

KVALE

Oslo, 2 September 2024

GMA/40122-501

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

OBSERVATIONS

submitted pursuant to Article 90(1) of the Rules of Procedure of the EFTA Court by

B

represented by Gjermund Mathisen, Kvale Advokatfirma DA, as Counsel

in Case E-15/24

A v B

in which *Borgarting lagmannsrett* (Borgarting Court of Appeal), Norway, has requested an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning 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 Article 28 of the EEA Agreement.

I INTRODUCTION

- (1) This is a case about the best interests of the child, the right to family life, and parental responsibility.
- (2) It is a case about fundamental rights.
- (3) The facts, in essence, are as follows. A and B have shared parental responsibility for C, their joint child, born in 2016. C has their permanent residence with A who is the "custodial parent" in this sense. The parents live in the same part of Oslo, Norway. C and B maintain weekly in-person contact.
- (4) A wants to relocate to Denmark with C. As the parents have shared parental responsibility, B must consent for A to be allowed to relocate to another State with their joint child, or A must obtain consent from a Norwegian court. B has agreed to C having their permanent residence with A, but objects to C being relocated to Denmark.
- (5) Mediation could not solve the disagreement between the parents. Having to decide the case by way of judgment, and weighing the arguments and evidence, the District Court then found that A was not permitted to relocate to Denmark with C.
- (6) In Norway, under the Children Act, the custodial parent can make the choice to relocate with the child *domestically*, without the consent of the other parent. However, such a decision might under certain circumstances give the other parent grounds for claiming a change in the child's place of residence, and potentially for an interim order to this effect.¹ A primary consideration in this respect will always be the best interests of the child,² and the right to family life must be respected.³ For a move *abroad*, the procedure works the other way

¹ See Sections 37, 40, 42a, 51 and 56 of [the Children Act](#).

² See Section 48 of the Children Act.

³ See Article 8 of the European Convention on Human Rights.

around; the custodial parent must seek a court order permitting relocation with the child if the other parent does not consent.

- (7) This does not appear unusual in a comparative perspective. By way of example, Danish law appears to be very similar, and there appears to be similarities with Icelandic law.⁴ The same goes for Germany.⁵ An expert report prepared for the Council of Europe in 2013 further appears to show that particular regulation of cross-border relocation is not uncommon in Europe.⁶

II ON THE QUESTIONS FROM BORGARTING LAGMANNSRETT

II.A Fundamental rights and a false equivalence

- (8) The questions from *Borgarting lagmannsrett* both spring from a comparison between relocating the child domestically and relocating the child abroad, and a perceived equivalence between the two.
- (9) This perceived equivalence is a false equivalence.
- (10) Granted, if it were all about the distances, the comparison might perhaps be justified. Given Norway's geography, it is possible to move a rather long distance domestically, farther than in many other EEA States. Though of course not nearly as far as within the whole of the EEA. Réunion is some 10 000 km away.
- (11) Alternatively, if it were all about communications, the comparison arguably could be justified in some instances even though in most cases domestic travel is just easier, as anyone who has commuted between Norway and continental Europe for an extended period of time will know.⁷ And outside of continental Europe there are additional challenges. There are time differences of one to six hours as compared to Norway, you leave the Schengen Area, and so the list goes on.

⁴ See [Prop. 161 L \(2015-2016\)](#) pkt. 6.3 (p. 38).

⁵ [Child Relocation 2023 - Germany | Global Practice Guides | Chambers and Partners](#), point 2.1.

⁶ See [Prop. 161 L \(2015-2016\)](#) pkt. 6.3 (p. 38).

⁷ Not to mention what the case may be in pandemic times. Or the costs as exchange rates fluctuate.

- (12) However, neither distances nor communications are the be-all and end-all of family life and the decisions that we make for our children, in their best interest.
- (13) Moving to a different country, even within the EEA and even just to a neighbouring State, entails making choices for the child going far beyond a move domestically – major choices that, under Norwegian law, are based on parental responsibility. By way of example, under the Children Act in Norway, opting to take the child out of one kind of school and sending the child to another kind of school is a decision both parents must consent to if they have shared parental responsibility.⁸ Similarly, moving abroad typically comes with a change of school and school system for the child; different curriculum, maybe a different religious (or secular) orientation, different pedagogical underpinnings. The child may also finish school a year earlier or a year later depending on the school system, classes may be taught in different languages, school holidays may be different, etc. And upon completing secondary education and reaching the age of majority, there may be mandatory military service – or not – in part depending on the country of residence.⁹
- (14) The notion of 'parental responsibility' is similarly understood in EU law to cover important decisions relating to the child. The CJEU has held that "*the concept of 'parental responsibility', as defined in Regulation No 2201/2003, must be interpreted as covering decisions relating to, in particular, custody of the child and the child's place of habitual residence*".¹⁰
- (15) One parent relocating with the child to another State is also of fundamental importance regarding the exercise of parental responsibility. Under the 1996

⁸ See [Ot.prp. nr. 56 \(1996–1997\)](#) pkt. 6.2.4.

