Registered at the EFTA Court under NºE-15/24-14 on 2 day of September 2024.

ESA | EFTA Surveillance Authority

Brussels, 2 September 2024
Case No: 92399
Document No: 1470055

ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by

THE EFTA SURVEILLANCE AUTHORITY

represented by Sigrún Ingibjörg Gísladóttir, Sigurbjörn Bernharð Edvardsson, Erlend M. Leonhardsen and Melpo-Menie Joséphidès, Department of Legal & Executive Affairs, acting as Agents,

IN CASE E-15/24

A

v

B

in which Borgarting Court of Appeal (*Borgarting lagmannsrett*) requests 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 concerning the compatibility of Section 40 of the Norwegian Act relating to Children and Parents with Article 28 of the EEA Agreement and Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

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1 INTRODUCTION AND THE FACTS OF THE CASE

1. The present request for an advisory opinion ("**the Request**") concerns the compatibility of Section 40 of the Norwegian Act relating to Children and Parents ("**the Children Act**") with EEA law.

2. Pursuant to the facts presented in the Request, the mother, *A*, wishes to relocate to Denmark with her child, *C*, who she has custody over but shares the parental responsibility with C's father, *B*. B has not consented to the move. According to Section 40 of the Children Act, A must, therefore, initiate legal action against B in order to relocate to Denmark with C and obtain the court's approval for the relocation. If A had wished to relocate with C to a place within Norway, she would not have needed the court's approval.

3. The Borgarting Court of Appeal ("**the Referring Court**") has submitted two questions to the EFTA Court ("**the Court**") regarding the disparity in the national rules governing the relocation of children when both parents have shared responsibility under the Children Act. The questions pertain to whether the requirement for a parent who wishes to relocate abroad with their child (including to other EEA States) to initiate legal action if the other parent opposes the relocation and seek the court's approval, as opposed to relocating within Norway, where court approval is not required, conflicts with EEA law.

4. The EFTA Surveillance Authority ("**ESA**") refers to the Request for further details about the facts of the case.

2 EEA LAW

5. Article 4 of the EEA Agreement ("**EEA**") provides:

> "*Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*."

6. Article 28 EEA provides:

> "*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."

7. 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 ("**Directive 2004/38/EC**" or "**the Directive**") was incorporated into the Agreement on the European Economic Area ("**the EEA Agreement**") by Decision No 158/2007 of the EEA Joint Committee of 7 December 2007, which entered into force on 1 March 2009.[1]

8. Article 4 of Directive 2004/38/EC is titled "*Right of exit*", and provides:

"*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*

[1] OJ L 124, 8 May 5 2008, p. 20.

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."

9. Article 7 of Directive 2004/38/EC is titled "*Right of residence for more than three months*, and provides in relevant parts:

"*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

(c)– are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they 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; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c)."

10. Article 27 of Directive 2004/38/EC lays down the general principles applicable notably to restrictions on the right of residence.

> "*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.*"

3 NATIONAL LAW

11. In reference to the relevant national law, ESA will provide a summary of the key points in the Request and otherwise refer to the detailed explanations of the applicable provisions of the Children Act in Part 3 of the Referring Court's Request. Moreover, ESA deems it important to consider specific provisions of the Norwegian 2005 Penal Code ("**the Penal Code**") as amended, particularly in relation to violations of the provisions of the Children Act relevant to this case.

12. Section 37 of the Children Act, which is titled "*Decisions that may be taken by the person with custody of the child",* inter alia lays down rules for domestic relocations:

> "*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."*[2]

13. Section 40 of the Children Act, which is titled "*Children relocating or staying abroad*," lays down special rules for relocations abroad:

> "*If one of the parents has sole parental responsibility, the other parent may not object to the child relocating abroad. 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.*"[3]

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[2] Translation by the Referring Court, cf. the Request, page 4.
[3] Translation by the Referring Court, cf. the Request, page 5.

14. Section 48 of the Children Act, which is titled "*The best interests of the child*" provides that:

> *"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."*

15. Section 261 of the Penal Code, titled "*Removal from care",* outlines the penalties for the wrongful removal or withholding of a minor. It provides in relevant part:

> *"Any person who seriously or repeatedly removes or withholds a minor from someone with whom, pursuant to statute, agreement or court decision, the minor lives on a permanent basis, (...) shall be subject to a penalty of a fine or imprisonment for a term not exceeding two years. The same penalty shall be applied to any person who takes a minor out of the country or keeps a minor abroad and thereby illegally withholds the minor from someone who pursuant to statute, agreement or court decision has parental responsibility. (...)*
>
> *Aggravated removal from care is punishable by imprisonment for a term not exceeding six years. In determining whether the removal from care is aggravated, particular weight shall be given to the strain it placed on the child."*[4]

4 THE QUESTIONS REFERRED

16. The Referring Court has asked the Court 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*

[4] Official English translation of the Norwegian Penal Code. See link: https://lovdata.no/dokument/NLE/lov/2005-05-20-28/*#*.

