

**TO THE EFTA-COURT**

In accordance with Article 20 of the Statute and Article 90 (1) of the Rules of Procedure of  
the EFTA Court

**HUNGARY**

represented by Miklós Zoltán FEHÉR and Katalin SZÍJJÁRTÓ, agents of the Hungarian  
Government (*Ministry of European Union Affairs, 25 Arany János street, 1051 Budapest,  
Hungary; accepting service to be effected electronically via e-EFTACourt*),

hereby presents the following

**WRITTEN OBSERVATIONS**

**in case E-15/24**

**A versus 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 citizens of the Union and their family members to  
move and reside freely within the territory of the Member States and of Article 28 of the EEA-  
Agreement.

## **I. Factual and legal background**

1. With regard to the factual and legal background of the case, the Hungarian Government refers to the content of the request for an advisory opinion submitted by the Borgarting Court of Appeal.
2. The Borgarting Court of Appeal requests that the EFTA Court provide an advisory opinion on the following questions:

*‘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 obtaining without the non-custodial parent’s consent or permission from the court?’*

*Second, 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 the non-custodial parent’s consent or permission from the court?’*

## **II. The position of the Hungarian Government**

3. The questions referred by the Norwegian court essentially seek to ascertain whether the right of free movement of the custodial parent and / or of the child under Directive 2004/38, or the right of free movement of that parent for the purpose of employment is hindered by the fact that the child’s relocation abroad is subject to the consent of the other parent or the court’s permission. The question also arises as to whether it is lawful to treat domestic and foreign situations differently, namely that no such authorisation is required in the case of a domestic move.
4. In the view of the Hungarian Government, it must first of all be stated that this requirement may constitute an obstacle to the custodial parent’s or child’s permanent residence in another Member State or to the parent’s establishment for employment purposes.
5. Therefore, as a second step the question of justification arises. The referring court also raises the question whether the grounds set out in Article 27 of Directive 2004/38 and those set out in Article 28(3) of the EEA Agreement or the non-statutory principle of overriding reasons in the public interest (which has been developed in the CJEU’s practise) come into play as justification.
6. Article 27 of Directive 2004/38 allows Member States to restrict the right of free movement and residence of Union citizens and their family members on grounds of

public policy, public security or public health. In the view of the Hungarian Government a national regulation such as that at issue in the main proceedings cannot fall within the scope of that article. In line with the Opinion of Advocate General Hogan in Case C-454/19, the Hungarian Government considers that the scope of that article is limited, on the one hand, to restrictions on the right of entry *stricto sensu* and, on the other hand, to measures of expulsion.<sup>1</sup> The present situation cannot be considered as such, since (i) the entry of the child or his / her parent is not restricted, (ii) expulsion measures cannot be taken (the lack of parental consent or judicial authorisation constitutes child abduction).

7. Article 28(3) of the EEA Agreement, like Article 27 of the Directive, lists three possible grounds for a restriction: public policy, public security, public health.
8. The Hungarian Government considers that in the present circumstances the justification of the restriction must be assessed on the basis of the non-statutory principle of overriding public interest developed by the CJEU. This principle is also applied by the EFTA Court in its case law.<sup>2</sup> According to this principle, national measures capable of hindering the exercise of fundamental freedoms guaranteed by the Treaty or of making it less attractive may be allowed only if they pursue a legitimate objective in the public interest, are appropriate to ensure the attainment of that objective, and do not go beyond what is necessary to achieve the objective pursued.<sup>3</sup>
9. The question therefore arises as to what reasons may justify the assumed restriction of the above-mentioned rights. As the requesting court sets out, the primary purpose of the provisions of the Children Act concerning relocations within Norway and abroad is to facilitate for the child being able to maintain contact with both parents. The Hungarian Government agrees that this ground can be considered as a reason of public interest apt to justify the potential restriction. The right to contact with both parents is a fundamental right of the child, recognised in both EU and international law (see Article 24(3) of the EU Charter of Fundamental Rights, Article 9(3) of the UN Convention on the Rights of the Child<sup>4</sup> or Article 8 of the European Convention on Human Rights).
10. That right may be clearly jeopardised from the point of view of the non-custodial parent if the child relocates abroad with the custodial parent. As recognised by the CJEU, the wrongful removal of a child, following a decision taken unilaterally by one of the parents, more often than not deprives the child of the possibility of maintaining on a regular basis a personal relationship and direct contact with the other parent.<sup>5</sup>
11. The distance of the child's new place of habitual residence from the place of habitual residence of the non-custodial parent is only one of the factors which can make such contact more difficult. This factor actually occurs with every move, however, relocating

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<sup>1</sup> Opinion of 4 June 2020, *Staatsanwaltschaft Heilbronn v ZW*, C-454/19, EU:C:2020:430, point 30.

