

Anonymised version

Translation

C-454/19 – 1

Case C-454/19

Request for a preliminary ruling

Date lodged:

14 June 2019

Referring court:

Amtsgericht Heilbronn (Germany)

Date of the decision to refer:

11 June 2019

Defendant:

ZW

[...]

Amtsgericht Heilbronn (Local Court, Heilbronn)

Order

In the criminal proceedings against

ZW,

[...], married, nationality: Romanian, resident [at] [...] Heilbronn

[...]

[...]concerning joint child abduction

the Amtsgericht Heilbronn (Local Court, Heilbronn) [...] decided: **[Or. 2]**

1. The proceedings are stayed [...] pending the preliminary ruling of the Court of Justice of the European Union.

2. The following questions shall be referred to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union for clarification:
 - (a) Is primary and/or secondary European law, in particular Directive 2004/38/EC of the European Parliament and of the Council, in the sense of a full right of EU citizens to move and reside freely within the territory of the Member States, to be interpreted as meaning that it also covers national criminal provisions?
 - (b) If the question is answered in the affirmative: does the interpretation of primary and/or secondary European law preclude the application of a national criminal provision which penalises the retention of a child from his guardian abroad where the provision does not differentiate between Member States of the European Union and third countries?

Grounds:

A. Subject-matter of the main proceedings

- 1 The main proceedings concern the question of whether point 2 of Paragraph 235(2) of the German Strafgesetzbuch (German Criminal Code, ‘the StGB’) infringes the rules on free movement of workers, in particular Directive 2004/38/EC, and the right of EU citizens regulated therein, including their family members (Article 2(2) of Directive 2004/38/EC), to move and reside freely within the territory of the Member States (Article 1 of Directive 2004/38/EC) and the principle of equal treatment under Article 24(1) [Or. 3] of Directive 2004/38/EC and, therefore, because of the primacy of EU law, whether it may no longer be applied by a national court.

B. Facts of the main proceedings

- 2 1. Background of the defendant, ZW, mother of AW

The defendant, ZW [...], born [...] in [...] in Romania, and QN, born [...] in [...] in Romania are the parents of AW, a child born outside of marriage [...] in [...], Romania. The defendant, ZW, spent the first year after the birth of her son, AW, in Romania. Thereafter, she saw an opportunity to build a life for her and her son in Germany. In preparation for this, she moved to Germany on her own first. Meanwhile, her son, AW, stayed in Romania with a godmother who looked after and maintained him. From 2009, the defendant, ZW, worked on a temporary basis, as an employee liable to make social security contributions, for temporary employment agencies which employed her as a cleaning lady in a kindergarten, a retirement home and a hospital. At times she was employed on a part-time basis and at times she was unemployed, when she would be registered as seeking work with the public employment office. After her employment situation was secured in 2009, the defendant, ZW, brought her son, AW, to Germany.

3 2. Background of QN, father of AW

The father of the child, QN, had originally attended a German school in Romania. He repeatedly spent time with his family members in Karlsruhe. These stays [Or. 4] also served the purpose of allowing QN to earn money in Germany. Currently, QN lives in Romania once again, where, on the basis of his income there, he is financially successful.

4 3. The situation regarding the son, AW

Under Romanian law, both parents (who have been separated a long time) are entitled to custody of AW. Rule violations occurred while AW was attending kindergarten in Germany which ultimately resulted in the provision of social and pedagogical family assistance to strengthen the parenting skills of the defendant, ZW, develop consistent parenting and support the family with formalities. Ultimately, however, these measures did not improve the situation.

5 In 2012, the defendant, ZW, brought her son to the father, QN, who was living in Romania, as a new passport had to be issued and documents were missing. In September 2012, when AW returned, there were behavioural problems once again, which is why, in March 2013, with the consent of the defendant, he was placed by the youth welfare office at a youth welfare facility in Bad Friedrichshall, near Heilbronn, the mother's place of residence. During a telephone call with the youth welfare office the father agreed 'reluctantly' to this until such time as he would want his son to come to stay with him.