⁹ As far as Norwegian law is concerned, see in particular Section 6 of [the Defence Act](#).

¹⁰ Order of 3 October 2019 in *OF v PG*, C-759/18, EU:C:2019:816, paras 46–54. See, now, Article 2(2)(7) of Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). 'Parental responsibility' includes 'rights of custody' as defined in Article 2(2)(9). In this context, also note recital (18) of the preamble: "*For the purposes of this Regulation, a person should be deemed to have 'rights of custody' where, pursuant to a decision, by operation of law or by an agreement having legal effect under the law of the Member State where the child is habitually resident, a holder of parental responsibility cannot decide on the child's place of residence without the consent of that person...*"

Child Protection Convention,¹¹ the exercise of parental responsibility is regulated by the laws of the State in which the child habitually resides, and the authorities of that State have jurisdiction, see Articles 5, 15 and 17:

CHAPTER II - JURISDICTION

Article 5

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

[...]

CHAPTER III - APPLICABLE LAW

Article 15

(1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.

[...]

Article 17

The exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence.

- (16) Under this legal framework, relocating with the child abroad is not equivalent to relocating domestically, not for the child, not for the parents, and certainly not for the parent that remains in the first State.¹²

¹¹ Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

¹² See further [NOU 2020: 14 Ny barnelov](#), pkt. 11.4.3.2 (end of p. 204, top of p. 205). Even if the situations are not equivalent, they could technically have been subject to more or less the same legal regime. This

(17) At the outset, the best interests of the child and matters of family life are for the child's parents to decide on,¹³ taking due account of the child's own views as appropriate according to the child's age and maturity. When two parents with shared parental responsibility cannot agree, it is ultimately for the courts to decide on e.g. the permissibility of relocating the child to another country. In so doing, the courts must safeguard the best interests of the child, and the right to family life for the child and the parents, in accordance with fundamental rights. In EU law, this finds expression in the Charter of Fundamental Rights of the European Union,¹⁴ Articles 24 and 7:

Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

[...]

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

is discussed in a recent [public consultation](#). Particular reasons for the current regulation of domestic situations are non-exhaustively articulated in e.g. [Prop. 161 L \(2015-2016\)](#) pkt. 6.9.2 (p. 44).

¹³ See Articles 5 and 18(1) of the Convention of 20 November 1989 on the Rights of the Child.

¹⁴ Further reference is made to Article 8 ECHR and the Convention on the Rights of the Child.

3. *Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.*

(18) Fundamental rights are also part of EEA law, in that they are part of the general principles of EEA law.¹⁵

(19) It is through this lens that the present case must be viewed.

II.B Assessment under Article 28 EEA

(20) As A invokes the right to freedom of movement for workers, it is appropriate at the outset to address the regime established under Article 28 EEA, which represents a specific expression of the general right to move and reside freely within the EEA.¹⁶

(21) National legislation entailing that the custodial parent cannot relocate with the child to another EEA State without consent from the other parent with whom parental responsibility is shared or, failing such consent, without obtaining the court's permission, does restrict the custodial parent's freedom of movement.

(22) Such a restriction, which is indistinctly applicable in that it is independent of the nationality of the persons concerned, may be justified if it is based on objective considerations of public interest and is proportionate to the legitimate objective pursued by the national legislation in question.¹⁷

(23) The legislation at issue is intended to protect the rights of the child and the right of parental responsibility. Indeed, when the decision whether or not to relocate the child cannot be based on parental responsibility alone because the parents

¹⁵ Judgment of 9 August 2024 in *Låssenteret v Assa Abloy*, E-11/23, para. 46, judgment of 2 July 2024 in *MH*, E-6/23, para. 63, and the case law cited.

¹⁶ Cf. judgment of 13 May 2020 in *Campbell*, E-4/19, para. 48.

