JUDGMENT OF THE COURT
12 December 2024*

(*Article 28 EEA – Article 7 of Directive 2004/38/EC – Relocation to another EEA State with child – Necessity of restriction requiring consent or a court permission – Joint parental responsibility – Sole custody – Best interests of the child*)

In Case E-15/24,

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

A

and

B,

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

THE COURT,

composed of: Páll Hreinsson, President, Bernd Hammermann and Michael Reiertsen (Judge-Rapporteur), Judges,

* Language of the request: English. Translations of national provisions are unofficial and based on those contained in the documents of the case.

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- A, represented by Johanne Førde, advocate;

- B, represented by Gjermund Mathiesen, advocate;

- the Norwegian Government, represented by Lotte Tvedt and Fredrik Bergsjø, acting as Agents;

- the Icelandic Government, represented by Hendrik Daði Jónsson and Svanhildur Þorbjörnsdóttir, acting as Agents;

- the Hungarian Government, represented by Miklós Zoltán Fehér and Katalin Szíjjártó, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Sigrún Ingibjörg Gísladóttir, Sigurbjörn Bernharð Edvardsson, Erlend M. Leonhardsen, and Melpo-Menie Joséphidès, acting as Agents; and

- the European Commission ("the Commission"), represented by Elisabetta Montaguti and Jonathan Tomkin, acting as Agents,

having regard to the Report for the Hearing,

having heard oral arguments on behalf of A, represented by Johanne Førde; B, represented by Gjermund Mathiesen; the Norwegian Government, represented by Lotte Tvedt; the Icelandic Government, represented by Hendrik Daði Jónsson; ESA, represented by Sigrún Ingibjörg Gísladóttir and Erlend M. Leonhardsen; and the Commission, represented by Jonathan Tomkin, at the hearing on 1 October 2024,

gives the following

JUDGMENT

1 This request for an advisory opinion concerns the interpretation of Article 28 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") and Articles 4 and 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and EEA Supplement 2012 No 5, p. 243) ("the Directive" or "Directive 2004/38/EC").

2 The request has been made in proceedings between A and B, respectively the mother and father of a minor child, C, relating to a request made by A to obtain a court permission to relocate with C to Denmark, in accordance with Sections 40 and 56 of the Norwegian Act relating to Children and Parents of 8 April 1981 No 7 (*lov 8. april 1981 nr. 7 om barn og foreldre (barneloven)*) ("the Children Act"). The essential question is whether a requirement for a parent with sole custody, but joint parental responsibility, to obtain a court permission or consent from the other parent when moving abroad is compatible with EEA law when there is no such a requirement when relocating within the EEA State in question.

I LEGAL BACKGROUND

EEA law

3 Article 28 EEA reads:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*
>
> *3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
>
> *(a) to accept offers of employment actually made;*
>
> *(b) to move freely within the territory of EC Member States and EFTA States for this purpose;*
>
> *(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
>
> *(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.*
>
> *4. The provisions of this Article shall not apply to employment in the public service.*
>
> *5. Annex V contains specific provisions on the free movement of workers.*

4 Directive 2004/38/EC was incorporated into the Agreement on the European Economic Area by Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 (OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17), and is referred to at point 1 of Annex V (Free movement of workers) and point 3 of Annex VIII (Right of establishment) to the EEA Agreement. Constitutional requirements indicated by Iceland, Liechtenstein and Norway were fulfilled on 9 January 2009, and the decision entered into force on 1 March 2009.

