



REPORT FOR THE HEARING

in Case E-15/24

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Borgarting Court of Appeal (*Borgarting lagmannsrett*), in the case between

A

and

B,

concerning the interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC and Article 28 of the Agreement on the European Economic Area.

I INTRODUCTION

1. The case pending before the referring court concerns a dispute under the Norwegian Act relating to Children and Parents. The parties share parental responsibility for their joint child, C, and the child has permanent residence with its mother, A. A wants to relocate to Denmark with C, to find employment and start a family there, with her new partner. C's father, B, has not consented to the move. In accordance with the Norwegian Act relating to Children and Parents, A must, in order to relocate to Denmark with C, initiate legal action against B, requesting that the court consent to the relocation. This is a different rule to the one that applies when parents relocate with children within Norway. In domestic relocations, the parent with whom the child has permanent residence may relocate with the child without the consent of the other parent sharing parental responsibility, or a court, being required.

2. A has initiated legal action, requesting the court's consent to her relocation to Denmark with the child, C. The main question before the referring court is whether such consent is to be given. This context gives rise to a question of whether the differentiation under the Norwegian Act relating to Children and Parents between relocating with

children abroad to an EEA State and relocating with children within Norway is in conflict with EEA law.

II LEGAL BACKGROUND

EEA law

3. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77) (“the Directive”) was incorporated into the Agreement on the European Economic Area (“the EEA Agreement”) by Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 (OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17), and is referred to at points 1 and 2 of Annex V (Free movement of workers) and point 3 of Annex VIII (Right of establishment) to the EEA Agreement. Constitutional requirements indicated by Iceland, Liechtenstein and Norway were later fulfilled on 9 January 2009, and the decision entered into force on 1 March 2009.

4. The third subparagraph of Article 1(1) of Decision No 158/2007 reads:

The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:

(a) The Directive shall apply, as appropriate, to the fields covered by this Annex.

(b) The Agreement applies to nationals of the Contracting Parties. However, members of their family within the meaning of the Directive possessing third country nationality shall derive certain rights according to the Directive.

(c) The words ‘Union citizen(s)’ shall be replaced by the words ‘national(s) of EC Member States and EFTA States’.

(d) In Article 24(1) the word ‘Treaty’ shall read ‘Agreement’ and the words ‘secondary law’ shall read ‘secondary law incorporated in the Agreement’.

5. Article 4 of the Directive, entitled “Right of exit”, reads:

1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members 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.

2. No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies.

3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.

4. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years.

6. Article 7(1) of the Directive, entitled “Right of residence for more than three months”, reads, in extract:

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

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

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

...

7. Article 27 of the Directive, entitled “General principles”, reads:

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

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

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

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this

essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

8. Article 28 of the EEA Agreement reads:

1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of EC Member States and EFTA States for this purpose;

(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

4. The provisions of this Article shall not apply to employment in the public service.

5. Annex V contains specific provisions on the free movement of workers.

National law¹

9. Chapters 5 and 6 of the Act relating to Children and Parents of 8 April 1981 No 7 (*lov om barn og foreldre av 8. april 1981 nr. 7 (barneloven)*) (“the Children Act”) regulate matters related to parental responsibility, place of residence, and contact.

10. Parental responsibility concerns the authority to make decisions for the child in important personal matters. The person or persons with parental responsibility are also the child’s guardians, cf. Section 16 of the Guardianship Act. Parental responsibility also covers decisions relating to such things as medical treatment, the choice of school beyond the Norwegian public school, a right to access medical information about the child, registering the child as a member of a religious community, and consent for adoption.

11. The norm is for parents who live together when the child is born to have joint parental responsibility, cf. Section 35 of the Children Act. When parents with joint parental responsibility separate, one parent may initiate legal action to request sole parental responsibility.

12. Section 36 of the Children Act, entitled “The child’s place of residence (custody)”, reads:

The parents may jointly decide that the child shall reside either with both of them (joint custody) or with one of them (sole custody).

If the parents fail to agree, the court must decide that one of the parents shall have custody of the child. When there are special reasons for doing so, the court may nonetheless decide that both parents shall have custody of the child.

13. Section 37 of the Children Act, entitled “Decisions that may be taken by the person with the custody of the child”, reads:

If the parents have joint parental responsibility, but only one of the parents has custody of the child, the other parent may not object to the parent with sole custody of the child making decisions concerning important aspects of the child’s care, such as the question of whether the child shall attend a day-care centre, where in Norway the child shall live and other major decisions concerning everyday life.