6 By decision of the Local Court, Heilbronn, of 14 November 2014, the right to determine the place of residence for their son, AW, the right to apply for youth welfare measures and social benefits for him and the right to participate in welfare planning and health care were taken from both parents. The rights that were taken from the parents were initially transferred to the district youth welfare office of the district administration [Or. 5] of Heilbronn as part of a judicial guardianship arrangement. Following the failure of the placement at the youth welfare facility in Bad Friedrichshall, AW was placed in a facility in Westerwald, where the child could not be cared for in the same manner as he would be cared for in another emergency care facility, meaning that AW, with the agreement of the district youth welfare office of the district administration of Heilbronn, returned to his mother's home. By letter dated 3 August 2017, the youth welfare office of Heilbronn, which was now responsible, applied for the transfer of parental care back to the child's mother. For reasons which remain unclear, this has not yet happened.

7 Meanwhile, at the beginning of December 2017, during a visit to the defendant, ZW, QN, with her agreement, brought his son to Romania again, where he has since lived with his son. What is not yet clear is whether the defendant had agreed that QN would bring his son to Romania permanently or just until after Christmas 2017. The youth welfare office of Heilbronn was not informed about this; neither

was the competent guardian which remained entrusted with the exercise of the rights which were taken away from the parents. The latter filed a criminal complaint concerning the removal of the child to Romania against both parents for ‘child abduction’ when the defendant, ZW, informed it of the bringing of the child to Romania.

8 4. Alleged criminal actions

The defendant has now been accused of the following facts:

‘On 9 December 2017 the accused and her husband, from whom she was living separately, agreed that their common 12-year-old son, AW, for whom the right to determine place of residence was vested in the district youth welfare office of Montabaur as, inter alia, guardian, by the Local Court, Heilbronn, should no longer live with her in Heilbronn but with the father in Romania. [Or. 6] In performance of this agreement and in wilful disregard by the parents of the right of the district youth welfare office of Montabaur to determine place of residence, AW was brought to Romania, where he has since lived.’

9 C. Legal Framework

The facts described above fulfil the constituent elements of the criminal offence of joint child abduction under point 2 of Paragraph 235(2) and Paragraph 25(2) of the StGB.

10 Paragraph 235 of the StGB reads as follows, whereby the following highlighted passages are to be applied:

‘Paragraph 235 Child abduction

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

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

2. a child, who is not a relative,

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

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

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

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

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

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

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

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

(5) If, by the offence, the person causes the death of the victim, the penalty shall be imprisonment of not less than three years. **[Or. 7]**

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

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

11 The joint commission of a criminal offence, which deals with mutual attribution of liability based on participation, is governed by Paragraph 25(2) of the StGB.

12 Paragraph 25 of the StGB provides as follows, whereby the following highlighted passages are to be applied:

'Paragraph 25 Principals

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

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

13 D. Relevance of the referred question to the decision

The only possible consequence of Paragraph 235 of the StGB being incompatible with primary and/or secondary European law and the latter, therefore, having primacy of application is that Paragraph 235 of the StGB is inapplicable. The Local Court, Heilbronn considers itself obliged to refer the matter to the Court of Justice for a preliminary ruling under Article 267(1)(a) and (b) as the interpretation of EU law determines the applicability of the national (criminal) legal provision.

14 D. Explanation of the questions referred

The referring court is of the view that the applicable criminal provision is not compatible with, in particular, Directive 2004/38/EC of the European Parliament and of the [Or. 8] Council and therefore cannot be applied because of the primacy of EU law. Directive 2004/38/EC governs the right of EU citizens and their family members to move and reside freely within the territory of the Member States. According to the recitals, the free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which that freedom is ensured in accordance with the provisions of the Treaty.

- 15 The following two aspects may preclude the national criminal provision from being compatible with Directive 2004/38/EC:
- 16 1. Under Article 4 of Directive 2004/38/EC, all Union citizens with a valid identity card or passport and their families who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.
- 17 As a Romanian national and, furthermore, as the son of ZW and QN, both Romanian nationals, the child, AW, falls within the scope of protection of Directive 2004/38/EC pursuant to Article 3 in conjunction with Article 2.
- 18 Under Article 4, therefore, AW has the right to leave the territory of a Member State, namely the Federal Republic of Germany, and to take up residence with his father in his home country, Romania. According to the eleventh of the recitals which provide the reasons for the adoption of the Directive, the fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and should not depend on administrative procedures. [Or. 9]
- 19 The application of the national criminal provision in Paragraph 235, by way of the alternatives under the first and second points of subparagraph (1), which are relevant in this case, would mean that the defendant, ZW, and/or the father of the child, QN, could, free of criminal wrongdoing, retain their child, AW (in the present situation) from the guardian, as long as they simply do not leave the territory of the Federal Republic of Germany. As soon as they bring their son to another Member State, however, and retain him from the guardian there, the constituent elements of the crime will have been committed – even though both they themselves and their son have the right under Article 4 of Directive 2004/38/EC to leave a Member State of the European Union.
- 20 The criminal provision in Paragraph 235 goes even further, however. Under the first point of subparagraph (2), ZW would already have opened herself up to prosecution if she and her son, AW, went to the territory of another Member State simply for a visit or on holidays without the express agreement of the guardian, which at times could not be reached for longer periods of time. On the other hand,

travel with the child within Germany would not be covered by the criminal provision.