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

> *The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:*
>
> *(a) The Directive shall apply, as appropriate, to the fields covered by this Annex.*
>
> *(b) The Agreement applies to nationals of the Contracting Parties. However, members of their family within the meaning of the Directive possessing third country nationality shall derive certain rights according to the Directive.*
>
> *(c) The words 'Union citizen(s)' shall be replaced by the words 'national(s) of EC Member States and EFTA States'.*
>
> *(d) In Article 24(1) the word 'Treaty' shall read 'Agreement' and the words 'secondary law' shall read 'secondary law incorporated in the Agreement'.*

6 Article 4 of the Directive, entitled "Right of exit", reads:

> *1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.*
>
> *2. No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies.*
>
> *3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.*
>
> *4. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years.*

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

> *1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:*
>
> *(a) are workers or self-employed persons in the host Member State; or*
>
> *(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or*
>
> *...*

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

> *1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.*
>
> *2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.*
>
> *The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.*
>
> *3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.*

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

National law

9 The second paragraph of Article 104 of the Norwegian Constitution reads:

> *For actions and decisions that affect children, the best interests of the child shall be a fundamental consideration.*

10 Chapters 5 and 6 of the Children Act regulate matters related to parental responsibility, place of residence, and contact.

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

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

13 Section 36 of the Children Act, entitled "The child's place of residence (custody)", reads:

> *The parents may jointly decide that the child shall reside either with both of them (joint custody) or with one of them (sole custody).*
>
> *If the parents fail to agree, the court must decide that one of the parents shall have custody of the child. When there are special reasons for doing so, the court may nonetheless decide that both parents shall have custody of the child.*

14 Section 37 of the Children Act, entitled "Decisions that may be taken by the person with the custody of the child", reads:

> *If the parents have joint parental responsibility, but only one of the parents has custody of the child, the other parent may not object to the parent with sole custody of the child making decisions concerning important aspects of the child's care, such as the question of whether the child shall attend a*

day-care centre, where in Norway the child shall live and other major decisions concerning everyday life.

15 Section 40 of the Children Act, entitled "Children relocating or staying abroad", reads:

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

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.

16 Section 42 a of the Children Act, entitled "Notification of and mediation prior to relocation", reads:

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

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

17 Section 43 of the Children Act, entitled "Extent of the right of access, etc.", reads:

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

The parents themselves shall agree on the extent of the right of access based on what they consider to be in the best interests of the child. Section 31, second paragraph, shall apply to the parents. In any agreement or decision regarding access, importance shall be attached, among other factors, to ensuring the best possible overall contact between the child and his or her parents, and to the age of the child, the degree to which the child is attached to the local neighbourhood, the distance that must be travelled between the parents and the child's interests in all other respects. If the

"ordinary right of access" is agreed or determined, this entitles the parent to spend one afternoon a week with an overnight stay, every other weekend, a total of three weeks of the summer holiday and alternate autumn, Christmas, winter and Easter holidays with the child.

Conditions for access may be imposed in agreements or in judgments. If supervision is made a condition, the court may appoint a person to perform supervision during access visits or request the parents to appoint such a person. The parent to be granted access shall cover the cost of the measure imposed as conditions for access pursuant to this provision.

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

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

18 Section 48 of the Children Act, entitled "The best interests of the child", reads:

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

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

International law

19 The United Nations ("UN") Convention on the Rights of the Child was adopted by the UN General Assembly by way of Resolution 44/25 on 20 November 1989 and entered into force on 2 September 1990, in accordance with Article 49 thereof. Iceland, Liechtenstein and Norway signed the convention on 26 January 1990, 30 September 1990 and 26 January 1990 respectively. Iceland, Liechtenstein and Norway ratified or acceded to the convention on 28 October 1992, 22 December 1995 and 8 January 1991 respectively.

20 Article 3 of the UN Convention on the Rights of the Child reads:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

21 The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the 1980 Hague Convention") entered into force on 1 December 1983. Norway and Denmark are parties to the 1980 Hague Convention.

22 Article 3 of the 1980 Hague Convention reads:

The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

23 The 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 ("the 1996 Hague Convention") entered into force on 1 January 2002. Norway and Denmark are parties to the 1996 Hague Convention.

24 Article 5 of the 1996 Hague Convention reads:

(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.

(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

25 Article 7 of the 1996 Hague Convention reads:

(1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or

b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

(2) The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

(3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.

