it should be noted at the outset that any rights which are granted to third-country nationals by provisions of EU law on citizenship of the Union are not autonomous rights of those nationals, but rights derived from the exercise of freedom of movement and residence by a Union citizen (see, to this effect, judgments of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 35; of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 22; and of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 36 and the case-law cited). Thus, a derived right of residence of a third-country national exists, in principle, only when it is necessary in order to ensure that a Union citizen can exercise effectively his rights to move and reside freely in the European Union.

37 In that context, it must be examined whether a third-country national such as Mr Rendón Marín may enjoy a derived right of residence, founded either on Article 21 TFEU and Directive 2004/38 or on Article 20 TFEU, and, should that be the case, whether his criminal record is capable of justifying a limitation of that right.

Article 21 TFEU and Directive 2004/38

The existence of a derived right of residence founded on Article 21 TFEU and Directive 2004/38

38 Article 3(1) of Directive 2004/38 defines as 'beneficiaries' of the rights conferred by the directive 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them'.

39 In the present instance, Mr Rendón Marín is a third-country national and the father of Union citizens who are minors in his sole care who have always resided in the same Member State, namely the Kingdom of Spain.

40 As Mr Rendón Marín's son, who is a minor, has never made use of his right of freedom of movement and has always resided in the Member State of which he is a national, that child is not covered by the concept of 'beneficiary' within the meaning of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him (judgments of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 57, and of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 42).

41 On the other hand, as the Spanish, Greek, Italian and Polish Governments and the Commission have submitted, Mr Rendón Marín's daughter, a child who is a minor of Polish nationality resident in Spain since birth, is covered by the concept of 'beneficiary' within the meaning of Article 3(1) of Directive 2004/38.

42 Indeed, the Court has pointed out that the situation, in the host Member State, of a national of another Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation, depriving that national of the benefit, in the host Member State, of the provisions of EU law on freedom of movement and of residence (see, to this effect, judgment of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 19).

43 It follows that Mr Rendón Marín's daughter is entitled to rely on Article 21(1) TFEU and the measures adopted to give it effect (see, to this effect, judgment of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 26).

44 Accordingly, Article 21(1) TFEU and Directive 2004/38 in principle confer a right to reside in Spain on Mr Rendón Marín's daughter.

45 However, according to the Court, that right of citizens of the Union to reside in a Member State other than that of which they are a national is recognised subject to the limitations and conditions imposed by the FEU Treaty and by the measures adopted to give it effect (judgment of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 26). Those limitations and conditions must be applied in compliance with the limits imposed by EU law and in accordance with the general principles of EU law, in particular the principle of proportionality (see to this effect, in particular, judgments of 17 September 2002, *Baumbast and R*, C-413/99, EU:C:2002:493, paragraph 91, and of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 32).

46 As regards those conditions, all Union citizens have the right of residence for a period of longer than three months on the territory of a Member State other than that of which they are a national if, in particular, they have, in accordance with Article 7(1)(b) of Directive 2004/38, sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State.

47 Unless Mr Rendón Marín's daughter has acquired a right of permanent residence in Spain, by virtue of Article 16(1) of Directive 2004/38, in which case her right of residence would not be subject to the conditions provided for in Chapter III of the directive, in particular those laid down in Article 7(1)(b), she can be granted a right of residence only if she fulfils the conditions prescribed in Article 7(1)(b).

48 In that regard, the Court has already held that, while the Union citizen must have sufficient resources, EU law does not, however, lay down any requirement whatsoever as to their origin, and they may be provided, inter alia, by a third-country national who is a parent of the citizens who are minors (see, to this effect, judgments of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 30, and of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 27).

49 In the present instance, it is apparent from the order for reference that Mr Rendón Marín's children are receiving appropriate care and schooling. The Spanish Government stated in addition at the hearing that, pursuant to Spanish law, Mr Rendón Marín is entitled to sickness insurance for himself and his children. Nevertheless, it is for the referring court to establish whether Mr Rendón Marín's daughter has, herself or through her father, sufficient resources and comprehensive sickness insurance cover, within the meaning of Article 7(1)(b) of Directive 2004/38.

50 As regards whether Mr Rendón Marín, a third-country national, may, as a direct ascendant of a Union citizen having a right of residence under Directive 2004/38, rely on a derived right of residence, it is clear from the case-law of the Court that the status of 'dependent' family member of a Union citizen holding a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence, so that, when, as in the present instance, the converse situation occurs and the holder of the right of residence is dependent on a third-country national, the third-country national cannot rely on being a 'dependent' relative in the ascending line of that right-holder, within the meaning of Directive 2004/38, with a view to having the benefit of a right of residence in the host Member State (see, to this effect, judgment of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 25).