¹⁷ Judgment of 19 November 2020 in *ZW*, C-454/19, EU:C:2020:947, para. 36 and the case law referred to. The judgment concerns Article 21 TFEU, but there is no reason why this part of the of the CJEU's analysis should not apply to an analysis under the other fundamental freedoms. See to this effect also the Opinion of Advocate General Hogan, EU:C:2020:430, para. 42, and note the Court's reference to case law concerning other fundamental freedoms, such as the free movement of goods.

sharing that responsibility cannot agree, the primary consideration for the courts in deciding on the matter is the best interests of the child.¹⁸

- (24) The right of parental responsibility is intrinsically linked to the protection of the child and of the child's fundamental rights.¹⁹
- (25) The CJEU has consistently held that the protection of the child is a legitimate interest which, in principle, justifies a restriction on a fundamental freedom guaranteed by the TFEU. The same applies to the protection of the fundamental rights of the child, as enshrined in Article 24 of the Charter of Fundamental Rights of the European Union.²⁰
- (26) With reference to the homogeneity principle and fundamental rights as part of the general principles of EEA law, this is no different under the EEA Agreement.
- (27) In view of the above, the legislation at issue pursues a legitimate objective.
- (28) Moreover, the legislation is appropriate for securing the attainment of the objective pursued. It protects the right of parental responsibility to the extent possible, whilst giving precedence to the protection of the child and of the child's fundamental rights.
- (29) In so doing, the legislation also does not go beyond what is necessary in order to attain its legitimate objective. A case-by-case assessment is required, and there is no presumption that either relocating or not relocating is in the best interest of the child.²¹ The assessment is not skewed against free movement.

¹⁸ See Section 48 of the Children Act.

¹⁹ Judgment of 19 November 2020 in *ZW*, C-454/19, EU:C:2020:947, paras 37–39, see also the Opinion of Advocate General Hogan, EU:C:2020:430, paras 38–39.

²⁰ Judgment of 19 November 2020 in *ZW*, C-454/19, EU:C:2020:947, para. 40 and the case law referred to.

²¹ [HR-2019-1230-A](#) avsn. 38–39 (Norwegian Supreme Court judgment of 26 June 2019).

- (30) Nor can the legislation be considered disproportionate to its legitimate objective, when balancing the importance of the objective – which is to safeguard fundamental rights – and the interference with the freedom of movement.²²
- (31) This is all the more so as it is apparent from the case law of the CJEU that it is not indispensable that measures laid down by a Member State to protect the rights of the child correspond to a conception shared by all Member States as regards the level of protection and the detailed rules relating to it. As that conception may vary from one Member State to another on the basis of, inter alia, moral or cultural views, Member States must be recognised as having a definite margin of discretion.²³
- (32) In brief, the restriction on the freedom of movement is justified.

II.C Assessment under Directive 2004/38/EC

- (33) An assessment under Directive 2004/38/EC does not change the outcome.
- (34) "*This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union*", recital (31) of the preamble sets out. The Directive cannot impinge on fundamental rights any more than can the fundamental freedoms. Rather, the Directive is subordinate to the Charter and to fundamental rights.
- (35) The Directive, and especially its Articles 4 and 7 as referred to by *Borgarting lagmannsrett*, serves to implement Article 21 TFEU. Again, the Directive cannot impinge on fundamental rights any more than can Article 21 TFEU, which was at issue in the judgment specifically referred to by *Borgarting lagmannsrett*.²⁴
- (36) Moreover, the EEA States, in particular their courts, must not only interpret their national law in a manner consistent with EEA law but are also under an obligation to ensure that the interpretation and application of acts incorporated into the

²² Cf. judgment of 21 March 2024 in *LDL*, E-5/23, para. 82.

²³ Judgment of 19 November 2020 in *ZW*, C-454/19, EU:C:2020:947, para. 42 and the case law referred to.

²⁴ Indeed the judgment of 19 November 2020 in *ZW*, C-454/19, EU:C:2020:947, concerned Article 21 TFEU.

EEA Agreement – *in casu* Directive 2004/38/EC – does not result in a conflict with fundamental rights protected by EEA law.²⁵

(37) It follows that the national legislation at issue is not in breach of the Directive.

III CONCLUSION

(38) In the light of the foregoing, B considers that the questions referred to the EFTA Court by *Borgarting lagmannsrett* 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.**

²⁵ Judgment of 2 July 2024 in *MH*, E-6/23, para. 63, judgment of 9 February 2021 in *Kerim*, E-1/20, para. 43, and the case law cited. See also the judgment of 21 March 2024 in *LDL*, E-5/23, para. 53.