26 Article 15 of the 1996 Hague Convention reads:

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

(2) However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

(3) If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence.

II FACTS AND PROCEDURE

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

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

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

30 A also wants to find employment in Denmark. A is currently employed in a multi-national company, which has offices and operations including in Norway and Denmark. A is currently employed in the Norwegian part of the operations, and she has her place of work in Oslo. A's employer has offered her the opportunity to continue in the same role with her place of work in Denmark, transferring her employment to the Danish part of the operations. A plans to accept this offer if she is permitted to move to Denmark with C.

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

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

33 As part of the case preparations, Oslo District Court appointed a specialist psychologist as an expert witness. The expert evaluated the case, which included an interview with the child. The District Court held a mediation meeting on 11 August 2023, but the parties could not reach a final agreement.

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

> Both in the main case and in the interim decision until a final and enforceable judgment is available:
> 1. A is not permitted to relocate to Denmark with C, born xx/xx/2016.
> 2. C, born xx/xx/2016, shall have contact with their father, B, as follows:
>
> - The father shall have contact alternate weekends, Friday-Sunday, in even-numbered weeks
> - The father shall have contact with C alternate Wednesday afternoons. The father shall pick C up from school and drop them off at the mother's home no later than 18:30.
> - C shall spend alternate autumn school breaks with their mother and father. In 2024, C shall spend their autumn break with their mother.
> - C shall spend alternate winter school breaks with their mother and father. In 2024, C shall spend their winter break with their father.
> - C shall spend alternate Christmas school breaks with their mother and father. In 2024, C shall spend their Christmas break with their mother.
> - C shall spend alternate Easter school breaks with their mother and father. In 2024, C shall spend their Easter break with their mother.
> - C shall spend a total of 4 weeks with their father during the summer school break and a total of 4 weeks with their mother during the summer school break.
>
> 3. Costs are not awarded.

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

36 Against this background, Borgarting Court of Appeal decided to request an advisory opinion from the EFTA Court. The request dated 26 June 2024, was registered at the Court on 27 June 2024. Borgarting Court of Appeal has referred the following questions to the Court:

> *Firstly, is it, and if so, under which circumstances is it, compatible with the rights of the parents and the child under Directive 2004/38/EC that national legislation on the relationship between a child and its parents stipulates that a custodial parent, in situations where the parents have joint parental*

responsibility and the non-custodial parent does not consent to the relocation, cannot relocate to another EEA state with the child without initiating legal action and getting the court's permission to relocate, when the same parent would have the right to relocate domestically with the child without obtaining the non-custodial parent's consent or permission from the court?

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

37 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as it is necessary for the reasoning of the Court.

III ANSWER OF THE COURT

The Questions

38 By both of its questions, the referring court enquires, in essence, whether it is compatible with EEA law that a parent with sole custody, but joint parental responsibility, must obtain consent from the non-custodial parent or the permission of a national court before relocating abroad while the custodial parent can relocate domestically without prior consent or court permission.

39 By its first and second questions, the referring court asks specifically about the compatibility of the Norwegian rule with Directive 2004/38/EC and Article 28 EEA respectively. It is clear from the request that A is a worker under Article 28 EEA. It is therefore appropriate for the Court to first answer the referring court's second question.

Question 2 – Article 28 EEA

The existence of a restriction

40 Article 28(1) EEA provides that freedom of movement for workers shall be secured among EU Member States and EFTA States. All provisions of the EEA Agreement relating to the freedom of movement for workers are intended to facilitate the pursuit by nationals of EEA States of occupational activities of all kinds throughout the EEA and preclude measures which might place nationals of EEA States at a disadvantage

when they wish to pursue an economic activity in the territory of another EEA State. Furthermore, national provisions which preclude or deter a national of an EEA State from leaving his or her country of origin in order to exercise his or her right to freedom of movement constitute restrictions on that freedom, within the meaning of Article 28 EEA, even if they apply without regard to the nationality of the workers concerned (see the judgment of 15 July 2021 in *ESA* v *Norway*, E-9/20, paragraph 101 and case law cited).