14. Section 40 of the Children Act, entitled “Children relocating or staying abroad”, reads:

If one of the parents has sole parental responsibility, the other parent may not object to the child relocating abroad.

¹ The translation of national law is unofficial.

If the parents have joint parental responsibility, both of them must consent to the child relocating or staying abroad other than for short trips; see section 41. This also applies in cases where an agreed stay is prolonged or altered, for instance where the child is left behind abroad.

Children who have reached the age of 12 must consent to any decision according to the first and second paragraphs concerning relocating or staying abroad without a parent with parental responsibility.

If the parents disagree as to who shall have parental responsibility, or on international relocation or custody, the child must not relocate abroad until the matter has been decided.

15. Section 42 a of the Children Act, entitled “Notification of and mediation prior to relocation”, reads:

If one of the parents intends to relocate within Norway or abroad, and access has been determined by agreement or decision, the parent who intends to move shall notify the other parent no later than three months prior to relocation.

If the parents disagree regarding relocation, the parent who intends to relocate with the child must request mediation pursuant to section 51.

16. Section 43 of the Children Act, entitled “Extent of the right of access, etc.”, reads:

A parent who does not have custody of the child has right of access to the child unless otherwise agreed or determined. The extent of the right of access should be further agreed. If such access is not in the best interests of the child, the court must decide that there shall be no access.

The parents themselves shall agree on the extent of the right of access based on what they consider to be in the best interests of the child. Section 31, second paragraph, shall apply to the parents. In any agreement or decision regarding access, importance shall be attached, among other factors, to ensuring the best possible overall contact between the child and his or her parents, and to the age of the child, the degree to which the child is attached to the local neighbourhood, the distance that must be travelled between the parents and the child's interests in all other respects. If the “ordinary right of access” is agreed or determined, this entitles the parent to spend one afternoon a week with an overnight stay, every other weekend, a total of three weeks of the summer holiday and alternate autumn, Christmas, winter and Easter holidays with the child.

Conditions for access may be imposed in agreements or in judgments. If supervision is made a condition, the court may appoint a person to perform supervision during access visits or request the parents to appoint such a person.

The parent to be granted access shall cover the cost of the measure imposed as conditions for access pursuant to this provision.

The other parent shall be notified a reasonable period of time in advance if access cannot take place as determined or if the time for the access must be agreed more specifically.

If the parent who has parental responsibility or custody of the child prevents a right of access from being exercised, the parent who has right of access may request a new decision as to who is to have parental responsibility or custody of the child; see section 63.

17. Section 48 of the Children Act, entitled “The best interests of the child”, reads:

Decisions on parental responsibility, international relocation, custody and access, and procedure in such matters, shall first and foremost have regard for the best interests of the child.

When making such decisions, regard shall be paid to ensuring that the child is not subjected to violence or in any other way treated in such a manner as to impair or endanger his or her physical or mental health.

III FACTS AND PROCEDURE

18. Parties A and B live in Oslo. They lived together from 2015. Their joint child, C, was born in 2016. The cohabitant relationship ended in 2022 with A moving out with C, to another home in the same district of Oslo.

19. A is originally from a third country outside of Europe but moved to Norway ten years ago and is a Norwegian national. B was born in Norway and is a Norwegian national.

20. A and B have, since C was born, shared parental responsibility. In accordance with an agreement between A and B, C has, since the breakdown of the parents’ relationship in 2022, had permanent residence with A.

21. Since 2022, A has had a partner, who lives in Denmark. This partner has two children of his own, who live with him half the time. A now wants to relocate to Denmark with C. In Denmark, A wants to live with her partner and start a family with him.

22. A also wants to find employment in Denmark. A is currently employed in a multi-national company, which has offices and operations in Norway and Denmark, as well as other countries. A is currently employed in the Norwegian part of the operations, and she has her place of work in Oslo. A’s employer has offered her the opportunity to continue in the same role with her place of work in Denmark, transferring her

employment to the Danish part of the operations. A plans to accept this offer if she is permitted to move to Denmark with C.

23. A filed a claim with Oslo District Court on 16 June 2023, with the claim that C have their place of residence with A and have contact with B as determined at the court's discretion, as well as the claim that A be permitted to relocate to Denmark with C. A also filed a claim for an interim decision permitting her to relocate to Denmark with C until a final ruling has been made in the case. B contested the claim and submitted a claim that A is not permitted to relocate to Denmark with C, and for B to have contact with C 50 per cent of the time.