51 However, a refusal to allow a parent, a third-country national, who is the carer of a minor child who is a Union citizen to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since enjoyment by a child who is a minor of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence (see judgments of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 45, and of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 28).

52 Thus, while Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor who is a national of another Member State and who satisfies the conditions laid down in Article 7(1)(b) of that directive, the same provisions allow a parent who is that minor's primary carer to reside with him in the host Member State (judgments of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraphs 46 and 47, and of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 29).

53 Leaving aside the situation contemplated in paragraph 47 above, if — a matter which, as has been pointed out in paragraph 49 above, is for the referring court to establish — Mr Rendón Marín's daughter fulfils the conditions laid down in Article 7(1) of Directive 2004/38 for having a right to reside in Spain on the basis of Article 21 TFEU and of that directive, the latter have to be interpreted as precluding, in principle, Mr Rendón Marín being refused a derived right to reside on the territory of that Member State.

The effect of a criminal record on recognition of a derived right of residence, in the light of Articles 27 and 28 of Directive 2004/38

54 It should now be examined whether any derived right of residence of M. Rendón Marín may be limited by national legislation such as that at issue in the main proceedings.

55 It must be pointed out that the right of Union citizens and their family members to reside in the European Union is not unconditional but may be subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect (see, inter alia, judgment of 10 July 2008, *Jipa*, C-33/07, EU:C:2008:396, paragraph 21 and the case-law cited).

56 It should also be noted that, according to recital 23 of Directive 2004/38, expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. For that reason, as follows from recital 24, Directive 2004/38 establishes a system of protection against expulsion measures which is based on the degree of integration of the persons concerned in the host Member State, so that the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be (judgment of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, paragraphs 24 and 25).

57 So far as concerns the main proceedings, the limitations on the right of residence derive in particular from Article 27(1) of Directive 2004/38, which provides that Member States may restrict the right of residence of Union citizens and their family members, irrespective of nationality, on grounds, in particular, of public policy or public security (see, to this effect, judgment of 10 July 2008, *Jipa*, C-33/07, EU:C:2008:396, paragraph 22).

58 It is settled case-law that the public policy exception constitutes a derogation from the right of residence of Union citizens and their family members, which must be interpreted strictly and the scope of which cannot be determined unilaterally by the Member States (see, to this effect, judgments of 4 December 1974, *van Duyn*, 41/74, EU:C:1974:133, paragraph 18; of 27 October 1977, *Bouchereau*, 30/77, EU:C:1977:172, paragraph 33; of 29 April 2004, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, EU:C:2004:262, paragraph 65; of 27 April 2006, *Commission* v *Germany*, C-441/02, EU:C:2006:253, paragraph 34; and of 7 June 2007, *Commission* v *Netherlands*, C-50/06, EU:C:2007:325, paragraph 42).

59 As is apparent from the first subparagraph of Article 27(2) of Directive 2004/38, in order to be justified, measures restricting the right of residence of a Union citizen or a member of his family, including measures taken on grounds of public policy, must comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned.

60 It should be added that Article 27(2) of the directive makes clear that previous criminal convictions cannot in themselves constitute grounds for taking public policy or public security measures, that the personal conduct of the individual concerned must represent a genuine and present threat affecting one of the fundamental interests of society or of the Member State concerned, and that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention

cannot be accepted (see, to this effect, judgments of 10 July 2008, *Jipa*, C-33/07, EU:C:2008:396, paragraph 23 and 24, and of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, paragraph 48).

61 It follows that EU law precludes a limitation on the right of residence that is founded on grounds of a general preventive nature and ordered for the purpose of deterring other foreign nationals, in particular where that measure has been adopted automatically following a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy (see, to this effect, judgment of 27 April 2006, *Commission* v *Germany*, C-441/02, EU:C:2006:253 paragraph 93 and the case-law cited).

62 Thus, in order to determine whether an expulsion measure is proportionate to the legitimate aim pursued, in the present instance protection of the requirements of public policy or public security, account should be taken of the criteria set out in Article 28(1) of Directive 2004/38, namely how long the individual concerned has resided on the territory of the host Member State, his age, his state of health, his family and economic situation, his social and cultural integration into the host Member State and the extent of his links with his country of origin. The degree of gravity of the offence must also be taken into consideration in the context of the principle of proportionality.

63 However, the legislation at issue in the main proceedings makes the grant of an initial residence permit automatically conditional — with no possibility of derogation — on the person concerned having no criminal record in Spain or in the countries in which he has previously resided.