41 A requirement to obtain consent or a prior court permission before relocating amounts to a prior authorisation scheme. It is settled case law that a prior authorisation scheme constitutes a restriction on the fundamental freedoms guaranteed by the EEA Agreement (see, to that effect, the judgment of 5 May 2021 in *Criminal proceedings against N*, E-8/20, paragraph 86 and case law cited).

42 The Court observes that the procedural requirement on a parent with sole custody but joint parental responsibility to obtain consent from the non-custodial parent or a court permission prior to the relocation formally only applies to relocation abroad and not to domestic relocation. This is because relocation within Norway is, according to Section 37 of the Children Act, a decision that may be taken by the parent enjoying custodial responsibility, whereas relocation abroad is a decision that must be taken by the parent(s) enjoying parental responsibility under Section 40 of the Children Act.

43 The Court observes that these procedural differences are sufficient to make it less attractive for the custodial parent to relocate abroad compared to relocating within Norway. Accordingly, the system, described above, constitutes a restriction under Article 28 EEA.

44 For the sake of completeness the Court notes that, while it is the responsibility of the referring court to interpret domestic law, it would appear from the case file that the difference between a parent with sole custody but joint parental responsibility wishing to relocate with his or her child within Norway, on the one hand, or to another EEA State, on the other, appears somewhat less significant in practice. In either case, the custodial parent must notify the non-custodial parent three months prior to the relocation, in accordance with Section 42 a of the Children Act. If the parents disagree regarding the relocation, they are obliged to participate in mediation in accordance with the fourth paragraph of Section 51 of the Children Act.

45 Further, as became apparent from the submissions from B and the Norwegian Government at the hearing, the non-custodial parent can challenge the relocation within Norway in court proceedings by either seeking custodial rights under the Children Act, or by claiming that the relocation is not in the child's best interests under Section 104 of the Norwegian Constitution and Article 8 of the European Convention on Human Rights ("ECHR"). In such cases, the national court must conduct a case-by-case assessment corresponding to that of Section 40 of the Children Act. Furthermore, the non-custodial parent may, under Section 60 of the Children Act, seek an interim order, precluding the custodial parent from relocating within Norway until the matter is settled.

46 Notwithstanding these similarities, however, there remain differences between the national rules concerning relocations within Norway and relocations to other EEA States. As such, the foregoing does not alter the conclusion that the national rules constitute a restriction under Article 28 EEA.

Justification

47 It is settled case law that national measures liable to hinder the exercise of fundamental freedoms guaranteed by the EEA Agreement or make it less attractive may be allowed only if they pursue an objective in the public interest, are appropriate for ensuring the attainment of that objective and do not go beyond what is necessary to attain that objective (compare the judgment of 15 June 2023 in *BM*, C-132/22, EU:C:2023:489, paragraphs 32 and 33 and case law cited).

48 Furthermore, it is settled case law that it is for the competent national authorities, where they adopt a measure derogating from a principle enshrined in EEA law, to show in each individual case that the measure is appropriate to attain the objective relied upon and does not go beyond what is necessary to attain it. It must also be pointed out that reasons invoked by an EEA State as justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments (see the judgment in *Criminal proceedings against N*, E-8/20, cited above, paragraph 95 and case law cited).

49 Accordingly, it should first be examined whether there are legitimate objectives that may justify a restriction upon the freedom of movement for workers (see, to that effect, the judgment in *Criminal proceedings against N*, E-8/20, cited above, paragraph 92).

50 In this context, it is settled case law that provisions of EEA law are to be interpreted in the light of fundamental rights, which form part of the general principles of EEA law. The provisions of the ECHR, which enshrines in Article 8 the right to respect for private and family life, and the judgments of the European Court of Human Rights ("ECtHR") are important sources for determining the scope of these fundamental rights. In that regard, it must be noted that 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 EEA Agreement does not result in a conflict with fundamental rights protected by EEA law (see the judgment of 9 August 2024 in *X* v *Finanzmarktaufsicht*, E-10/23, paragraph 72 and case law cited, and the judgment of 9 February 2021 in *Kerim*, E-1/20, paragraph 43 and case law cited).

