Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

11 September 2014*

(Article 267 TFEU — National constitution — Interlocutory procedure for the mandatory review of constitutionality — Assessment as to whether a national law is consistent both with EU law and with national constitutional law — Jurisdiction and the enforcement of judgments in civil and commercial matters — Where the defendant has no known domicile or place of residence in the territory of a Member State — Prorogation of jurisdiction where the defendant enters an appearance — Court-appointed representative in absentia for the defendant)

In Case C-112/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 17 December 2012, received at the Court on 8 March 2013, in the proceedings

A

v

B and Others,

THE COURT (Fifth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, E. Juhász, A. Rosas, D. Šváby and C. Vajda, Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 27 February 2014,

after considering the observations submitted on behalf of:

— A, by T. Frad, Rechtsanwalt,

— B and Others, by A. Egger, Rechtsanwalt,

— the Austrian Government, by G. Hesse, acting as Agent,

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

— the French Government, by G. de Bergues, D. Colas and B. Beaupère-Manokha, acting as Agents,

* Language of the case: German.

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

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

after hearing the Opinion of the Advocate General at the sitting on 2 April 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 267 TFEU and Article 24 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2 The request has been made in proceedings between A, on the one hand, and B and Others, on the other, concerning an action for damages brought against A by B and Others before the Austrian courts.

Legal context

EU law

3 Recitals 2, 11 and 12 in the preamble to Regulation No 44/2001 state:

'(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.

…

(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.'

4 Article 2(1) of Regulation No 44/2001 provides:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

5 Under Article 3 of that regulation:

‘1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.’

6 In Section 7 of Chapter II of Regulation No 44/2001, which is entitled ‘Prorogation of jurisdiction’, Article 24 provides:

‘Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.’

7 In Section 8 of Chapter II of Regulation No 44/2001, which is entitled ‘Examination as to jurisdiction and admissibility’, Article 26 provides:

‘1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

…’

8 In Chapter III of Regulation No 44/2001, which is entitled ‘Recognition and Enforcement’, point 2 of Article 34 provides that a judgment is not to be recognised ‘where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so’.

Austrian law

Federal Constitutional Law

9 Under Paragraph 89(1) and (2) of the Federal Constitutional Law (Bundes-Verfassungsgesetz; ‘the B-VG’), ordinary courts do not have jurisdiction to strike down ordinary laws as unconstitutional. The Oberster Gerichtshof (Supreme Court) and courts hearing cases at second instance are under a duty, if doubts arise as to the constitutionality of an ordinary law, to apply to the Verfassungsgerichtshof (Constitutional Court) to have the ordinary law in question struck down.

10 By virtue of Paragraph 92(1) of the B-VG, the Oberster Gerichtshof is the highest Austrian court in civil and criminal matters.

11 Under Paragraph 140(1) of the B-VG, the Verfassungsgerichtshof has jurisdiction to determine — at the request, in particular, of the Oberster Gerichtshof and courts hearing cases at second instance — whether ordinary laws are constitutional. Pursuant to Paragraph 140(6) and (7) of the B-VG, a judgment of the Verfassungsgerichtshof striking down an ordinary law as unconstitutional has general effect and is binding on all courts and administrative authorities.

Code of Civil Procedure

12 Paragraph 115 of the Code of Civil Procedure (Zivilprozessordnung; 'the ZPO') lays down the general rule that, in the case of persons whose address is unknown, service is to be effected by the publication of an official notice in the official notices database (Ediktsdatei).

13 Paragraph 116 of the ZPO provides:

'In the case of persons on whom service can be effected only by public notice because their address is unknown, the court shall, of its own motion or following a request, appoint a representative (Paragraph 9 [of the ZPO]) if, as a result of the service to be effected on them, those persons have to perform a procedural act in order to protect their rights and, in particular, if the documents to be served contain a summons requiring them to appear in court.'

14 Under Paragraph 117 of the ZPO, the appointment of a representative must be announced by an official notice published in the official notices database.

