



Reykjavík, 2 September 2024

To the President and Members of the EFTA Court

Written Observations

submitted pursuant to Article 20 of the Statute of the EFTA Court and
Article 90 of the Rules of Procedure of the EFTA Court by

the Government of Iceland

represented by

Mr. Hendrik Daði Jónsson, Legal Adviser, Ministry for Foreign Affairs, and
Ms. Svanhildur Þorbjörnsdóttir, Legal Adviser, Ministry of Justice, acting as Agents in

Case E-15/24

A v B

in which the Borgarting Court of Appeal (Borgarting lagmannsrett) has requested the EFTA Court to give 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 on whether legislation regulating the relocation of a child by its custodial to another EEA State is compatible with the rights of the parents and the child under 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 and Article 28 of the EEA Agreement.

The Government of Iceland has the honour of lodging the following written observations.

I. Introduction

1. With a request dated 27 June 2024, the Borgarting Court of Appeal (“the Referring Court”) requested an Advisory Opinion from the EFTA Court, pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, on two questions concerning the interpretation of the EEA Agreement in relation to a dispute between the parents of a child with joint parental responsibility, where the custodial parent wishes to relocate with the child to another EEA State against the objections of the non-custodial parent. Under Norwegian law, where parents have joint parental responsibility and the non-custodial parent does not consent to the relocation of the child abroad, the custodial parent cannot undertake the relocation without the permission of a court. The Referring Court requests the EFTA Court to advise on the compatibility of such provisions of national law with the right to free movement of persons under the EEA Agreement, specifically Directive 2004/38/EC and Article 28 of the Agreement itself.
2. For further details on the factual background of the case, the Government of Iceland refers to the request for an Advisory Opinion.
3. The questions of the Referring Court arise in a context where a State is required to balance competing fundamental rights of individuals, including the rights of the child, which may by consequence entail a restriction on the right to free movement under the EEA Agreement. While any restriction on free movement rights must be assessed on a case-by-case basis, the Government of Iceland submits that national measures such as those described in the Referring Court’s request are legitimate, appropriate and necessary to enable States to ensure that the fundamental rights of the child are respected. The Government therefore submits that the questions of the Referring Court should be answered in the affirmative for the reasons and in the manner set out in the following observations.

II. General Observations

4. States have few responsibilities as basic and absolute as to ensure the wellbeing of the children within their jurisdictions. The status of children as a vulnerable group in society, by reason of their physical and mental immaturity, requires that they are afforded special safeguards and care to enable their healthy growth and development. To this end, children have been universally recognised as holders of fundamental rights under international law which are codified in the Convention on the Rights of the Child, the most widely ratified human rights treaty in the world. The central principle of this legal regime is that the best interests of the child shall be a primary consideration in all actions regarding children. In the present Case, the EFTA Court is requested to advise on the interaction between the EEA Agreement and national law providing for the special safeguards owed to children. The Government of Iceland submits that the fundamental rights of the child require that other legal rights and obligations, including those prescribed by the EEA Agreement, must be

interpreted and applied in a manner which does not prejudice the specially protected status of children.

5. The national case in which the request for an Advisory Opinion of the EFTA Court has arisen concerns a dispute between the parents of a child who are separated and share parental responsibility. The dispute concerns a significant decision for the life of the child where one of the parents seeks to move with the child to another place of residence in another State, thereby bringing the child out of that State's territorial jurisdiction against the will of the other parent. Disputes of this kind are sensitive although not infrequent and require a careful balancing of the rights of all parties, to ensure that the rights of the child are respected and that the best interest of the child is a primary consideration in the decision taken. In this regard, the Government of Iceland recalls that, under the Convention on the Rights of the Child, States have the responsibility of ensuring that a child shall not be separated from its parents against their will, except when competent authorities subject to judicial review determine that such separation is necessary for the best interest of the child, such as where the parents are living separately and a decision must be made as to the child's place of residence. In such cases, States are to respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
6. As is stated in the request of the Referring Court, the national legislation being applied in the national case serves "to facilitate for the child being able to maintain contact with both parents" which "is presumed to be in the child's best interest". In this vein, the Government of Iceland notes that the provisions of Norwegian national law described in the request are similar to the Icelandic legal regime on the rights of the child. The Icelandic Children Act No. 76/2003 is the national legislation applicable to children's custody arrangements and how decisions on their residence are taken. Under the act, a child is entitled to the custody (*forsjá*) of one or both of their parents until they reach the age of majority, and the parents in turn have a duty to exercise that custody. Pursuant to Article 28 a of the Act, parents exercising joint custody are to take all major decisions regarding the child jointly. If the parents exercising joint custody do not live together, the parent with whom the child is domiciled as their permanent residence is authorised to take important decisions regarding the child's daily life, including the child's place of residence in Iceland, the choice of the child's kindergarten, primary school and daycare, normal and necessary health services and regular leisure-time activities. The parents should nevertheless attempt to consult each other before final decisions on these matters are taken. In this context, it should be noted that the term custody is employed in the Icelandic Children Act to signify what is meant by the term parental responsibility in the Norwegian Children Act, as it is described in the request for an Advisory Opinion. Similarly to what is the case in Norway, joint custody within the meaning of the Icelandic Children Act restricts the ability of either parent to travel with the child abroad without the consent of the other parent. Paragraph 5 of Article 28 a of the Children Act stipulates that neither parent exercising joint custody may take the child out of Iceland without the consent