24. The case before Oslo District Court did not include parental responsibility, as the parties agreed that this would be joint. The parties also agreed that C would have their place of residence with A. A's claim for a judgment to establish the child's place of residence was therefore not maintained, and the District Court did not include this issue in its adjudication.

25. As part of the case preparations, Oslo District Court appointed specialist psychologist Olav H. Bendiksby as an expert witness. Mr Bendiksby evaluated the case, with his evaluation including an interview with the child. The District Court held a mediation meeting on 11 August 2023, but the parties could not reach a final agreement.

26. The District Court held the main hearing in the case on 14 February 2024. On 27 February 2024, the District Court rendered a judgment and issued an order with the following conclusion:

Both in the main case and in the interim decision until a final and enforceable judgment is available:

1. A is not permitted to relocate to Denmark with C, born xx/xx/2016.
2. C, born xx/xx/2016, shall have contact with their father, B, as follows:
 - The father shall have contact alternate weekends, Friday-Sunday, in even-numbered weeks
 - The father shall have contact with C alternate Wednesday afternoons. The father shall pick C up from school and drop them off at the mother's home no later than 18:30.
 - C shall spend alternate autumn school breaks with their mother and father. In 2024, C shall spend their autumn break with their mother.
 - C shall spend alternate winter school breaks with their mother and father. In 2024, C shall spend their winter break with their father.
 - C shall spend alternate Christmas school breaks with their mother and father. In 2024, C shall spend their Christmas break with their mother.
 - C shall spend alternate Easter school breaks with their mother and father. In 2024, C shall spend their Easter break with their mother.

- C shall spend a total of 4 weeks with their father during the summer school break and a total of 4 weeks with their mother during the summer school break.

3. Costs are not awarded.

27. In a notice of appeal dated 26 March 2024, A has appealed the district court's judgment to Borgarting Court of Appeal. In the appeal, A maintains her claim for the court's consent to her relocating to Denmark with C, and for contact between C and B to be determined at the court's discretion. B has submitted a respondent's notice, requesting that the appeal be dismissed.

28. As part of its preparations for appellate proceedings, Borgarting Court of Appeal decided to request an advisory opinion from the EFTA Court concerning the questions related to EEA law raised in the case. These are, in essence, whether the difference in treatment in Norwegian law, between situations where the relocation is to other EEA States and situations where the relocation is within Norway, conflicts with the EEA Agreement.

29. Against this background, Borgarting Court of Appeal decided to refer the following questions to the Court:

Firstly, is it, and if so, under which circumstances is it, compatible with the rights of the parents and the child under Directive 2004/38/EC that national legislation on the relationship between a child and its parents stipulates that a custodial parent, in situations where the parents have joint parental responsibility and the non-custodial parent does not consent to the relocation, cannot relocate to another EEA state with the child without initiating legal action and getting the court's permission to relocate, when the same parent would have the right to relocate domestically with the child without obtaining the non-custodial parent's consent or permission from the court?

Secondly, is it, and if so, under which circumstances is it, compatible with Article 28 of the EEA Agreement that national legislation on the relationship between a child and its parents stipulates that a custodial parent, in situations where the parents have joint parental responsibility and the non-custodial parent does not consent to the relocation, cannot relocate to another EEA state with the child to take up employment there without initiating legal action and getting the court's permission to relocate, when the same parent would have the right to relocate domestically with the child without obtaining the non-custodial parent's consent or permission from the court?

IV WRITTEN OBSERVATIONS

30. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

- A, represented by Johanne Førde, advocate;
- B, represented by Gjermund Mathisen, advocate;
- the Norwegian Government, represented by Lotte Tvedt and Fredrik Bergsjø, acting as Agents;
- the Icelandic Government, represented by Hendrik Daði Jónsson and Svanhildur Þorbjörnsdóttir, acting as Agents;
- the Hungarian Government, represented by Miklós Zoltán Fehér and Katalin Szíjjártó, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Sigrún Ingibjörg Gísladóttir, Sigurbjörn Bernharð Edvardsson, Erlend M. Leonhardsen, and Melpo-Menie Joséphidès, acting as Agents; and
- the European Commission (“the Commission”), represented by Elisabetta Montaguti and Jonathan Tomkin, acting as Agents.