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 noncustodial 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?"

5 LEGAL ANALYSIS

5.1 Preliminary remarks

17. In its two questions, which ESA will consider together below, the Referring Court, in essence, asks whether Section 40 of the Norwegian Children Act is compatible with Directive 2004/38/EC and/or Article 28 EEA. In the context of the two questions, the Referring Court is seeking the Court's views as to whether EEA law prevents it from exclusively basing its assessment on whether the relocation is in the child's best interest, and whether EEA law would require the Referring Court to provide its reasoning if a claim for relocating with the child to another EEA state does not succeed.[5] Although not phrased as a separate question, the Referring Court essentially asks the Court to give its opinion on whether the difference in treatment between relocations within Norway and the EEA in the Children Act could conflict with other provisions of the main part of the EEA Agreement or secondary law than those referred to in its two questions.[6]

[5] See the Request, page 7.
[6] *Ibid.*

18. ESA recalls that any EEA national who exercises the right of freedom of movement to seek employment and/or has been employed in an EEA state other than that of residence falls within the scope of Article 28 EEA.[7]

19. An EEA national may also enjoy rights to movement under the Directive, including Article 4 (right to exit) and Article 7 (right to reside), because, as noted by the Court in *Campbell*, the objectives pursued by the Directive "*do not render redundant the rights which the EEA Agreement had already established for the exercise of an economic activity, including freedom of movement for workers provided in Article 28 EEA*".[8] In that case, the Court considered the regime established under Article 28 EEA in conjunction with the relevant provision of the Directive, "[s]*ince the freedom of movement for workers represents a specific expression of the general right to move and reside freely within the EEA*".[9]

20. ESA submits that Chapter VI of the Directive cannot be regarded as imposing a precondition to the acquisition and maintenance of a right of entry and residence, but as providing exclusively the possibility to restrict, where justified, the exercise of a right derived from primary EEA law.[10] As such, noting that Article 27 of Directive 2004/38/EC may be relied upon by an EEA national against their EEA State of origin when that EEA State imposes restrictions on their right to exit their territory,[11] it is clear that the same must be true of the rights that EEA nationals enjoy on the basis of primary law. Hence, Article 28 EEA can be considered in conjunction with the provisions of the Directive, where applicable, including against their home state.

21. Given that A has not yet relocated from Norway but intends to take up an employment offer in Denmark, it appears her situation is more appropriately

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[7] See Judgment of the Court of Justice of the European Union ("**CJEU**") of 26 February 1991 in Case C-292/89 *Antonissen,* EU:C:1991:80, paragraphs 11 and 13, where the CJEU held that *"freedom of movement for workers forms one of the foundations of the Community and, consequently, the provisions laying down that freedom must be given a broad interpretation".* This *"also entails the right for nationals of Member States to move freely within the territory of the other Member States and to stay there for the purposes of seeking employment."* See also Judgment of the EFTA Court of 5 May 2021 in Case E-8/20 *Criminal Proceedings against N* [2021] EFTA Ct. Rep. 24, paragraph 74; Judgment of the EFTA Court of 13 May 2020 in Case E-4/19 *Campbell* [2020] EFTA Ct. Rep. 21, paragraphs 49-50 and case law cited; Judgment of the CJEU of 12 May 1998 in Case C-85/96 *Maria Martinez Sala,* EU:C:1998:217, paragraphs 32-33.

[8] Judgment of the EFTA Court of 13 May 2020 in Case E-4/19 *Campbell*, paragraph 48.

[9] *Ibid.*

[10] Judgment of the CJEU of 27 April 1989 in Case C-321/87 *Commission v. Belgium*, EU:C:1989:176, paragraph 10.

[11] Judgments of the CJEU of 17 November 2011 in Case C-430/10 *Gaydarov,* EU:C:2011:749, and Case C-434/10 *Aladzhov*, EU:C:2011:750.

analysed under the framework of Article 28 EEA, which safeguards her fundamental right to free movement as a worker within the EEA. It would, therefore, seem unnecessary to assess A's rights under the Directive.[12]

22. The disputed requirements under Section 40 of the Children Act primarily concern A's right to long-term stay and residence in Denmark (and C's right to accompany her) where, according to the facts of the case, A would be a worker pursuant to Article 28 EEA and Article 7(1)(a) Directive 2004/38/EC. The facts would thus appear to fall under Article 28 of the EEA and/or Article 7(1)(a) of the Directive.

23. With the aforementioned in mind, ESA considers it sufficient and appropriate to assess the rights enjoyed by A under Article 28 EEA. As further explained below, that would provide her with the right to free movement for employment within the EEA and to be accompanied by C. It is also necessary to assess whether she enjoys these rights regardless of the rule in Section 40 of the Children Act.