64 In the present instance, the order for reference indicates that, pursuant to this legislation, the application for a temporary residence permit on the basis of exceptional circumstances which Mr Rendón Marín submitted on 18 February 2010 was rejected because he had a criminal record. The residence permit applied for was thus refused automatically, without account being taken of the specific situation of the appellant in the main proceedings, that is to say, without assessment of his personal conduct or of any present danger that he could represent for the requirements of public policy or public security.

65 As regards assessment of the circumstances that are relevant in the present instance, it is apparent from the documents before the Court that Mr Rendón Marín was convicted of an offence committed in 2005. That previous criminal conviction cannot in itself constitute grounds for refusing a residence permit. While the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and the Court has pointed out that the condition relating to the existence of a present threat must, in principle, be fulfilled at the time when the measure at issue is adopted (see, inter alia, judgment of 27 October 1977, *Bouchereau*, 30/77, EU:C:1977:172, paragraph 28), that does not seem to be the case here as the custodial sentence imposed on Mr Rendón Marín was suspended and does not appear to have been enforced.

66 As regards, moreover, the possible expulsion of Mr Rendón Marín, it is necessary, first, to take account of the fundamental rights whose observance the Court ensures, in particular the right to respect for private and family life, as laid down in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') (see, to this effect, judgment of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, paragraph 52) and, secondly, to observe the principle of proportionality. Article 7 of the Charter must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) thereof (see, to this effect, judgment of 23 December 2009, *Detiček*, C-403/09 PPU, EU:C:2009:810, paragraphs 53 and 54).

67 Having regard to all the foregoing considerations, Article 21 TFEU and Directive 2004/38 must be interpreted as precluding national legislation which requires a third-country national to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record where he is the parent of a minor child who is a Union citizen and who is his dependant and resides with him in the host Member State.

Article 20 TFEU

The existence of a derived right of residence pursuant to Article 20 TFEU

68 In the event that the referring court, when reviewing the conditions laid down in Article 7(1) of Directive 2004/38, comes to the conclusion that those conditions are not fulfilled and, in any event, so far as concerns Mr Rendón Marín's son, a minor, who has always resided in the Member State of which he is a national, it should be examined whether a derived right of residence for Mr Rendón Marín may, where appropriate, be founded on Article 20 TFEU.

69 It must be recalled first of all that, in accordance with the Court's settled case-law, Article 20 TFEU confers on every individual who is a national of a Member State citizenship of the Union, which is intended to be the fundamental status of nationals of the Member States (see judgment of 30 June 2016, *NA*, C-115/15, EU:C:2016:487, paragraph 70 and the case-law cited).

70 Citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaty and the measures adopted for their implementation (see, to this effect, judgments of 7 October 2010, *Lassal*, C-162/09, EU:C:2010:592, paragraph 29, and of 16 October 2012, *Hungary* v *Slovakia*, C-364/10, EU:C:2012:630, paragraph 43).

71 As the Court held in paragraph 42 of the judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens.

72 On the other hand, the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals (judgments of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 66, and of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 34).

73 As has been noted in paragraph 36 above, any rights conferred on third-country nationals by the Treaty provisions on citizenship of the Union are not autonomous rights of those nationals but rights derived from those enjoyed by the Union citizen. The purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere, in particular, with the Union citizen's freedom of movement (judgments of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraphs 67 and 68, and of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 35).

74 In this connection, the Court has already held that there are very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence must nevertheless be granted to a third-country national who is a family member of his since the effectiveness of citizenship of the Union would otherwise be undermined, if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status (see, to this effect, judgments of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraphs 43 and 44; of 15 November 2011, *Dereci and Others*, C-256/11,

EU:C:2011:734, paragraphs 66 and 67; of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 71; of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 36; and of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 32).

75 The above situations have the common feature that, although they are governed by legislation which falls, a priori, within the competence of the Member States, namely legislation on the right of entry and residence of third-country nationals outside the scope of provisions of secondary legislation which provide for the grant of such a right under certain conditions, they nonetheless have an intrinsic connection with the freedom of movement and residence of a Union citizen, which prevents the right of entry and residence being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom (see, to this effect, judgments of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 72, and of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 37).

76 In the present instance, as Mr Rendón Marín's children possess the nationality of a Member State, namely Spanish and Polish nationality respectively, they enjoy the status of Union citizen (see, to this effect, judgments of 2 October 2003, *Garcia Avello*, C-148/02, EU:C:2003:539, paragraph 21, and of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 25).

77 Therefore, as Union citizens, Mr Rendón Marín's children have the right to move and reside freely within the territory of the European Union, and any limitation of that right falls within the scope of EU law.