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

15 On 12 October 2009, B and Others brought an action for damages against A before the Landesgericht Wien (Regional Court, Vienna), in which they claimed that A had abducted their husbands or fathers in Kazakhstan.

16 With regard to the jurisdiction of the Austrian courts, B and Others submitted that A had his normal place of domicile within the jurisdiction of the Landesgericht Wien.

17 The Landesgericht Wien made numerous attempts at service, which revealed that A was no longer domiciled at the addresses indicated for service. On 27 August 2010, the Landesgericht Wien appointed, at the request of B and Others, a representative *in absentia* (Abwesenheitskurator; 'the court-appointed representative'), in accordance with Paragraph 116 of the ZPO.

18 Following service of the document instituting proceedings, the court-appointed representative lodged a defence contending that the action should be dismissed and raising numerous counter-arguments to the substantive claims made, but did not contest the jurisdiction of the Austrian courts.

19 It was not until later that a firm of lawyers instructed by A intervened on his behalf to challenge the international jurisdiction of the Austrian courts. In that regard, A submitted that the defence lodged by the court-appointed representative could not form the basis for the international jurisdiction of the Austrian courts, since that representative had not been in contact with A and had no knowledge of the relevant circumstances, which had occurred in Kazakhstan. With regard to his domicile, A indicated that he had left Austria permanently before the action was brought against him. Claiming that his life was in danger, A did not provide the Landesgericht Wien with details of his domicile, but asked for all notices to be addressed thereafter to the firm of lawyers whom he had instructed.

20 The Landesgericht Wien declared that it lacked international jurisdiction and dismissed the action. It found that A was domiciled in the territory of the Republic of Malta and that the lodging of the defence by the court-appointed representative did not amount to the entering of an appearance for the purposes of Article 24 of Regulation No 44/2001.

21 The Oberlandesgericht Wien (Higher Regional Court, Vienna) allowed the appeal brought by B and Others against that judgment and rejected the preliminary objection alleging lack of international jurisdiction. The Oberlandesgericht Wien took the view that, under Article 26 of Regulation No 44/2001, the national courts were not obliged to examine their international jurisdiction unless the defendant failed to enter an appearance. Under Austrian law, however, the procedural acts of a court-appointed representative, who is under a duty to safeguard the interests of the party represented, have the same legal effect as those of an ordinary legal representative.

22 A alleged before the Oberster Gerichtshof, which was hearing his appeal on a point of law ('Revision'), an infringement of his rights of defence as guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'), and of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). B and Others contended, on the other hand, that the ECHR and the Charter guaranteed in equal measure their fundamental right to an effective remedy, making it necessary to appoint a representative *in absentia* for the defendant, in accordance with Paragraph 116 of the ZPO.

23 According to the findings of the Oberster Gerichtshof, at the time when the action was lodged, A was domiciled in Malta. In view of the fact that the court-appointed representative for A did not challenge the international jurisdiction of the Austrian courts, the question arises as to whether the defence lodged by that representative was attributable to A and could be assimilated to A having 'entered an appearance' for the purposes of Article 24 of Regulation No 44/2001. In that respect, the Oberster Gerichsthof points out that the broad powers of representation conferred on the court-appointed representative under Paragraph 116 of the ZPO may be regarded as necessary in order to guarantee the fundamental right of B and Others to an effective remedy, while at the same time being regarded as incompatible with A's fundamental right to be heard.

24 In that context, the Oberster Gerichtshof states that an established line of authority required it, in recognition of the primacy of EU law, to refrain on a case-by-case basis from applying statutory provisions that were contrary to EU law. However, by judgment U 466/11 of 14 March 2012, the Verfassungsgerichtshof departed from that case-law, ruling that its jurisdiction to review the constitutionality of national statutes, in proceedings under Paragraph 140 of the B-VG for the review, in general terms, of the legality of legislation (Verfahren der generellen Normenkontrolle), covers the provisions of the Charter. In the context of such proceedings, the rights guaranteed by the ECHR may be relied upon before the Verfassungsgerichtshof as constitutional rights. According to the Verfassungsgerichtshof, it follows that, by dint of the principle of equivalence, as established by the case-law of the Court of Justice, the general review of legislation must also cover the rights guaranteed by the Charter.

