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JUDGMENT OF THE COURT (First Chamber)

22 December 2010 (\*)

(Judicial cooperation in civil matters – Regulation (EC) No 2201/2003 – Jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility – Parental responsibility – Rights of custody – Child abduction – Article 42 – Enforcement of a certified judgment ordering the return of a child handed down by a (Spanish) court with jurisdiction – Power of the requested (German) court to refuse enforcement of that judgment in a case of serious infringement of the child’s rights)

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,

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-0000, paragraph 30; Case C-211/10 PPU *Povse* [2010] ECR I-0000, paragraph 35; and Case C-400/10 PPU *McB.* [2010] ECR I-0000, 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]

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\* Language of the case: German.