78 Thus, if — a matter which is for the referring court to check — the refusal to grant residence to Mr Rendón Marín, a third-country national, to whose sole care those children have been entrusted, were to mean that he had to leave the territory of the European Union, that could result in a restriction of that right, in particular the right of residence, as the children could be compelled to go with him, and therefore to leave the territory of the European Union as a whole. Any obligation on their father to leave the territory of the European Union would thus deprive them of the genuine enjoyment of the substance of the rights which the status of Union citizen nevertheless confers upon them (see, to this effect, judgments of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 67; of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 71; of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 36; and of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 32).

79 Several Member States which have submitted observations have contended that Mr Rendón Marín and his children could move to Poland, the Member State of which his daughter is a national. Mr Rendón Marín, for his part, stated at the hearing that he maintains no ties with the family of his daughter's mother, who, according to him, does not reside in Poland, and that neither he nor his children know the Polish language. In this regard, it is for the referring court to check whether, in the light of all the circumstances of the main proceedings, Mr Rendón Marín, as the parent who is the sole carer of his children, may in fact enjoy the derived right to go with them to Poland and reside with them there, so that a refusal of the Spanish authorities to grant him a right of residence would not result in his children being obliged to leave the territory of the European Union as a whole (see, to this effect, judgment of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraphs 34 and 35).

80 Subject to the checks referred to in paragraphs 78 and 79 above, it seems to be clear from the information before the Court that the situation at issue in the main proceedings is capable of resulting, for Mr Rendón Marin's children, in their being deprived of the genuine enjoyment of the substance of the rights which the status of Union citizen confers upon them, and that it therefore falls within the scope of EU law.

The possibility of limiting a derived right of residence flowing from Article 20 TFEU

81 Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security. However, in so far as Mr Rendón Marin's situation falls within the scope of EU law, assessment of his situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which, as has been pointed out in paragraph 66 above, must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter.

82 Furthermore, as a justification for derogating from the right of residence of Union citizens or members of their families, the concepts of 'public policy' and 'public security' must, as has been noted in paragraph 58 above, be interpreted strictly, so that their scope cannot be determined unilaterally by the Member States without being subject to control by the EU institutions.

83 The Court has thus held that the concept of 'public policy' presupposes, in any event, the existence, in addition to the disturbance of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. As regards 'public security', it is apparent from the Court's case-law that this concept covers both the internal security of a Member State and its external security and that, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security (see, to this effect, judgments of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, paragraphs 43 and 44, and of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraphs 65 and 66).

84 In this context, it must be held that, where refusal of the right of residence is founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security, in view of the criminal offences committed by a third-country national who is the sole carer of children who are Union citizens, such refusal would be consistent with EU law.

85 On the other hand, that conclusion cannot be drawn automatically on the basis solely of the criminal record of the person concerned. It can result, where appropriate, only from a specific assessment by the referring court of all the current and relevant circumstances of the case, in the light of the principle of proportionality, of the child's best interests and of the fundamental rights whose observance the Court ensures.

86 That assessment must therefore take account, in particular, of the personal conduct of the individual concerned, the length and legality of his residence on the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of the children at issue and their state of health, as well as their economic and family situation.

87 It follows that Article 20 TFEU must be interpreted as precluding national legislation which requires a third-country national who is a parent of minor children who are Union citizens in his sole care to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the European Union.

88 In the light of all the foregoing considerations, the answer to the question referred is as follows:

— Article 21 TFEU and Directive 2004/38 must be interpreted as precluding national legislation which requires a third-country national to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record where he is the parent of a minor child who is a Union citizen and a national of a Member State other than the host Member State and who is his dependant and resides with him in the host Member State;

— Article 20 TFEU must be interpreted as precluding the same national legislation which requires a third-country national who is a parent of minor children who are Union citizens in his sole care to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the European Union.

Costs

89 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 (Grand Chamber) hereby rules:

Article 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 must be interpreted as precluding national legislation which requires a third-country national to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record where he is the parent of a minor child who is a Union citizen and a national of a Member State other than the host Member State and who is his dependant and resides with him in the host Member State.

Article 20 TFEU must be interpreted as precluding the same national legislation which requires a third-country national who is a parent of minor children who are Union citizens in his sole care to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the European Union.