24. ESA nonetheless underlines that should the Court find it appropriate to address A's situation under the Directive, the facts of the case give rise to the same assessment.

25. From the outset, it is useful to recall that the rights found in Article 28 EEA, like all EEA law, must be interpreted in light of and in line with fundamental rights that form part of the general principles of EEA law.[13] In that regard, the requirements found in Section 40 of the Children Act must evidently be considered with respect to the right to respect for private and family life pursuant to Article 8 of the European Convention on Human Rights ("**ECHR**") as well as the principle of the best interests of the child,[14] the paramount importance of which, in the words of the European Court of Human Rights, "*reflects the broad consensus on this matter, expressed notably in Article 3 of the UN Convention of the Rights of the Child.*"[15]

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[12] See for comparison Judgment of the EFTA Court of 12 November 2021 in Case E-16/20 *Q and others v. Norway* [2021] EFTA Ct. Rep. 47, paragraph 51; Judgment of the EFTA Court of 21 March 2024 in Case E-5/23 *Criminal Proceedings against LDL,* paragraph 57, where the Directive was applied and not Article 28.

[13] Judgment of the EFTA Court of 19 April 2016 in Case E-14/15 *Holship* [2016] EFTA Ct. Rep. 240, paragraph 123.

[14] See Judgment of the EFTA Court of 21 April 2021 in Case E-2/20 *UNE and L* [2021] EFTA Ct. Rep. 21, paragraphs 52 and 54; Judgment of the CJEU of 8 May 2018 in Case C-82/16 *K.A. and Others v. Belgium,* EU:C:2018:308, paragraph 90.

[15] *Vavřička and Others v. the Czech Republic*, [GC], no. 47621/13, paragraphs 287-288 (ECtHR 8 April 2021).

5.2 The existence of a restriction

5.2.1 The impact of Section 40 of the Children Act on A's Rights under Article 28 EEA

26. It is settled case law that when assessing whether the application of national legislation, such as that at issue in the present case, constitutes an obstacle to the free movement of workers under Article 28 EEA, all measures which prohibit, impede, or render less attractive the exercise of that freedom must be regarded as restrictions.[16] Furthermore, it is irrelevant whether restrictions are imposed by the home State or by the host State.[17]

27. ESA highlights that if an EEA national exercises or seeks to exercise their right as a worker under Article 28 EEA, the effectiveness of that right may depend on the ability to bring their family members with them to the host EEA State. Essentially, this entails that an EEA national's right to free movement within the EEA depends on that right not being deterred by an obstacle to the exit or entry and residence of their family members.[18]

28. Under Section 40(2) of the Children Act, parents with shared parental responsibility must agree to their child moving or staying abroad for an extended period. If the parents cannot come to an agreement about relocating internationally, "*the child must not move abroad until a decision has been made*", as mentioned in Section 40(4). This means that if both parents share parental responsibility and the parent who does not have primary custody does not agree to the child moving abroad, the custodial parent may not take the child abroad without obtaining a court order through legal proceedings. Failing to comply – either with the refusal of the other

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[16] See, e.g., Judgment of the CJEU of 16 April 2013 in Case C-202/11 *Las*, EU:C:2013:239, paragraphs 19 and 20; Judgment of the CJEU of 11 February 2021 in Joined Cases C-407/19 and C-471/19 *Katoen*, EU:C:2021:107, paragraph 82.

[17] Judgment of the EFTA Court in Case E-8/20, *Criminal Proceedings against N,* paragraph 80 and of 27 June 2014 in Case E-26/13, *Gunnarsson* [2014] EFTA Ct. Rep. 254, paragraphs 77-78 and 82.

[18] See Judgment of the CJEU of 17 September 2002 in Case C-413/99 *Baumbast,* EU:C:2002:493, paragraphs 68-75; Judgment of the CJEU of 18 May 1989 in Case C-249/86 *Commission v. Germany,* EU:C:1989:204, paragraphs 9 and 11-13. For comparison, see also Judgments of the EFTA Court of 26 July 2016 in Case E-28/15 *Jabbi* [2016] EFTA Ct. Rep. 576 and in Case E-4/19 *Campbell* where the EFTA Court held that when an EEA national has created or strengthened a family life with a third country national, during genuine residence in an EEA State other than that of which he or she is a national, Article 7 of Directive 2004/38/EC applies by analogy where that EEA national returns with the family member to his or her home state. In ESA's opinion, the same must apply, *mutatis mutandis*, if an EEA national seeks to exercise their right as a worker to move from their home state to a host EEA State. The effectiveness of that right depends on whether the national law of the home state restricts the possibility of their family life continuing after departure.

parent or the judgment of the relevant national court – may lead to a criminal penalty pursuant to Section 261 of the Penal Code. Relocations within Norway are thus treated in a different and less restrictive manner from the perspective of the parent seeking to relocate than relocations to other EEA States.