of the other. Where the parents disagree on a proposed short-term journey abroad, either parent may, pursuant to Article 51 a of the Children Act, request the ruling of a District Commissioner on whether the journey may take place. The District Commissioner is to consider factors such as the purpose of the journey, its duration and the effect it would have on the right of the other parent to access the child. Furthermore, if a parent exercising joint custody with whom the child is domiciled as their permanent residence wishes to move abroad with the child against the objection of the other parent, the matter would, as is the case in Norway, need to be resolved through legal action before the national courts. In such an event, a parent in Iceland would need to request sole custody of the child which, if granted, would grant them the authority to take the unilateral decision to relocate with the child abroad.

7. The Government of Iceland submits that a regime as described above serves to balance the competing rights of parents and, first and foremost, to ensure that the fundamental rights of the child are respected and that the best interest of the child prevails. A child has a right to an upbringing by its parents and those parents, likewise, have a duty to the upbringing of their child. Irrespective of whether parents live together, parenthood is in most cases a common endeavour where decisions of consequence to a child's upbringing must be made jointly. Necessarily, this means that one parent's capacity to make decisions unilaterally is curtailed by the rights of the other parent in relation to the child. Turning to address the compatibility of such a regime with free movement rights under the EEA Agreement, the Government of Iceland notes that it is not at issue in the national case in Norway whether the parent or the child can exercise their right to free movement, but rather how the decision to exercise it can be made in respect of the child.

III. Compatibility with Free Movement Rights under the EEA Agreement

8. The Referring Court has requested the EFTA Court to advise on the compatibility of the Norwegian national regime applicable to the relocation abroad of the children of parents sharing parental responsibility with, firstly, the rights of the parents and the child to free movement of persons under Directive 2004/38/EC and, secondly, the free movement of workers under Article 28 of the EEA Agreement. Based on the way the facts of the case are presented in the Referring Court's request, the Government of Iceland understands that Article 28 of the Agreement would be applicable, as A is seeking to move to Denmark for the purpose of taking up employment. Relevant provisions of Directive 2004/38/EC, including Articles 4, 5 and 7, would not appear to be directly engaged in the present circumstances. In any case, if national measures such as those described in the request for an Advisory Opinion were held to constitute a restriction of free movement rights under either Directive 2004/38/EC or Article 28 of the Agreement, they could be justified as legitimate and proportionate.
9. It is settled by the case-law of the EFTA Court and of the CJEU that a restriction of a right to free movement is determined to exist where a national measure is liable to

hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement. Such a restriction will exist even where the national measure is applicable without discrimination on the grounds of nationality.