[Signatures]

Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

13 September 2016 *

(Reference for a preliminary ruling — Citizenship of the Union — Article 20 TFEU — Third-country national having a young dependent child who is a Union citizen — Right to reside in the Member State of which the child is a national — Criminal convictions of the child's parent — Decision to expel the parent resulting in the indirect expulsion of the child concerned)

In Case C-304/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom), made by decision of 4 June 2014, received at the Court on 24 June 2014, in the proceedings

Secretary of State for the Home Department

v

CS,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, C. Toader, D. Šváby, F. Biltgen and C. Lycourgos, Presidents of Chambers, A. Rosas (Rapporteur), E. Juhász, A. Borg Barthet, M. Safjan, M. Berger, A. Prechal and K. Jürimäe, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 June 2015,

after considering the observations submitted on behalf of:

— CS, by R. Husain QC and L. Dubinsky and P. Tridimas, Barristers, instructed by D. Furner, Solicitor,

— the United Kingdom Government, by M. Holt and J. Beeko, acting as Agents, and D. Blundell, Barrister,

— the Danish Government, by C. Thorning and M. Wolff, acting as Agents,

— the French Government, by D. Colas and R. Coesme, acting as Agents,

* Language of the case: English.

— the Polish Government, by B. Majczyna, K. Pawłowska and M. Pawlicka, acting as Agents,

— the European Commission, by I. Martínez del Peral, C. Tufvesson and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 February 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 20 TFEU.

2 The request has been made in proceedings between CS — a third-country national and the mother of a young child who is a Union citizen possessing the nationality of a Member State in which he has always resided — and the Secretary of State for the Home Department ('the Home Secretary') concerning a deportation order expelling CS from the territory of the United Kingdom to a third country because of her criminal record.

Legal context

EU law

3 Article 3 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 at OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34), headed 'Beneficiaries', provides:

'1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence ...

...

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.'

United Kingdom law

The Borders Act

4 Under section 32(5) of the UK Borders Act 2007 ('the Borders Act'), where a person who is not a British citizen is convicted in the United Kingdom of an offence and is sentenced to a period of imprisonment of at least 12 months, the Home Secretary must make a deportation order in respect of him.

5 It is apparent from section 33 of the Borders Act that that obligation is excluded where the removal of the convicted person in pursuance of the deportation order would:

(a) breach a person's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 May 1950;

(b) breach the United Kingdom's obligations under the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, vol. 189, p. 150, No 2545 (1954)); or

(c) breach rights of the offender under the EU Treaties.

The Immigration Regulations

6 Under regulation 15A(4A) of the Immigration (European Economic Area) Regulations 2006, in the version as amended in 2012 ('the Immigration Regulations'), which takes account of the judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), a person who satisfies the criteria in regulation 15A(4A) is entitled to a 'derivative right to reside in the United Kingdom'.

7 However, in accordance with regulation 15A(9) of the Immigration Regulations, a person who would otherwise be entitled to a derivative right of residence under, inter alia, regulation 15A(4A) is not entitled to that right 'where the [Home Secretary] has made a decision under regulation 19(3)(b), 20(1) or 20A(1)'.

8 By virtue of regulation 20(1) of the Immigration Regulations, the Home Secretary may refuse to issue, revoke or refuse to renew a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card 'if the refusal or revocation is justified on grounds of public policy, public security or public health'.

9 Under regulation 20(6) of the Immigration Regulations, such a decision must be taken in accordance with regulation 21.

10 Regulation 21A of the Immigration Regulations applies a modified version of Part 4 of the Immigration Regulations to decisions taken in relation, in particular, to derivative rights of residence. Regulation 21A(3)(a) applies Part 4 as if 'references to a matter being "justified on grounds of public policy, public security or public health in accordance with regulation 21" referred instead to a matter being "conducive to the public good"'.

11 It follows from those provisions that it is possible to refuse to grant a derived (or 'derivative') right of residence to a person who could otherwise claim a right of residence under Article 20 TFEU, as interpreted by the Court in its judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), where that is conducive to the public good.

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

12 CS, a third-country national, married a British citizen in 2002. In September 2003 she was granted a visa on the basis of her marriage and entered the United Kingdom lawfully, with leave to remain until 20 August 2005. On 31 October 2005, she was granted indefinite leave to remain in the United Kingdom.

13 In 2011 a child of the marriage was born, in the United Kingdom. CS is said to be the sole carer of the child, who is a British citizen.

14 On 21 March 2012, CS was convicted of a criminal offence. On 4 May 2012, she was sentenced to a term of imprisonment of 12 months.

15 On 2 August 2012, CS was notified that by reason of her conviction she was liable to be deported from the United Kingdom. On 30 August 2012, she applied for asylum in the United Kingdom. That application was considered by the appropriate national authority, namely the Home Secretary.