V PROPOSED ANSWERS SUBMITTED

A

31. A submits that the questions referred should be answered as follows:

- (I) *It is not compatible with the rights established by the Citizenship Directive that the national legislation stipulates that in situations where the parents of a child have joint parental responsibility but only one parent has custody, the custodial parent must obtain the consent of the non-custodial parent or the prior approval of the national court, but the custodial parent remains free to relocate within Norway without prior approval.*
- (II) *It is not compatible with the Article 28 of the EEA Agreement that the national legislation stipulates that in situations where the parents of a child have joint parental responsibility but only one parent has custody, the custodial parent must obtain the consent of the non-custodial parent or the prior approval of the national court, but the custodial parent remains free to relocate within Norway without such prior approval.*

B

32. B submits that the questions referred should be answered as follows:

1. *It is compatible with the rights of the parents and the child under Directive 2004/38/EC that national legislation on the relationship between a child and its parents stipulates that a custodial parent, in situations where the parents have joint parental responsibility and the non-custodial parent does not consent to the relocation, cannot relocate to another EEA state with the child without initiating legal action and getting the court's permission to relocate, even if the same parent would have the right to relocate domestically with the child without obtaining the non-custodial parent's consent or permission from the court.*
2. *It is compatible with Article 28 of the EEA Agreement that national legislation on the relationship between a child and its parents stipulates that a custodial parent, in situations where the parents have joint parental responsibility and the non-custodial parent does not consent to the relocation, cannot relocate to another EEA state with the child to take up employment there without initiating legal action and getting the court's permission to relocate, even if the same parent would have the right to relocate domestically with the child without obtaining the non-custodial parent's consent or permission from the court.*

Norwegian Government

33. The Norwegian Government submits that the questions referred should be answered as follows:

Article 28 of the EEA Agreement does not preclude a national provision pursuant to which the relocation of a child for whom the parents have joint parental responsibility to another country requires either the consent of both the custodial and non-custodial parent or a court decision.

Articles 4 and 7 of Directive 2004/38 do not apply to a national provision pursuant to which the relocation of a child for whom the parents have joint parental responsibility to another country requires either consent of both the custodial and non-custodial parent or a court decision.

Icelandic Government

34. The Icelandic Government submits that the questions referred should be answered as follows:

National legislation on the relationship between a child and its parents stipulating that a custodial parent, in situations where the parents have joint parental responsibility and the non-custodial parent does not consent to the

relocation, cannot relocate to another EEA State with the child, in exercise of free movement rights under Directive 2004/38/EU or Article 28 of the EEA Agreement, without initiating legal action and receiving the permission of a national court to relocate, can be compatible with both Directive 2004/38/EU and Article 28 of the EEA Agreement, irrespective of whether such legal action would be required for a relocation domestically.

Hungarian Government

35. The Hungarian Government submits that the questions referred should be answered as follows:

The national legislation at issue is compatible both with Directive 2004/38 and with Article 28 of the EEA Agreement since its legitimate reason is to safeguard the child's fundamental right to maintain contact with both parents and it is proportionate to the objective pursued.

ESA

36. ESA submits that the questions referred should be answered as follows:

National measures that result in a custodial parent, in situations where the parents have joint parental responsibility and the non-custodial parent does not consent to relocation, cannot relocate to another EEA state with the child without initiating legal action and getting the court's permission to relocate, can in principle be compatible with Article 28 EEA. However, such a restriction must be proportionate and consistent in nature with comparable domestic situations. Sections 37 and 40 of the Norwegian Children Act appear to fall short of that requirement as they always require approval for relocations across borders within the EEA, but never domestically, even when such relocations result in substantial changes to a child's circumstances.

European Commission

37. The Commission submits that the questions referred should be answered as follows:

Article 28 EEA should be interpreted as not precluding, in principle, national rules which makes the right of a parent who exercises joint parental responsibility over a child, to move with that child to reside and work in another EEA State, conditional on that parent obtaining the consent of the other parent or issuing proceedings with a view to obtaining permission from a court, where that condition is conceived and applied in a manner that is suitable to achieve the public interest objective invoked and does not go beyond what is necessary to attain that objective. That requirement is not, however, fulfilled in a case where the obligation to obtain consent applies exclusively to relocation to

another EEA State without applying to relocation within the EEA State concerned.

Michael Reiertsen

Judge-Rapporteur