10. Applying this criterion to the context of the present case, the Government of Iceland considers that measures restricting the capacity of an EEA national to relocate with their child to another EEA State is liable to render the exercise of the applicable free movement rights by that EEA national less attractive and would thus constitute a restriction thereof. Restrictions of this kind may be justified on the grounds set out in the relevant provision of the EEA Agreement, in this case Article 28(3), or by overriding reasons in the public interest, provided that they are appropriate to secure the attainment of the objective which they pursue and that they do not go beyond what is necessary in order to attain it.
11. The Government of Iceland submits that restrictions such as those imposed by the national measures in question can, in principle, fulfil both requirements.
12. Such measures serve the legitimate public policy objective of securing the enjoyment of the fundamental rights of the child. These rights entail human rights obligations owed by States both to children and to parents within their jurisdiction as a matter of international law, *inter alia* under the Convention on the Rights of the Child and Article 8 of the European Convention on Human Rights. As the Convention on the Rights of the Child sets out, the specific vulnerabilities inherent to children warrant special safeguards to ensure that their fundamental rights are respected. Of particular concern to the international relocation of a child are the right not to be separated from one's parents against their will, subject to the provisions of the Convention, and the obligations of States to prevent the abduction of children for any purpose or in any form. The attainment of these objectives constitutes an overriding reason in the public interest to legitimately impose a restriction on conflicting free movement rights.
13. As to the proportionality of the restriction imposed, the Government of Iceland submits that the national measure in question, as described in the Referring Court's request, appears to reflect a careful balancing of the competing rights at stake so as to limit the restriction imposed to what is both appropriate and necessary to attain the objective pursued. The national measure appears to give the parent with whom a child is domiciled as their permanent residence considerable discretion to relocate with the child, subject to a notification obligation to the other parent. The limitation of that right occurs where the parent seeks to relocate with the child abroad against the wishes of the other parent. As the Referring Court specifically raises the fact that the national legislation distinguishes between domestic and international relocations, the Government of Iceland submits that there are substantial grounds to justify such a distinction and that it may in fact reflect the proportionality of the measure. While any relocation may impact the life of a child, it must be underscored that an international relocation, when compared to a domestic one, is more likely to result in a significant change to a child's daily life, including its access to family

members, including a parent, the composition of its familial community, as well as to its educational, language and cultural environment. The international relocation of a child with one of its parents also has a greater consequence for the capacity of the other parent to exercise their rights and duties in relation to the child. If one parent could unilaterally decide on such a relocation of the child, it could deprive the other parent and the child of the enjoyment of their fundamental rights. It is therefore appropriate for there to be limitations in this regard.

14. In considering whether a measure of this kind goes beyond what is necessary for the attainment of its objective, the Government of Iceland submits that a less restrictive measure could not be effective. The restriction imposed is only applicable in cases where the parents disagree on the relocation of the child, and the national legislation in Norway, as described in the Referring Court's request, appears to be designed to facilitate the effective resolution of the parents' dispute through mediation. Where the parents cannot agree on the international relocation of the child, the matter can be settled by a national court which makes a ruling based on the specific circumstances of the case and considering what is in the child's best interest. Any less restrictive measure would necessarily mean that the relocation could take place without the consent of both parents or the decision of a competent judicial or executive authority. That would necessarily entail that the child could be brought into the jurisdiction of another State which would then be responsible for giving effect to the rights of the child and the parents, including in custodial matters. The State in which the child was resident prior to that relocation would, in such a situation, not be able to fulfil its international obligations, including under Article 9 of the Convention on the Rights of the Child, to ensure that the fundamental rights of the child were respected in the making of the decision to relocate.
15. Against this backdrop, the Government of Iceland would caution that the evaluation of the appropriateness and necessity of a restriction of free movement rights in relation to children's custodial matters must reflect the significant margin of appreciation that EEA States have in adopting measures in this area. This area is not harmonised under the EEA Agreement and, unlike what is the case for some EU Member States, the Agreement does not provide for judicial cooperation in matters of parental responsibility or international child abductions. In the absence of more profound cooperation between EEA States in this area, a more liberal regime could hamper the capacity of a State to effectively prevent illicit conduct in relation to a child's custodial matters. For example, it would possibly open corridors for forum-shopping whereby a parent could move with a child abroad to file a custody case in a State where different rules apply. It would further be unclear how the provisions of the 1980 Hague Convention on Civil Aspects of International Child Abductions would apply in such a situation where a parent with joint custody with whom the child is domiciled would move with the child abroad without the consent of the other parent.
16. On the basis of the above considerations, the Government of Iceland submits that national measures such as those described in the Referring Court's request for an

Advisory Opinion, and which are applicable under Icelandic national law, which restrict the capacity of a custodial parent to move with a child to another EEA State against the objections of the other parent, which shares parental responsibility, without the permission of a national court are justified on the basis of the attainment of the public policy objective of ensuring the enjoyment of the fundamental rights of the child and that they are both appropriate and necessary to the attainment of that objective.

IV. Answer to the Question Referred

17. The Government of Iceland respectfully submits that the EFTA Court answer the question from the referring court 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.”

For the Government of Iceland,

Hendrik Daði Jónsson

Svanhildur Þorbjörnsdóttir

Agent

Agent