- 21 The decisive consideration for imposing criminal liability under Paragraph 235 is that a child cannot be returned or can only be returned with major difficulty from another culture [...]. The court is of the view that these grounds do not apply within the European Union, in particular, as in this situation children may be returned without major difficulty under the Brussels II Regulation, and the children are not from a foreign culture. The regulation governs generally the obligation to recognise and enforce decisions on care and access rights made in one EU Member State in another EU Member State (Articles 21 and 28). **[Or. 10]**
- 22 The criminal provision in Paragraph 235 affects the free movement of EU citizens in such a way that, by removing the parental rights of a child, parents also indirectly de facto lose their freedom of movement, provided that they would not wish to lose the proximity to their child guaranteed to them in Article 8 of the European Convention on Human Rights (right to respect for private and family life). The referring court is of the view that the possible additional administrative expenses associated with the return of a child from the territory of the Union (conduct of enforcement proceedings in another Member State of the European Union) do not carry such weight that it would be appropriate to use them to justify the interference in the freedom of movement. This is because it may possibly be considerably easier to return a child who has been registered with the authorities – in this case AW's place of residence with his father is even known – from another Member State than it is to locate a child who has disappeared with a parent within the territory of the Federal Republic of Germany. Under no circumstances do (possible) additional administrative costs justify the difference in treatment with regard to the retention of a child within the territory of the Federal Republic of Germany, on the one hand, and within the territory of the European Union, on the other, so that [...] only the second form of conduct could constitute a criminal offence.
- 23 While German parents of a German child are free to move and reside in their typical (social and geographical) environment, Romanian parents of a Romanian child born in Romania shall be liable to prosecution if they move to Romania with the child and choose to reside in their home country. Given the possibility at all times of returning the child within the EU, the reasons for this differentiation are not evident. Furthermore, in the present case there is also the fact that so far it appears a prompt return has not been deemed **[Or. 11]** necessary and, in any case, without anything further, telephone contact between the guardian and AW, which was already the only contact between them, is also possible in the Member State of Romania.
- 24 The interference in the free movement of EU citizens caused by the criminal provision in Paragraph 235 of the StGB may therefore not be justified.

- 25 2. Under Article 24(1) of Directive 2004/38/EC, which governs equal treatment, all Union citizens residing on the basis of that Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.
- 26 This principle of equal treatment may also have been infringed as a result of the blanket rule, as is demonstrated convincingly by the following example: Had a German national in the situation of the defendant, ZW, been involved in ensuring that the common child was taken back to his (in this case, naturally, German) home region to the father still, or again, living there, she would not have opened herself up to prosecution even if this new residence were in another region a thousand kilometres away from the previous residence. Conversely, for a Union citizen it constitutes a criminal offence under Paragraph 235 if he or she brings his or her child under the same circumstances to his or her home country, which is typically another Member State of the European Union. The discrimination affecting an EU citizen becomes particularly apparent when one considers that (under the present circumstances) he may already be open to prosecution if, for example, he permanently brings his child only a few kilometres [Or. 12] from Kehl, across the no longer visible Franco-German border, to his home in Strasbourg, while a German father would not be liable to prosecution if he brought his child permanently to a (German) hometown a hundred times further away.
- 27 The criminal law provision, which does not differentiate further, does not result in an EU citizen being treated in the same way as a national of the Member State but rather as the national of a random third country on the other side of the world with which there is no relation in the field of international legal assistance.
- 28 The referring court therefore asks the Court of Justice to state whether the provision in Paragraph 235 of the German StGB, which does not differentiate between the territory of the European Union and third countries, infringes primary and/or secondary European law.
- 29 The referring court also asks the Court to state whether the consequence of the infringement results in the inapplicability of the national criminal law provision.

The outcome of the criminal proceedings herein depends on these two questions as, in particular, there can be no criminal liability under Paragraph 235(1), meaning that ZW would have to be acquitted in the case of Paragraph 235(2) being inapplicable.

[...]