16 On 2 November 2012, CS was released after completing her period of imprisonment and on 9 January 2013 the Home Secretary rejected her application for asylum. The order deporting CS from the United Kingdom to a third country was made under section 32(5) of the Borders Act. CS challenged the order by exercising her right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) (United Kingdom). On 3 September 2013, her appeal was allowed on the ground that her deportation would lead to a breach of the Convention relating to the Status of Refugees, of Articles 3 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and of the Treaties.

17 In its decision, the First-tier Tribunal (Immigration and Asylum Chamber) found that, if a measure deporting CS were adopted, no other family member could care for her child in the United Kingdom, so that he would have to follow her to her State of origin. Referring to the rights of CS's child that are linked to his Union citizenship, under Article 20 TFEU as interpreted by the Court in the judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), it held that 'a citizen of the EU simply cannot be constructively expelled from the territory of the EU in any circumstances whatsoever … [, that that] obligation permits of no derogation at all, including where … the parents had a criminal history … [and that] the deportation order in this case is therefore not in accordance with the law because it violates the child's rights under Article 20 TFEU'.

18 The Home Secretary was granted permission to appeal to the Upper Tribunal (Immigration and Asylum Chamber). She argued that the First-tier Tribunal (Immigration and Asylum Chamber) erred in law in allowing CS's appeal, in particular as regards its assessment relating to the rights of CS's child under Article 20 TFEU, to the judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), and to CS's derived rights. The Home Secretary submitted in particular that EU law does not preclude CS being deported to her State of origin even if to do so would deprive her child, a Union citizen, of the genuine enjoyment of the substance of the rights attaching to that status.

19 It was in those circumstances that the Upper Tribunal (Immigration and Asylum Chamber) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does EU law, and in particular Article 20 TFEU, preclude a Member State from expelling from its territory to a non-Union country a non-Union national who is the parent and primary carer of a child who is a citizen of that Member State (and, consequently, a citizen of the Union), where to do so would deprive the Union citizen child of the genuine enjoyment of the substance of his or her rights as a European Union citizen?

2. If the answer to Question 1 is "No", in what circumstances would such an expulsion be permitted under EU law?

3. If the answer to Question 1 is "No", to what extent, if any, do Articles 27 and 28 of Directive [2004/38] inform the answer to Question 2?'

Consideration of the questions referred

20 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 20 TFEU must be interpreted as precluding legislation of a Member State which requires a third-country national who has been convicted of a criminal offence of a certain gravity to be expelled from the territory of that Member State to a third country notwithstanding the fact that that national is the primary carer of a young child who is a national of that Member State, in which he has been residing since birth without having exercised his right of freedom of movement, when the envisaged expulsion would require the child to leave the territory of the European Union, thereby depriving him of the genuine enjoyment of the substance of his rights as a Union citizen.

The provisions of EU law relating to citizenship of the Union

21 First, Article 3 of Directive 2004/38, headed 'Beneficiaries', provides in paragraph 1 that the directive is to apply to all Union citizens who 'move to or reside in a Member State other than that of which they are a national, and to their family members'.

22 It follows that Directive 2004/38 is not applicable to a situation such as that at issue in the main proceedings, as the Union citizen concerned has never made use of his right of freedom of movement and has always resided in the Member State of which he is a national (see judgment of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraph 39). In so far as a Union citizen is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, a member of his family is not covered by that concept either, given that the rights conferred by that directive on the family members of a beneficiary of the directive are not autonomous rights of those family members, but derived rights, acquired through their status as members of the beneficiary's family (see judgments of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraph 42; of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 55; and of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 31).

23 So far as concerns, secondly, Article 20 TFEU, the Court has already had occasion to hold that the situation of a Union citizen who, like CS's child of British nationality, has not made use of the right of freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation, that is to say, a situation which has no factor linking it with any of the situations governed by EU law (see judgments of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraph 46; of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 61; and of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 43).

24 CS's child, as a national of a Member State, enjoys, under Article 20(1) TFEU, the status of Union citizen, which is intended to be the fundamental status of nationals of the Member States, and may therefore rely on the rights pertaining to that status, including against the Member State of which he is a national (see judgments of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraph 48; of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 63; and of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 44).

25 Citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaty and the measures adopted for their implementation (see, to this effect, judgments of 7 October 2010, *Lassal*, C-162/09, EU:C:2010:592, paragraph 29, and of 16 October 2012, *Hungary* v *Slovakia*, C-364/10, EU:C:2012:630, paragraph 43).

26 As the Court held in paragraph 42 of the judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens.

27 On the other hand, the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals (judgments of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 66, and of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 34).

28 Any rights conferred on third-country nationals by the Treaty provisions on citizenship of the Union are not autonomous rights of those nationals but rights derived from those enjoyed by the Union citizen. The purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere, in particular, with the Union citizen's freedom of movement (judgments of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraphs 67 and 68, and of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 35).