25 According to the Oberster Gerichtshof, the effect of that judgment is that Austrian courts may not, of their own motion, refrain from applying a statute that is contrary to the Charter; rather, 'without prejudice to the possibility of making a reference to the Court of Justice for a preliminary ruling', they must lodge an application with the Verfassungsgerichtshof for that law to be struck down. Furthermore, the Verfassungsgerichtshof has ruled that, if a right guaranteed by the Austrian Constitution has the same scope as a right guaranteed by the Charter, it is not necessary to make a request to the Court for a preliminary ruling under Article 267 TFEU. In such circumstances, the interpretation of the Charter would not be relevant for the purposes of ruling on an application for a statute to be struck down, that being a decision which may be given on the basis of rights guaranteed by the Austrian Constitution.

26 The referring court is uncertain whether the principle of equivalence requires the remedy of an interlocutory procedure for the review of constitutionality also to be available in respect of rights guaranteed by the Charter, given that it would prolong the proceedings and increase costs. The objective of securing a general correction of the law through the striking down of a statute that is contrary to the Charter could also be achieved after the proceedings have come to a close. Furthermore, the fact that a right under the Austrian Constitution has the same scope as a right under the Charter does not trigger a waiver of the obligation to make a reference for a preliminary ruling. The possibility cannot be ruled out that the Verfassungsgerichtshof might construe that fundamental right differently from the Court and that, as a consequence, its decision might encroach on the obligations flowing from Regulation No 44/2001.

27 In those circumstances, the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. In the case of rules of procedural law under which the ordinary courts called upon to decide on the substance of cases are also required to examine whether legislation is unconstitutional but are not empowered to strike down legislation generally, this being reserved for a specially organised constitutional court, does the “principle of equivalence” in the implementation of [EU] law mean that, where legislation infringes Article 47 of the [Charter], the ordinary courts are also required, in the course of the proceedings, to request the constitutional court to strike down the legislation generally, and cannot simply refrain from applying that legislation in the particular case concerned?

2. Is Article 47 of the Charter to be interpreted as precluding a procedural rule under which a court which does not have international jurisdiction appoints a representative *in absentia* for a party whose place of domicile cannot be established and that representative can then, by “entering an appearance”, confer binding international jurisdiction on that court?

3. Is Article 24 of [Regulation No 44/2001] to be interpreted as meaning that “a defendant enters an appearance”, for the purposes of that provision, only where that procedural act was carried out by the defendant himself or by a legal representative authorised by him, or does the foregoing obtain without restriction also in the case of a representative *in absentia* appointed under the law of the Member State in question?’

Consideration of the questions referred

Question 1

28 By its first question, the referring court asks, in essence, whether EU law and, in particular, Article 267 TFEU must be interpreted as precluding rules of national law, such as those at issue in the main proceedings, under which ordinary courts hearing an appeal or adjudicating at final instance are under a duty, if they find that a national statute is contrary to Article 47 of the Charter, to apply, in the course of the proceedings, to the constitutional court for that statute to be generally struck down, and may not simply refrain from applying that statute in the case before them.

29 Although the Oberster Gerichtshof refers, in its first question, solely to the principle of equivalence, because the Verfassungsgerichtshof had relied on that principle as a basis for the obligation to apply to it for the general striking down of any statute contrary to the Charter, it is clear from the reasoning of the order for reference that the Oberster Gerichtshof wishes specifically to know whether that case-law is consistent with the obligations of the ordinary courts under Article 267 TFEU and the principle of the primacy of EU law.

30 In that regard, it emerges from the order for reference that, according to the case-law of the Verfassungsgerichtshof referred to in paragraph 24 above, ordinary courts hearing an appeal or adjudicating at final instance are under a duty, by virtue of the procedure for the general striking down of legislation under Paragraphs 89 and 140 of the B-VG, to apply to that court if they consider a statute to be contrary to the Charter. Given that such an application must be made in the course of proceedings pending, the Oberster Gerichtshof finds that those ordinary courts are thus unable to decide the dispute before them immediately, leaving unapplied any law that they consider to be contrary to the Charter.