51 The best interests of the child form part of the right to family life under Article 8 ECHR (compare the ECtHR judgment of 5 November 2002 in *Yousef* v *The Netherlands*, CE:ECHR:2002:1105JUD003371196, § 73). It is clear, moreover, that ensuring that the child's best interests are safeguarded in decisions concerning children implies positive obligations on the EEA States under the ECHR. This

positive obligation may extend to regulating personal matters to ensure effective respect for family life, including, but not limited to, the effective enforcement of parental and access rights (compare the ECtHR judgments of 5 December 2019 in *Luzi* v *Italy*, CE:ECHR:2019:1205JUD004832217, § 65, and of 23 June 2005 in *Zawadka* v *Poland*, CE:ECHR:2005:0623JUD004854299, § 53).

52 The Court notes that the principle of the best interests of the child has been explicitly recognised as part of EU primary law through Article 24(2) of the Charter of Fundamental Rights of the European Union. The principle that the best interests of the child shall represent a primary consideration in all actions concerning children, either by public authorities, or private institutions, is also prescribed by Article 3 of the 1989 UN Convention on the Rights of the Child, which has been ratified by all EEA States. Moreover, the Court has previously upheld the relevance of this principle in its case law (see the judgment of 21 April 2021 in *The Norwegian Government* v *L*, E-2/20, paragraph 52).

53 In the light of the above, it is clear that the best interests of the child represents a fundamental principle that forms part of the general principles of EEA law that must be recognised in accordance with EEA law.

54 On the basis of the foregoing, the Court concludes that seeking to ensure the protection of the best interests of the child is an objective that, in principle, may justify restrictions on Article 28 EEA (compare the judgment of 19 November 2020 in *ZW*, C-454/19, EU:C:2020:947, paragraph 40 and case law cited).

55 In the case at hand, the referring court must assess whether the requirement to obtain consent or a prior court approval before relocating abroad is appropriate to attain the objective of the best interests of the child and does not go beyond what is necessary to obtain that objective (compare the judgment of 14 February 2008 in *Dynamic Medien*, C-244/06, EU:C:2008:85, paragraph 42). The Court recalls, in this regard, that under the ECHR positive obligations in decisions concerning children may arise on the basis of the protection of the best interests of the child, and, as stated above, that this may include regulating personal matters to ensure effective respect for family life, including the effective enforcement of parental and access rights (compare the ECtHR judgments in *Luzi* v *Italy*, cited above, § 65, and *Zawadka* v *Poland*, cited above, § 53). As such, the fact that an EEA State imposes a requirement on a parent with sole custody but joint parental responsibility to obtain consent from the other parent or alternatively, to obtain court approval, before relocating abroad may, in principle, be appropriate to ensure a legitimate objective, namely the protection of the best interests of the child.

56 It is settled case law that a measure will not be appropriate if it does not genuinely reflect a concern to attain the objective in a consistent and systematic manner (see the judgment of 21 March 2024 in *LDL*, E-5/23, paragraph 89 and case law cited).

57 In the present case, the participants disagree as to whether the divergent rules that apply, depending on whether a relocation abroad, or a domestic relocation is

contemplated, imply that Norway has not pursued the objective of safeguarding the best interests of the child in a consistent and systematic manner. A, ESA and the Commission argue, in essence, that Norway is treating similar situations in a different manner, whereas B, Iceland and Norway, in essence, argue that the situations are so different that they require a different treatment.

58 The Court notes that maintaining contact with both parents is one of the factors that must be evaluated – on a case-by-case basis, and taking into account the personal and family circumstances in the particular case at issue – in determining the best interests of the child. However, the Court observes in this respect that a relocation abroad will not always affect the child's ability to maintain contact with both parents to a greater extent than moving domestically.