29 In this connection, the Court has already held that there are very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence must nevertheless be granted to a third-country national who is a family member of his since the effectiveness of citizenship of the Union would otherwise be undermined, if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status (see, to this effect, judgments of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraphs 43 and 44; of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraphs 66 and 67; of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 71; of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 36; and of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 32).

30 The above situations have the common feature that, although they are governed by legislation which falls, a priori, within the competence of the Member States, namely legislation on the right of entry and residence of third-country nationals outside the scope of provisions of secondary legislation which provide for the grant of such a right under certain conditions, they nonetheless have an intrinsic connection with the freedom of movement and residence of a Union citizen, which prevents the right of entry and residence being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom (see, to this effect, judgments of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 72, and of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 37).

31 In the present instance, CS's child has the right, as a Union citizen, to move and reside freely within the territory of the European Union, and any limitation of that right falls within the scope of EU law.

32 The expulsion of that child's mother, who is his primary carer, could result in a restriction of the rights conferred by the status of Union citizen, as he may be compelled, *de facto*, to go with her, and therefore to leave the territory of the European Union as a whole. In this sense, the expulsion of the child's mother would deprive the child of the genuine enjoyment of the substance of the rights which the status of Union citizen nevertheless confers upon him.

33 Consequently, the situation at issue in the main proceedings could result, for CS's child, in his being deprived of the genuine enjoyment of the substance of the rights which his status of Union citizen confers upon him, and therefore falls within the scope of EU law.

The possibility of limiting a derived right of residence flowing from Article 20 TFEU

34 The United Kingdom Government contends that the commission of a criminal offence can take a case outside the scope of the principle established by the Court in the judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124). If, however, the Court were to hold that that principle is applicable in a situation such as that at issue in the main proceedings, it is capable of limitation. In this connection, the United Kingdom Government submits that the decision to deport CS on account of her criminal conduct of a certain gravity corresponds to a public policy ground, since that conduct represents a clear threat to a legitimate interest of the United Kingdom, namely the preservation of social cohesion and respect for its societal values. It has noted that, in this instance, the Court of Appeal (England and Wales) (Criminal Division), in the decision dismissing CS's appeal against her sentence to a term of imprisonment, recognised the seriousness of the offence committed by her.

35 In that context, the United Kingdom Government observes that Articles 27 and 28 of Directive 2004/38 set out a framework governing the Member States' ability to expel a Union citizen from their territory, in particular when he has committed a criminal offence. Failure to recognise the possibility of limiting a derived right of residence flowing directly from Article 20 TFEU and of adopting an expulsion measure would mean that a Member State would be unable to expel a third-country national who is guilty of such an offence if he is the parent of a child who is a Union citizen resident in the Member State of which he is a national. Accordingly, the degree of protection from expulsion from that Member State's territory would be greater for a third-country national who has a derived right of residence than for a Union citizen. In the United Kingdom Government's submission, therefore, a Member State must be entitled to derogate from the derived right of residence flowing from Article 20 TFEU and to expel such a third-country national from its territory if a criminal offence of a certain gravity has been committed, even where this means that the child in question will have to leave the territory of the European Union, provided that such a decision is proportionate and respects fundamental rights.

36 It should be pointed out that Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security. However, since CS's situation falls within the scope of EU law, assessment of her situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), an article which must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter (see, to this effect, judgment of 23 December 2009, *Detiček*, C-403/09 PPU, EU:C:2009:810, paragraphs 53 and 54).

37 Furthermore, it should be borne in mind that, as a justification for derogating from the right of residence of Union citizens or members of their families, the concepts of 'public policy' and 'public security' must be interpreted strictly, so that their scope cannot be determined unilaterally by the Member States without being subject to control by the EU institutions (see, to this effect, judgments of 4 December 1974, *van Duyn*, 41/74, EU:C:1974:133, paragraph 18; of 27 October 1977, *Bouchereau*, 30/77, EU:C:1977:172, paragraph 33; of 29 April 2004, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, EU:C:2004:262, paragraphs 64 and 65; of 27 April 2006, *Commission* v *Germany*, C-441/02, EU:C:2006:253, paragraph 34; and of 7 June 2007, *Commission* v *Netherlands*, C-50/06, EU:C:2007:325, paragraph 42).