31 As regards, moreover, the implications of that constitutional case-law for the obligations under Article 267 TFEU, the Oberster Gerichtshof merely states that the obligation to refer to the Verfassungsgerichtshof every law contrary to the Charter does not affect the right to make a reference to the Court for a preliminary ruling, without specifying whether that right is subject to any conditions.

32 Nevertheless, it emerges from the documents before the Court, which include the decision of the Verfassungsgerichtshof referred to in paragraph 24 above, that the obligation to apply to that court for the general striking down of statutes does not affect the right of the ordinary courts, as expressed by the Verfassungsgerichtshof in wording borrowed from the judgment of the Court of Justice in *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 57), to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary; to adopt any measure necessary to ensure provisional judicial protection; and to disapply, at the end of such an interlocutory procedure, a national legislative provision contrary to EU law. In that regard, the Verfassungsgerichtshof considers it important, as can be seen from paragraph 42 of its judgment, that the Court should not be deprived of the possibility of reviewing EU secondary legislation in the light of primary law and the Charter.

33 It is the light of those facts that the first question must be answered.

34 It should be noted in that connection that Article 267 TFEU confers jurisdiction on the Court to give preliminary rulings concerning both the interpretation of the Treaties and acts of the institutions, bodies, offices or agencies of the European Union and the validity of those acts. The second paragraph of Article 267 TFEU provides that a national court or tribunal may refer such questions to the Court, if it considers that a decision on the question is necessary to enable it to give judgment, and the third paragraph of Article 267 TFEU provides that the national court or tribunal must bring the matter before the Court if there is no judicial remedy under national law against its decisions.

35 It follows, first, that, while it might be convenient, in certain circumstances, for the facts of the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court (see Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* EU:C:1981:62, paragraph 6; *Meilicke*, C-83/91, EU:C:1992:332, paragraph 26; and *JämO*, C-236/98, EU:C:2000:173, paragraph 31), national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity, necessitating a decision on their part (see, inter alia, *Rheinmühlen-Düsseldorf*, 166/73, EU:C:1974:3, paragraph 3; *Mecanarte*, C-348/89, EU:C:1991:278, paragraph 44; *Cartesio*, C-210/06, EU:C:2008:723, paragraph 88; and *Melki and Abdeli*, EU:C:2010:363, paragraph 41).

36 Second, the Court has held that a national court that is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means (see, inter alia, *Simmenthal*, 106/77,

EU:C:1978:49, paragraphs 21 and 24; *Filipiak*, C-314/08, EU:C:2009:719, paragraph 81; *Melki and Abdeli*, EU:C:2010:363, paragraph 43 and the case-law cited; and *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 45).

37 Any provision of a national legal system and any legislative, administrative or judicial practice that might impair the effectiveness of EU law by withholding from the national court with jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions that might prevent EU rules from having full force and effect are incompatible with those requirements, which are the very essence of EU law (see *Simmenthal*, EU:C:1978:49, paragraph 22; *Factortame and Others*, C-213/89, EU:C:1990:257, paragraph 20; and *Åkerberg Fransson*, EU:C:2013:105, paragraph 46 and the case-law cited). This would be the case in the event of a conflict between a provision of EU law and a national law, if the solution of the conflict were to be reserved to an authority with a discretion of its own, other than the court called upon to apply EU law, even if such an impediment to the full effectiveness of EU law were only temporary (see *Simmenthal*, EU:C:1978:49, paragraph 23, and *Melki and Abdeli*, EU:C:2010:363, paragraph 44).