<sup>2</sup> See, for example, judgment of 5 May 2001 in Case E-8/20, N, paragraph 91 and the case-law cited therein.

<sup>3</sup> See, for example, judgment of 1 April 2008, *Gouvernement de la Communauté française and Others*, C-212/06, EU:C:2008:178, paragraph 55 and the case-law cited.

<sup>4</sup> Convention on the Rights of the Child, adopted by the General Assembly of the United Nations in New York on 20 November, 1989.

<sup>5</sup> Judgment of 23 December, 2009, *Detiček*, C-403/09 PPU, EU:C:2009:810, paragraph 56.

abroad is more likely to result in a significant increase in physical distance from the non-custodial parent than moving domestically.

12. However, regardless of physical distance, crossing the national border may make it significantly more difficult for the non-custodial parent to exercise his / her parental rights, including maintaining contact with the child and enforce their right in this regard. As under private international law the applicable law is usually based on the child's place of habitual residence, a different law should be applied in the event of a relocation abroad, which is likely to be less known to the non-custodial parent. Foreign law may also regulate differently, where appropriate, the right of contact of the non-custodial parent. In addition, there may be linguistic and financial difficulties if the non-custodial parent is forced to enforce their right of contact with the child.
13. Although the principle of equal treatment requires comparable situations to be treated in the same way, the Hungarian Government considers that domestic and foreign relocations cannot be regarded as comparable situations. Thus, although in some cases the planned habitual residence abroad may be closer to the current place of habitual residence than in case of some long-distance domestic relocations, a national regulation which impose stricter condition for the former cases does not, in itself, constitute a breach of EU or EEA law. The right of the child to maintain personal and direct contact with both parents is an overriding public interest for which additional requirements may be imposed when relocating abroad, having regard to the above-mentioned risks arising from the fact that the child is subject to another legal regime and that the non-custodial parent therefore may encounter difficulties in securing his or her right of contact.
14. Next, it is necessary to examine the important question whether the national legislation at issue is proportionate to the objective pursued, that is to say, whether it does not go beyond what is necessary to safeguard the abovementioned objective.
15. In the view of the Hungarian Government, the guarantee of proportionality lies in the fact that in case of dispute between parents on the child's habitual residence, an independent and impartial authority – a court under the Norwegian law – will ultimately decide on the permission to relocate the child abroad. In making that decision, it considers all the relevant circumstances that may arise from the child's or the parents' side in the context of the particular case. Such circumstances may include, for example, the distance of the habitual residence abroad from the habitual residence of the other parent, the possible difficulties in maintaining direct and personal contact due to the relocation (including possible contacts with the extended family), or the extent to which the rights of the custodial parent would be compromised by the refusal of the permission. However, it should be emphasised that the best interests of the child, as provided for in Article 24 of the Charter and in Article 3 (1) of the UN Convention on the Rights of the Child, must be taken into account in first place in that assessment.
16. The Norwegian regulation (and similarly the Hungarian one) is based on the concept that the parents have to decide jointly on all important issues concerning the fate of their common child. If this is not possible, a court (or an authority under Hungarian law) will decide on the matter, considering all relevant circumstances of the case and taking into

account the best interests of the child. It should be emphasised that the absence of the non-custodial parent's consent to relocation abroad does not entail that the relocation is not possible at all. The legislation provides for court proceedings in the event of a dispute between the parents, which ultimately means that the right to free movement is restricted only in cases where it infringes the child's fundamental right of contact. In our view this adequately ensures the proportionality of the regulation, since in those cases where the child's right to contact is not actually compromised the right of free movement is not restricted.

17. In the light of the foregoing, the Hungarian Government propose answering the questions in such a way that the Norwegian 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.

### **III. Conclusions**

In view of the above, the Hungarian Government proposes the following answer to the questions referred:

**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.**

**Budapest, 30 August 2024.**

**Fehér Miklós Zoltán**

**Szijjártó Katalin**