38 The Court has thus held that the concept of 'public policy' presupposes, in any event, the existence, in addition to the disturbance of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

39 As regards 'public security', it is apparent from the Court's case-law that this concept covers both the internal security of a Member State and its external security and that, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security (see, to this effect, judgments of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, paragraphs 43 and 44, and of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraphs 65 and 66). The Court has also held that the fight against crime in connection with drug trafficking as part of an organised group (see, to this effect, judgment of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, paragraphs 45 and 46) or against terrorism (see, to this effect, judgment of 26 November 2002, *Oteiza Olazabal*, C-100/01, EU:C:2002:712, paragraphs 12 and 35) is included within the concept of 'public security'.

40 In this context, it must be held that, where the expulsion decision is founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security, in view of the criminal offences committed by a third-country national who is the sole carer of children who are Union citizens, that decision could be consistent with EU law.

41 On the other hand, that conclusion cannot be drawn automatically on the basis solely of the criminal record of the person concerned. It can result, where appropriate, only from a specific assessment by the national court of all the current and relevant circumstances of the case, in the light of the principle of proportionality, of the child's best interests and of the fundamental rights whose observance the Court ensures.

42 That assessment must therefore take account in particular of the personal conduct of the individual concerned, the length and legality of his residence on the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of the child at issue and his state of health, as well as his economic and family situation.

43 In the present instance, the referring court indicates that, under the national legislation at issue in the main proceedings, the Home Secretary is obliged to make a deportation order in respect of a national of a State other than the United Kingdom who is convicted of an offence and sentenced to a period of imprisonment of at least 12 months, unless that order 'breach[es] the rights of the convicted offender under the EU Treaties'.

44 That legislation therefore seems to establish a systematic and automatic link between the criminal conviction of the person concerned and the expulsion measure applicable to him or, in any event, there is a presumption that the person concerned must be expelled from the United Kingdom.

45 However, as is clear from paragraphs 40 to 42 of the present judgment, the mere existence of a criminal record cannot, by itself, justify an expulsion decision which may deprive CS's child of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen.

46 In the light of the considerations set out in paragraph 40 of the present judgment, the referring court, first of all, has the task of examining what, in CS's conduct or the offence that she committed, constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or of the host Member State, which may justify, on the ground of protecting the requirements of public policy or public security, an order deporting her from the United Kingdom.

47 It is incumbent in this respect upon the referring court to assess (i) the extent to which CS's criminal conduct is a danger to society and (ii) any consequences which such conduct might have for the requirements of public policy or public security of the Member State concerned.

48 In carrying out the balancing exercise required of it, the referring court has also to take account of the fundamental rights whose observance the Court ensures, in particular the right to respect for private and family life, as laid down in Article 7 of the Charter (see, to this effect, judgment of 23 November 2010, *Tsakouridis*, C-145/09, EU:C:2010:708, paragraph 52), and to ensure that the principle of proportionality is observed.

49 In the present instance, account is to be taken of the child's best interests when weighing up the interests involved. Particular attention must be paid to his age, his situation in the Member State concerned and the extent to which he is dependent on the parent (see, to this effect, ECtHR, 3 October 2014, *Jeunesse v. the Netherlands*, CE:ECHR:2014:1003JUD001273810, § 118).

50 In the light of all the foregoing considerations, the answer to the questions referred is that Article 20 TFEU must be interpreted as precluding legislation of a Member State which requires a third-country national who has been convicted of a criminal offence to be expelled from the territory of that Member State to a third country notwithstanding the fact that that national is the primary carer of a young child who is a national of that Member State, in which he has been residing since birth without having exercised his right of freedom of movement, when the expulsion of the person concerned would require the child to leave the territory of the European Union, thereby depriving him of the genuine enjoyment of the substance of his rights as a Union citizen. However, in exceptional circumstances a Member State may adopt an expulsion measure provided that it is founded on the personal conduct of that third-country national, which must constitute a genuine, present and sufficiently serious threat adversely affecting one of the fundamental interests of the society of that Member State, and that it is based on consideration of the various interests involved, matters which are for the national court to determine.

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 (Grand Chamber) hereby rules:

Article 20 TFEU must be interpreted as precluding legislation of a Member State which requires a third-country national who has been convicted of a criminal offence to be expelled from the territory of that Member State to a third country notwithstanding the fact that that national is the primary carer of a young child who is a national of that Member State, in which he has been residing since birth without having exercised his right of freedom of movement, when the expulsion of the person concerned would require the child to leave the territory of the European Union, thereby depriving him of the genuine enjoyment of the substance of his rights as a Union citizen. However, in exceptional circumstances a Member State may adopt an expulsion measure provided that it is founded on the personal conduct of that third-country national, which must constitute a genuine, present and sufficiently serious threat adversely affecting one of the fundamental interests of the society of that Member State, and that it is based on consideration of the various interests involved, matters which are for the national court to determine.

[Signatures]