38 Third, the Court has held that a national court which, in a case concerning EU law, considers that a provision of national law is not only contrary to EU law, but also unconstitutional, does not lose the right or escape the obligation under Article 267 TFEU to refer questions to the Court of Justice on the interpretation or validity of EU law by reason of the fact that the declaration that a rule of national law is unconstitutional is subject to a mandatory reference to the constitutional court. The effectiveness of EU law would be in jeopardy if the existence of an obligation to refer a matter to a constitutional court could prevent a national court hearing a case governed by EU law from exercising the right conferred on it by Article 267 TFEU to refer to the Court of Justice questions concerning the interpretation or validity of EU law in order to enable it to decide whether or not a provision of national law was compatible with that EU law (*Melki and Abdeli*, EU:C:2010:363, paragraph 45 and the case-law cited).

39 In the light of the case law referred to in paragraphs 35 to 38 above, the functioning of the system of cooperation between the Court of Justice and the national courts established by Article 267 TFEU requires, as does the principle of primacy of EU law, the national court to be free to refer to the Court for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality (see, to that effect, *Melki and Abdeli*, EU:C:2010:363, paragraphs 51 and 52).

40 Furthermore, in so far as national law lays down an obligation to initiate an interlocutory procedure for the review of constitutionality, the functioning of the system established by Article 267 TFEU requires that the national court be free, first, to adopt any measure necessary to ensure the provisional judicial protection of the rights conferred under the EU legal order and, second, to disapply, at the end of such an interlocutory procedure, that national legislative provision if that court holds it to be contrary to EU law (see *Melki and Abdeli*, EU:C:2010:363, paragraph 53).

41 Lastly, as regards the simultaneous applicability to national legislation implementing EU law, within the meaning of Article 51(1) of the Charter, of fundamental rights guaranteed by a national constitution and those guaranteed by the Charter, it should also be observed that the priority nature of an interlocutory procedure for the review of the constitutionality of a national law (the content of which merely transposes the mandatory provisions of an EU directive) may not undermine the jurisdiction of the Court of Justice alone to declare an act of the European Union invalid, and in particular a directive, the purpose of that jurisdiction being to guarantee legal certainty by ensuring that EU law is applied uniformly (see, to that effect, *Foto-Frost*, 314/85, EU:C:1987:452, paragraphs 15 to 20; *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 27; *Lucchini*, C-119/05, EU:C:2007:434, paragraph 53; and *Melki and Abdeli*, EU:C:2010:363, paragraph 54).

42 To the extent that the priority nature of an interlocutory procedure for the review of constitutionality leads to the repeal of a national law (the content of which merely transposes the mandatory provisions of an EU directive) on the basis that that law is contrary to the national constitution, the Court could in practice, at the request of the courts ruling on the substance of cases in the Member State concerned, be denied the possibility of reviewing the validity of that directive in relation to the same grounds relating to the requirements of primary law and, in particular, the rights recognised by the Charter, to which Article 6 TEU accords the same legal value as that accorded to the Treaties (*Melki and Abdeli*, EU:C:2010:363, paragraph 55).

43 Before the interlocutory review of the constitutionality of a law (the content of which merely transposes the mandatory provisions of an EU directive) can be carried out in relation to the same grounds which cast doubt on the validity of the directive, national courts against whose decisions there is no judicial remedy under national law are, as a rule, required — under the third paragraph of Article 267 TFEU — to refer to the Court of Justice a question on the validity of that directive and, thereafter, to draw the appropriate conclusions resulting from the preliminary ruling given by the Court, unless the court which initiates the interlocutory review of constitutionality has itself referred that question to the Court pursuant to the second paragraph of Article 267 TFEU. In the case of a national implementing law with such content, the question whether the directive is valid takes priority, in the light of the obligation to transpose that directive (*Melki and Abdeli*, EU:C:2010:363, paragraph 56).

44 Also, where EU law allows Member States a measure of discretion in the implementation of an act of EU law, national authorities and courts remain free to protect fundamental rights under the national constitution, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised (see, to that effect, *Melloni*, C-399/11, EU:C:2013:107, paragraph 60).