29. The relocation requirements introduced in Article 40 of the Children Act thus relate directly to the exercise of freedom under Article 28 EEA,[19] insofar as these requirements have the potential to prohibit, impede, or render it less attractive. As such they can pose an obstacle to A and C's freedom to relocate from Norway to another EEA State.[20]

30. More specifically, the requirement for individuals who wish to relocate from Norway to another EEA State for extended work stays with children to obtain prior authorization from the other parent may discourage workers from exercising their freedom of movement.[21] Similarly, the requirement for A to take legal action to relocate to another EEA State with their child in the event that the other parent refuses to consent to the relocation constitutes a separate and distinct restriction. These requirements, whether considered separately or jointly, could limit A's ability to effectively exercise her right to free movement under EEA law, due to potential delays, financial costs, and uncertainty.[22] The imposition of criminal sanctions for failing to comply, either with a refusal on behalf of the other parent, or with a relevant court judgment pertaining to the relocation, could have the same effect. These factors may discourage a parent from pursuing work in another EEA State. Additionally, if a court would deny a claim for relocation, it would prevent the parent from exercising their right under Article 28 EEA.

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[19] Judgment of the CJEU of 2 October 1997 in Case C-122/96 *Saldanha*, EU:C:1997:458, paragraph 17.

[20] Compare Judgment of the EFTA Court in Case E-8/20 *Criminal Proceedings against N*, paragraph 85, where the EFTA Court held that by its very essence, a condition limiting the duration of stays abroad constitutes a restriction on the freedom to receive services abroad because it is liable to render the provision of services between EEA States more difficult than within the home State and is liable to lead the loss of benefits or to limit the places to which the individual may travel.

[21] Compare Judgment of the EFTA Court of 16 November 2018 in Case E-8/17 *Kristoffersen* [2018] EFTA Ct. Rep. 383, paragraph 76 and case law cited.

[22] Judgment of the EFTA Court in Case E-8/20 *Criminal Proceedings against N,* paragraph 86.

31. From the above, it follows that Section 40 of the Children Act imposes a restriction that is likely to affect the exercise of A's freedom of movement within the meaning of Article 28 EEA.[23]

5.3 Justifications

5.3.1 Legitimacy of the objectives pursued

32. According to settled case law, the right of free movement of EEA citizens is not unconditional. It may be subject to the limitations and conditions imposed by the EEA Agreement and by measures adopted to give it effect.[24]

33. ESA recalls that when a national measure constitutes a restriction on the fundamental freedoms of EEA law, it falls to the relevant EEA State to demonstrate that the measure is suitable to achieve the legitimate objective pursued along with genuinely reflecting a concern to attain that aim in a consistent and systematic manner.[25] In this regard, the EEA State in question must demonstrate that the measure adopted is in fact necessary. The necessity test implies that the chosen measure must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law.

34. According to established case law, it is for the EEA State that invokes a derogation from one of the fundamental freedoms to show that its rules are necessary and proportionate to attain the aim pursued.[26] ESA cannot see from the preparatory works to the Children Act that the national measure at issue has been subjected to such an analysis by the Norwegian Government.

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[23] ESA further notes that non-Norwegian EEA nationals are more likely to want to relocate with their children to another EEA State, chiefly their EEA State of origin and to retain them there, particularly on their return to the latter State. Consequently, ESA notes that Section 40 of the Children Act could be seen as establishing a difference in treatment that is liable to operate mainly to the detriment of nationals of other EEA States than Norway who have exercised their right to move and reside freely in Norway, thus constituting indirect discrimination by reason of nationality. Hence, Section 40 of the Children Act could be seen as indirectly discriminatory against non-Norwegian EEA nationals, an issue not of concern in the present case.

[24] Judgment of the EFTA Court of 2 July 2024 in Case E-6/23 *MH*, paragraph 57 and case law cited.

[25] Judgment of the EFTA Court 16 May 2017 in Case E-8/16 *Netfonds Holding and Others* [2017] EFTA Ct. Rep. 163, paragraph 117 and case law cited

[26] *Ibid.,* paragraphs 126-127 and case law cited. In that respect, ESA bears in mind that the burden of proof cannot be so extensive as to require the EEA State to prove positively that no other conceivable measure could enable the objective pursued to be attained under the same conditions.