45 In relation to the principle of equivalence, to which the referring court refers in its request for a preliminary ruling, it should be borne in mind that, according to that principle, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions, (*Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraph 33, and *Agrokonsulting-04*, C-93/12, EU:C:2013:432, paragraph 36 and the case-law cited). Reliance on the principle of equivalence may not relieve the national courts, in the application of domestic procedural rules, of their duty to observe in full the requirements flowing from Article 267 TFEU.

46 In the light of the above considerations, the answer to Question 1 is that EU law and, in particular, Article 267 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which ordinary courts hearing an appeal or adjudicating at final instance are under a duty, if they consider a national statute to be contrary to Article 47 of the Charter, to apply, in the course of the proceedings, to the constitutional court for that statute to be generally struck down, and may not simply refrain from applying that statute in the case before them, to the extent that the priority nature of that procedure prevents — both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question — all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. On the other hand, EU law and, in particular, Article 267 TFEU must be interpreted as not precluding such national legislation to the extent that those ordinary courts remain free:

— to make a reference to the Court at whatever stage of the proceedings they consider appropriate, and even at the end of the interlocutory procedure for the review of constitutionality, in respect of any question which they consider necessary,

— to adopt any measure necessary to ensure interim judicial protection of rights conferred under the EU legal order, and

— to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.

It is for the referring court to ascertain whether the national legislation at issue before it can be construed in such a way as to meet those requirements of EU law.

Questions 2 and 3

47 By its second and third questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 24 of Regulation No 44/2001, considered in the light of Article 47 of the Charter, must be interpreted as meaning that, if a national court appoints, in accordance with national law, a representative *in absentia* for a defendant upon whom the document instituting proceedings has not been served because there is no known place of residence for him, the appearance entered by the court-appointed representative amounts, for the purposes of Article 24 of Regulation No 44/2001, to an appearance being entered by the defendant, establishing the international jurisdiction of that court.

48 At the outset, it should be noted that, according to the findings of the Oberster Gerichtshof, at the time when the dispute before it was first brought before the Austrian courts, A was no longer resident in that Member State. Furthermore, that dispute was an action for damages in relation to the abduction of persons, not in Austria, but in Kazakhstan. Clearly, therefore, the international jurisdiction of the Austrian courts does not arise under Article 2(1) of Regulation No 44/2001. Moreover, it does not appear that the dispute in the main proceedings has any link whatsoever with Austrian territory that could establish the jurisdiction of the Austrian courts, unless A had entered an appearance before the court seised for the purposes of Article 24 of Regulation No 44/2001.

49 In that respect, it can be seen from the documents before the Court that a representative appointed by a court under Paragraph 116 of the ZPO has a wide power of representation, which includes the power to enter an appearance for the absent defendant.

50 According to settled case-law, the provisions of Regulation No 44/2001 must be interpreted autonomously, primarily by reference to the scheme and purpose of that regulation (see, to that effect, *Cartier parfums-lunettes and Axa Corporate Solutions Assurance*, C-1/13, EU:C:2014:109, paragraph 32 and the case-law cited, and *Hi Hotel HCF*, C-387/12, EU:C:2014:215, paragraph 24).

51 Furthermore, the provisions of EU law, such as those of Regulation No 44/2001, must be interpreted in the light of fundamental rights which, according to settled case-law, form an integral part of the general principles of law whose observance the Court ensures and which are now set out in the Charter (see, to that effect, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 68 and the case-law cited). In that respect, it must be borne in mind that all the provisions of Regulation No 44/2001 express the intention to ensure that, within the scope of the objectives of that regulation, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence enshrined in Article 47 of the Charter are observed (see *Hypoteční banka*, C-327/10, EU:C:2011:745, paragraphs 48 and 49, and *G*, C-292/10, EU:C:2012:142, paragraphs 47 and 48 and the case-law cited).

52 It is in the light of those considerations that it is appropriate to examine the question whether an appearance entered by a court-appointed representative amounts to an appearance entered by the absent defendant, for the purposes of Article 24 of Regulation No 44/2001.