35. In the present case, the conditions for the disputed limitations stem, in particular, from Article 28(3) EEA,[27] which allows EEA States to take measures which restrict the freedom of movement of EEA nationals or their family members on the grounds of *public policy, public security, or public health* or, if applicable without discrimination on the grounds of nationality, by *"overriding reasons of general interest",*[28] as long as the measures taken are compatible with fundamental rights as part of the unwritten principles of EEA law.[29] All derogations from fundamental freedoms of EEA law must be interpreted restrictively. The measure must, moreover, be capable of ensuring the achievement of the objective in question and not go beyond what is necessary to attain that objective.[30]

36. Based on the Request and the references to the preparatory works of the Children Act regarding relocations with children within Norway and abroad,[31] ESA understands that a consideration underlying Section 40 and the Children Act in general is intrinsically linked to the protection of the child and the child's fundamental rights. ESA notes that, generally speaking, the protection of children has been deemed a legitimate interest that, in principle, can justify a restriction on fundamental freedoms.[32] Afterall, the EEA States are recognised as having a margin of discretion in determining their policy to protect the rights of the child, so long as it is exercised in accordance with EEA law.[33]

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[27] For comparison, see Judgment of the EFTA Court of 21 March 2024 in Case E-5/23 *Criminal Proceedings against LDL*, paragraphs 50 and 57-58, where the EFTA Court held that in the circumstances of that case, neither Article 28 nor Article 36 EEA provided for a more extensive right for an individual to enter and reside in Norway than the Directive. According to the EFTA Court, the restrictions at issue in that case seem primarily supposed to be analysed with reference to Chapter VI of the Directive. See also Judgment of the EFTA Court in Case E-6/23 *MH,* paragraph 58, where the EFTA Court held that from the time when the national of a third country who is a family member of an EEA national derives rights of entry and residence from the Directive, an EEA State may restrict these rights "*only in compliance with Articles 27 and 35 of the Directive".* However, in the present case, A's right under Directive 2004/38/EC has not yet become active. Hence, the restrictions on her right to free movement are primarily analysed under Article 28(3) EEA.

[28] Judgment of the EFTA Court of 9 July 2014 in Joined Cases E-3/13 and E20/13 *Fred. Olsen and Others* [2014] 400, paragraphs 162 and 220. See also Judgment of the EFTA Court in Case E-14/15 *Holship*, paragraph 121.

[29] Judgment of the EFTA Court in Case E-14/15 *Holship,* paragraph 123.

[30] See, e.g., Judgment of the EFTA Court of 16 July 2012 in Case E-9/11 *ESA v Norway* [2012] EFTA Ct. Rep. 442, paragraphs 83 and 87.

[31] See the Request, page 7.

[32] Compare the Judgment of the CJEU of 19 November 2020 in Case C-454/19 *ZW*, EU:C:2020:947, paragraphs 38-40.

[33] *Ibid*, paragraph 42 and Judgment of the EFTA Court of 21 April 2021 in Case E-2/20 *UNE and L.*

37. Thus, ESA submits that the reasons underlying Section 40, in so far as they concern the best interest of the child, relate to objective considerations of public interest.[34] It follows from the above that protecting the child's best interests can constitute a valid justification for restricting the right to free movement of workers under Article 28 EEA, so long as other conditions are fulfilled.

5.3.2 Suitability

38. As noted above, although the EEA States enjoy a margin of discretion in determining their policy to protect the rights of the child, such discretion must be exercised in accordance with EEA law. As regards justifications from the fundamental principle of free movement of workers, those requirements must be interpreted strictly so that their scope cannot be determined unilaterally by each EEA State.[35]

39. In assessing suitability as part of the proportionality test, ESA contends that the *consistency test* should be employed.[36] Even though restrictions can be justified by overriding reasons in the public interest, they must align with similar measures already in place. In keeping with this principle, a state should not enact, facilitate, or tolerate measures that would undermine the intended objective of a given national measure.[37] Conversely, the measure taken must genuinely reflect a concern to attain that objective in a consistent and systematic manner.[38]

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[34] See also, e.g., Opinion of Advocate General Sugmandsgaard of 14 December 2017 in Joined Cases C-334/16 and C-366/16 *K v. Staatssecretaris van Veiligheid en Justitie,* EU:C:2017:455, paragraph 33: "*Although the requirements of public policy do not cover economic interests or the mere prevention of disturbance of the social order which any infringement of the law involves, they may cover protection of the various interests that the Member State concerned considers to be fundamental interests in accordance with its own system of values. In particular, the Court has recognised that, in certain circumstances, a Member State may invoke, as a matter of public policy, the protection of a fundamental interest as far removed from the calm and direct physical security of the population as the need to ensure the recovery of tax liabilities*."

[35] Judgment of the EFTA Court of 2 July 2024 in Case E-6/23 *MH*, paragraph 64.

[36] See, e.g., Judgment of the EFTA Court of 16 November 2018 in Case E-8/17 *Kristoffersen*, paragraphs 118-120.

[37] Judgment of the CJEU of 6 November 2003 in Case C-243/01 *Gambelli*, EU:C:2003:597, paragraph 63; Judgment of the CJEU of 11 September 2008 in Case C-141/07 *Commission v Germany*, EU:C:2008:492, paragraph 56, and of 14 March 2017 in Case C-157/15 *Achbita (*G4S), EU:C:2017:203, paragraph 40.

[38] Judgment of the EFTA Court of 15 July 2021 in Case E-9/20 *ESA v Norway* [2021] EFTA Ct. Rep. 36, paragraph 91. See also Judgment of the EFTA Court of 14 March 2008 in Case E-1/06 *ESA v. Norway (Gaming Machines)* [2008] EFTA Ct. Rep. 7, paragraph 43 and case law cited. There, the Norwegian Government sought to combat gambling addiction by limiting gambling opportunities through a state-owned monopoly on gaming machines. The EFTA Court found that Norway could

40. In the present case, it appears that the Norwegian legislature's two principal rationales for implementing distinct regulations for the relocation of parents abroad, compared to relocations within Norway, appear to be to facilitate the child's ability to maintain contact with and access to both parents and to prevent child abduction.[39] To consistently uphold this objective, Norway must thus ensure that its regulations do not contradict or undermine the aims that they are designed to protect.

41. As already noted, Section 40 of the Children Act imposes no comparable limitations on relocations within Norway and, on the contrary, Section 37 allows a custodial parent to move with the child without needing the other parent's consent or court approval, regardless of the relocation's distance. This approach implies that the impact of domestic relocations is inherently less significant, even though the distance between two locations within Norway can often be much greater than the distance between a Norwegian town or city and a location in a neighbouring EEA state. This is so also regardless of other factors, such as the needs of the child or whether both the parents and the child have linguistic or cultural ties to another EEA State, or, indeed, even if all three have the nationality of another EEA State.

42. Here, a more consistent (and less restrictive) approach might for example involve evaluating relocations on a case-by-case basis, so that for instance, approval or an administrative or court order would be required in instances where a relocation is likely to substantially affect the child's day to day life, surroundings and ability to stay in contact with both parents, rather than imposing restrictions based solely on geographic or jurisdictional boundaries.

43. ESA considers it questionable to impose an absolute rule regarding relocations to another EEA State while applying no such rule for relocations within the Norway if the objective is to facilitate the child's access to both parents, unless reasons were provided that justified that distinction specifically.

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not simultaneously endorse or tolerate measures, such as extensive marketing, which could lead to an increase in gambling opportunities.

[39] See the Request, page 7.

5.3.3 Necessity and Case C-454/19 ZW

5.3.3.1 General Comments

44. As noted by the Referring Court, Case C-454/19 *ZW* ("**ZW**") appears relevant to the case at hand.[40] That case concerned a provision in the German Criminal Code that drew a distinction depending on whether a child was removed or retained inside or outside Germany, including, in the latter case, to other EU Member States. If a child was retained by a parent from his appointed carer in another Member State, it attracted criminal penalties, even in the absence of force, threat of serious harm or deception. However, in Germany, the same act was punishable only if recourse was had to force, threat of serious harm or deception. In paragraph 35 of its judgment, the CJEU held that the distinction "*[established] a difference in treatment that [was] likely to affect or even restrict the freedom of movement of Union citizens within the meaning of Article 21 TFEU*."

45. The Referring Court rightly observes that *ZW* was primarily decided on the basis of Article 21 TFEU, which does not have a direct equivalent in the EEA Agreement. Here, ESA emphasizes that the Court has consistently interpreted free movement rights in alignment with principles established under EU law, despite the absence of a provision equivalent to Article 21 TFEU in the EEA Agreement. In particular, the Court has, in cases such as *Gunnarsson*,[41] *Jabbi*[42] and *Campbell*,[43] recognized that the right to free movement (in those cases under Directive 2004/38EC and its predecessors, both of which give effect to rights stemming from Article 28 EEA), must be interpreted broadly and mirror the protections afforded under EU law in order to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the EEA States.[44] ESA also notes that the aim of the EEA Agreement per its Article 1(1) is to create a homogenous EEA and in order to attain that objective, the EEA Agreement shall entail, *inter alia*,

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[40] Judgment of the CJEU of 19 November 2020 in Case C-454/19 *ZW*, referred to in the Request, page 7 and cited above.
[41] Judgment of the EFTA Court of 27 June 2014 in Case E-26/13 *Gunnarsson*.
[42] Judgment of the EFTA Court of 26 July 2016 in Case E-28/15 *Jabbi*, paragraph 68.
[43] Judgment of the EFTA Court of 13 May 2020 in Case E-4/19 *Campbell*.
[44] See also Judgment of the CJEU of 2 April 2020 in Case C-897/19 *I.N.*, EU:C:2020:262, paragraph 50, where the CJEU emphasised that one of the principal objectives of the EEA Agreement is "*to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA*".

pursuant to Article 1(2)(b), "*the free movement of persons*".[45] Therefore, ESA maintains that even though there is no direct equivalent to Article 21 of the TFEU in the EEA Agreement, the *ZW* judgment is still highly relevant in evaluating A's free movement rights in this case, particularly when it comes to the *necessity* aspect of the proportionality test.