53 In that regard, it should first be borne in mind that Article 24 falls within Section 7 of Chapter II of Regulation No 44/2001, which is entitled 'Prorogation of jurisdiction'. The first sentence of Article 24 of Regulation No 44/2001 lays down a rule of jurisdiction, based on the entering of an appearance by the defendant, for all disputes in which the jurisdiction of the court seised does not derive from other provisions of that regulation. Article 24 of Regulation No 44/2001 applies also in cases where a court has been seised in breach of that regulation and implies that the entering of an appearance by the defendant may be regarded as tacit acceptance of the jurisdiction of the court seised and, accordingly, as a prorogation of that court's jurisdiction (see *ČPP Vienna Insurance Group*, C-111/09, EU:C:2010:290, paragraph 21, and *Cartier parfums-lunettes and Axa Corporate Solutions Assurance*, EU:C:2014:109, paragraph 34).

54 Thus, as the Advocate General observed in point 43 of his Opinion, the tacit prorogation of jurisdiction by virtue of the first sentence of Article 24 of Regulation No 44/2001 is based on a deliberate choice made by the parties to the dispute regarding jurisdiction, which presupposes that the defendant was aware of the proceedings brought against him. On the other hand, an absent defendant upon whom the document instituting proceedings has not been served and who is unaware of the proceedings against him may not be regarded as having tacitly accepted the jurisdiction of the court seised.

55 Furthermore, an absent defendant who is unaware of the action brought against him or of the appointment of a representative to act on his behalf cannot provide that representative with all the information necessary, for the purposes of determining whether the court seised has international jurisdiction, which would enable him effectively to contest that jurisdiction or to accept it in full knowledge of the facts. Nor, accordingly, may an appearance entered by a court-appointed representative be regarded as tacit acceptance, by the defendant, of the jurisdiction of that court.

56 Secondly, it should be observed that, within the scheme of Regulation No 44/2001, the international jurisdiction of the court seised is not subject to judicial scrutiny by the court of its own motion or on the application of the defendant, as is clear from Article 26 and point (2) of Article 34 of that regulation, unless the defendant can be regarded as not having entered an appearance. Accordingly, respect for the rights of the defence requires that the legal representative should be unable validly to enter an appearance on behalf of the defendant, for the purposes of Regulation No 44/2001, unless that measure does in fact ensure that an absent defendant's rights of defence are respected. However, as is made clear by the case-law of the Court relating to Article 27(2) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), as amended by the later conventions relating to the adherence of new Member States to the Brussels Convention, and by the case-law on point (2) of Article 34 of Regulation No 44/2001, where proceedings are initiated against a person without his knowledge and a lawyer or 'representative' appears on his behalf but without his authority, such a person is quite powerless to defend himself and must therefore be regarded as a defendant in default of appearance, for the purposes of point (2) of Article 34 of Regulation No 44/2001, even if the proceedings have become *inter partes* (see, to that effect, as regards the interpretation of the Convention of 27 September 1968, as amended, *Hendrikman and Feyen*, C-78/95, EU:C:1996:380, paragraph 18, and *Hypoteční banka*, EU:C:2011:745, paragraphs 53 and 54).

57 Third, to interpret Article 24 of Regulation No 44/2001 as allowing a court-appointed representative to enter an appearance on behalf of an absent defendant would not be consistent with the objectives of the rules on jurisdiction established by that regulation, which — as is clear from the eleventh recital thereto — must be highly predictable and generally based on the defendant's domicile. In circumstances such as those of the case before the referring court, where the document instituting proceedings has not been served on A, who was domiciled in a Member State other than that of the court seised, the establishment of the international jurisdiction of the Austrian courts on the basis of an appearance entered by a representative *in absentia*, appointed on A's behalf, cannot be regarded as predictable.

58 Lastly, the applicant's right to an effective remedy — as guaranteed by Article 47 of the Charter, which must be implemented in conjunction with respect for the defendant's rights of defence within the scheme of Regulation No 44/2001 (see, to that effect, *Hypoteční banka*, EU:C:2011:745, paragraphs 48 and 49, and *G*, EU:C:2012:142, paragraphs 47 and 48) — does not require a different interpretation of Article 24 of that regulation, contrary to the arguments put forward by B and Others in their observations submitted to the Court.

59 In that regard, B and Others submit that, in the dispute before the referring court, A has never revealed his actual place of domicile, thus making it impossible to determine the court with jurisdiction and preventing them from exercising their right to an effective remedy. In those circumstances, in order to avoid a situation in which justice was denied and to strike a fair balance between the rights of the applicants and those of the defendant, in accordance with the case-law referred to in paragraph 58, it is necessary — they argue — to allow a representative *in absentia* to enter an appearance for the defendant, for the purposes of Article 24 of Regulation No 44/2001.

60 However, although the Court has held, in the specific circumstances of the cases that gave rise to the judgments in *Hypoteční banka* (EU:C:2011:745) and *G* (EU:C:2012:142), that Regulation No 44/2001, interpreted in the light of Article 47 of the Charter, does not preclude a procedure against an absent defendant in which the latter was deprived of the opportunity to defend himself effectively, it emphasised the fact that the defendant would have the opportunity to ensure respect for the rights of the defence by opposing, in accordance with Article 34(2) of that regulation, recognition of the judgment issued against him (see, to that effect, *Hypoteční banka*, EU:C:2011:745, paragraphs 54 and 55, and *G*, C-292/10, EU:C:2012:142, paragraphs 57 and 58). That remedy on the basis of Article 34(2) of Regulation No 44/2001 presupposes, however — as was stated in paragraph 56 above — that the defendant failed to enter an appearance and that the procedural steps taken by the guardian *ad litem* or the court-appointed representative *in absentia* do not amount to an appearance having been entered by the defendant for the purposes of that regulation. In the present case, on the other hand, the procedural steps taken by the court-appointed representative under Paragraph 116 of the ZPO have the effect under national law that A must be regarded as having entered an appearance before the court seised. However, to construe Article 24 of Regulation No 44/2001 as meaning that such a guardian or representative *in absentia* may enter an appearance on behalf of the defendant for the purposes of Article 24 of Regulation No 44/2001 cannot be regarded as striking a fair balance between the right to an effective remedy and the rights of the defence.

61 Accordingly, the answer to Questions 2 and 3 is that Article 24 of Regulation No 44/2001, read in the light of Article 47 of the Charter, must be interpreted as meaning that, if a national court appoints, in accordance with national legislation, a representative *in absentia* for a defendant upon whom the documents instituting proceedings have not been served because his place of domicile is not known, the appearance entered by that representative does not amount to an appearance being entered by that defendant for the purposes of Article 24 of that regulation.

Costs

62 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 (Fifth Chamber) hereby rules:

1. **EU law and, in particular, Article 267 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which ordinary courts hearing an appeal or adjudicating at final instance are under a duty, if they consider a national statute to be contrary to Article 47 of the Charter, to apply, in the course of the**

proceedings, to the constitutional court for that statute to be generally struck down, and may not simply refrain from applying that statute in the case before them, to the extent that the priority nature of that procedure prevents — both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question — all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. On the other hand, EU law and, in particular, Article 267 TFEU must be interpreted as not precluding such national legislation to the extent that those ordinary courts remain free:

— to make a reference to the Court at whatever stage of the proceedings they consider appropriate, and even at the end of the interlocutory procedure for the review of constitutionality, in respect of any question which they consider necessary,

— to adopt any measure necessary to ensure interim judicial protection of rights conferred under the EU legal order, and

— to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.

It is for the referring court to ascertain whether the national legislation at issue before it can be construed in such a way as to meet those requirements of EU law.

2. **Article 24 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, if a national court appoints, in accordance with national legislation, a representative *in absentia* for a defendant upon whom the documents instituting proceedings have not been served because his place of domicile is not known, the appearance entered by that representative does not amount to an appearance being entered by that defendant for the purposes of Article 24 of that regulation.**

[Signatures]