46. In paragraphs 37 and 38 of *ZW,* the CJEU discussed the institution of a more restrictive regime where cross-border movement was involved, which was due to "*practical difficulties*" related, in that instance, to the securing the return of a child retained abroad, including when the child was in another Member State. The German legislature had deemed it necessary to introduce stricter penalties to international child abductions due to the complexities in enforcing, in another State, a German judicial decision on child custody and the seriousness of all international abductions, in particular where the child had been removed to a State belonging to a different cultural zone and it was not possible to secure his prompt return.

47. In paragraph 48, the CJEU noted that the argument advanced by Germany that it would be excessively difficult to have the child returned to Germany effectively placed other EU Member States on the same footing as third states and went against the spirit of Regulation 2201/2003 ("**Brussels II**"). In paragraph 49, the court emphasized that regulation is based on the principle of mutual recognition of judicial decisions and mutual trust between the EU Member States. As such, the CJEU held that the German model was incompatible with EU law.

48. In the present case, as summarised in the Request,[46] the reasons for the distinction drawn between domestic and international relocations under the Children Act seem intrinsically linked to the child's protection and the child's fundamental right to contact with both parents. In that context, the Request mentions that the child's interest is a fundamental consideration in actions involving children under both Norwegian and international law and refers to Article 3 of the UN Convention on the Rights of the Child and Article 8 of the ECHR in that regard. Moreover, the preparatory works note that the provisions align with the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in

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[45] Judgment of the EFTA Court of 26 July 2016 in Case E-28/15 *Jabbi*, paragraph 59.
[46] See the Request, page 7-8.

respect of Parental Responsibility and Measures for the Protection of Children ("**the 1996 Hague Convention**") and preserve the Convention's purpose, which is to protect children in international situations. Amongst other things, the Convention aims to prevent conflict between the legal systems of different states in matters involving parental authority and protection measures for children and to establish cooperation in this area between states and between states' competent authorities.

49. The preparatory works also point out that the provisions can help prevent child abductions. If a parent relocates abroad with the child against Section 40(1) or (2), the other parent can exercise their right using the provisions of the Child Abduction Act based on the 1980 Hague Convention and the Act Relating to the Recognition and Enforcement of Foreign Decisions Concerning Custody of Children, etc. and on the Return of Children ("**the 1980 Hague Convention**").[47]

50. The arguments cited in the preparatory works closely resemble those the CJEU deemed impermissible in the *ZW* case, as summarized earlier, namely, to prevent and combat international child abduction in light of the practical challenges of securing the return of a child retained abroad, even when the child is located in another EEA State.

51. ESA recalls that in the *ZW* case, the disputed German law *automatically* imposed criminal penalties, either a prison sentence or a fine, on anyone who removed or retained a child abroad without notifying the holder(s) of parental authority. This automatic imposition of penalty may have influenced the CJEU's finding that the German legislation was disproportionate.[48] In comparison, ESA notes that Section 48(1) of the Norwegian Children Act introduces a "*best interests of the child*" criterion that, in principle, requires a case-by-case assessment. Additionally, it is observed that the Norwegian restriction in question has procedural safeguards in the sense that if the parents do not agree on the relocation, a court order can be obtained.

52. However, ESA highlights that the restrictions imposed by Section 40 of the Children Act automatically apply to all international relocations with a child. The eventual

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[47] *Ibid.*

[48] Opinion of Advocate General Hogan 4 June 2020 in Case C-454/19 *ZW*, EU:C:2020:430, paragraphs 49 and 54.

case-by-case assessment of the child's best interests does not mitigate the fact that the legislation imposes broad restrictions that do not apply in purely domestic situations and that thus need to be assessed.

53. Additionally, it appears to ESA that criminal sanctions pursuant to Section 261, first subparagraph second sentence, of the Penal Code would be liable to be pursued without a case-by-case assessment as such (although such factors can presumably be relevant for the sanction imposed), given that those "*shall be applied*" to someone who leaves Norway with a child without approval, whereas in other circumstances such charges are brought in situations where someone has "*seriously or repeatedly*" removed or withhold a minor from their custodian.

5.3.3.2 Relevance of norms outside the EEA legal order

54. The rules settling cross-border matters between children and their parents within the European Union are part of the Council Regulation (EU) 2019/1111 - Brussels IIb 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. The Regulation replaced Regulation (EU) 2201/2003 – the Brussels IIa Regulation, which, however, continues to apply to proceedings instituted before Regulation (EU) 2019/1111 came into application on 1 August 2022. The Brussels IIb Regulation is the cornerstone of EU judicial cooperation in matrimonial matters and matters of parental responsibility. The Regulation applies in all EU Member States except Denmark.[49]

55. The principal aim of Brussels IIb is to enhance the practical functionality of Brussels IIa, particularly by making judicial proceedings more efficient.[50] Both instruments contain rules on jurisdiction, recognition and enforcement of decisions on parental responsibility.[51]

56. Neither of the Brussels II Regulations form part of the EEA Agreement. However, both Norway and Denmark have ratified both the 1980 and 1996 Hague Conventions. These conventions, grounded in the principle of mutual trust and

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[49] Under the Treaty of Amsterdam, Denmark negotiated opt-outs from participating in measures concerning the area of freedom, security and justice, cf. Protocol (No. 5) on the position of Denmark (1997) [2006] OJ C321E/201.

[50] Regulation 2019/1111, Recitals, paragraph 2.

[51] Regulation 2019/1111, Recitals, paragraphs 16-17.

recognition, provide a robust framework for cross-border cooperation on matters of parental responsibility, return of children and child protection that aims at similar protections to those offered under the Brussels II Regulations. Both states are additionally parties to the 1980 Council of Europe European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children

57. ESA recalls that a special relationship exists between the European Union and the EFTA States, which the Grand Chamber of the CJEU described in Case C-897/19 *I.N.* as "*based on proximity, long-standing common values and European identity*" and that it is in "*light of that special relationship that one of the principal objectives of the EEA Agreement must be understood, namely to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the EFTA States.*"[52]

58. In Case C-488/19, the dispute in the main proceedings concerned a European arrest warrant issued on the basis of acts of recognition and enforcement delivered by a Norwegian court. The CJEU observed that Norway was "*a third State which has a special relationship with the European Union, going beyond economic and commercial cooperation*". This was because Norway is a party to the EEA Agreement, "*participates in the Common European Asylum System, implements and applies the Schengen acquis, and has concluded with the European Union the Agreement on the surrender procedure between the Member States of the European Union and Iceland and Norway which entered into force on 1 November 2019.*" As the CJEU pointed out, in that agreement, "*the parties expressed their mutual confidence in the structure and functioning of their legal systems and their ability to guarantee a fair trial.*"[53] Even though the present case does not concern that agreement, ESA considers that the mutual confidence it expresses is equally relevant to the present case.

[52] Judgment of the CJEU of 2 April 2020 in Case C-897/19 *I.N.*, EU:C:2020:262, paragraph 50.
[53] Judgment of the CJEU of 17 March 2021 in Case C-488/19 *JR,* EU:C:2021:206, paragraph 60; Judgment of the CJEU of 14 September 2023 in Case C-71/21 *KT*, EU:C:2023:668, paragraphs 32 and 39.

59. In Case C-897/19 *I.N.*, the CJEU looked at whether a situation was "*objectively comparable*" to that which the Union offers with respect to freedom, security and justice without internal borders. Here, ESA argues, a similar approach must be taken where it is considered whether the situation is objectively comparable to that in *ZW* with respect to the possibility of enforcement of court orders.[54]

60. Consequently, when evaluating whether the distinction between relocations domestically and within the EEA under Section 40 of the Children Act is necessary because of jurisdictional considerations, the Court should, in ESA's view, consider whether the legal landscape within the EEA incorporates mechanisms of mutual trust and cooperation in these areas in a similar manner as the EU. Such an analysis, in ESA's view, makes arguments based on practical difficulties of returning a child retained from Norway to another EEA State less likely to succeed.

61. ESA notes that it may well be justified to restrict the free movement of children generally, domestically and/or abroad, but the absolute distinction drawn in Section 40 of the Children Act, which results in such a restriction never occurring domestically but always occurring when borders are crossed within the EEA, does not seem to be consistent in nature with the objectives pursued. As such, this could be seen as an unjustified restriction on the free movement of workers as guaranteed by Article 28 EEA.

62. The assessment above has been undertaken on the basis of Article 28 EEA; however, ESA notes that the same result would occur on the basis of an assessment under Directive 2004/38/EC, under the criteria set out in Article 27 thereof.

5.4 Final remarks

63. The present case is between two individuals. ESA notes that it is for the national court to interpret national rules in so far as possible in line with EEA law.

64. Here, a balance must be struck between A and C's right to free movement under Article 28 EEA, and other considerations that can result in the restriction of that right, including A, B, and C's respective rights to family life, and the best interests

[54] See for comparison Judgment of the CJEU of 29 July 2024 in Case C-202/24 *MA*, EU:C:2024:649, paragraphs 65-70.

of the child (C). ESA submits that the assessment should be comparable to that which would be carried out for domestic relocations that are contested before a domestic court, taking into account the relevant factual and legal circumstances of the case, including A and C's rights to free movement.

6 CONCLUSION

Accordingly, ESA respectfully requests the Court to answer the questions referred 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.

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