59 The Court observes that this is particularly the case in an EEA State such as Norway, where long distances can be involved, even when moving from one Norwegian city to another, or, conversely, when one moves just across Norway's land border to another EEA State. Hence, the mere crossing of the border is in itself not decisive for the child's ability to maintain physical contact with both parents. The Court therefore agrees with A, ESA and the Commission in holding that a legal requirement to obtain consent or prior court permission only when crossing a border, and irrespective of the actual distance the child relocates away from the non-custodial parent does not seem to pursue the objective of the best interests of the child by ensuring that the child can retain regular physical contact with both parents in a consistent and systematic manner.

60 The Court recalls, however, that substantive issues of family law are not harmonised in the EEA. Hence, it is not indispensable that measures laid down by an EEA State to protect the rights of the child correspond to a conception shared by all EEA States as regards detailed rules relating to it. As that conception may vary from one EEA State to another on the basis of, inter alia, moral or cultural views, EEA States must be recognised as having a definite margin of discretion. While it is true that it is for the EEA States, in the absence of harmonisation within the EEA, to determine the level at which they intend to protect the interest concerned, the fact remains that that discretion must be exercised in conformity with the obligations arising under EEA law (compare the judgment in *ZW*, C-454/19, cited above, paragraph 42 and case law cited). In addition, it is necessary to view the measure adopted by the EEA State in question in the broader context of any other measures designed to ensure, inter alia, that the best interests of the child are effectively protected.

61 The Court observes, subject to the referring court's verification, that Norway has three different legal concepts defining the contact between a child and an adult guardian, as well as the responsibility of the latter. First, decisions of significant importance to the child's life are taken by the parent(s) exercising parental responsibility. Second, decisions concerning a child's daily life are taken by the parent(s) enjoying custody rights. Third, decisions concerning the child's daily life when the child is together with the parent enjoying access rights at that particular moment may be taken by the parent enjoying access rights.

62 It appears from the request that, under Norwegian legislation, relocation abroad is classified as a decision to be taken by the parent(s) exercising parental responsibility, whereas relocation within Norway is classified as a decision to be taken by the parent(s) enjoying custody rights. The Court acknowledges that this distinction is one of substantive family law that falls under the discretion of EEA States, provided that it is compatible with EEA law.

63 The Court observes, as noted by B and the Icelandic and Norwegian Governments, that although a relocation abroad and a relocation within Norway may impact the child in fairly similar ways, e.g. because the child may have to change schools and be removed from his or her familiar environment of friends and family, there are also essential differences that distinguish the two situations. When children relocate abroad, they will not only have to physically change the school they attend but they will be enrolled in a different school system, typically implying a different pedagogical underpinning and curriculum. Furthermore, the language, as well as the cultural and religious environment in which the child grows up in may change. As such, the mere fact that crossing a border or otherwise may not, in all cases, have a decisive influence on the child's ability to maintain physical contact with both parents cannot be considered conclusive. Rather, the overall effect of a move abroad on the child, when compared to a domestic relocation, must be considered.

64 The mere fact that Norwegian law makes relocation abroad a decision to be taken on the basis of parental responsibility and relocation domestically a decision to be taken on the basis of custody does not entail that Norway has not pursued the best interests of the child in a consistent and systematic manner. The Court notes, following B's submissions, that decisions concerning similar important changes to the child's life are also taken on the basis of parental responsibility when they occur within Norway. Subject to the referring court's verification, it appears that the type of school the child shall attend and membership in faith communities are both examples of decisions that fall within the parental responsibility and therefore cannot be unilaterally decided by the parent with sole custody but joint parental responsibility.

65 The referring court must also assess whether the restriction goes beyond what is necessary to obtain the objective pursued. This 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 (see the judgment in *Criminal proceedings against N*, E-8/20, cited above, paragraph 94 and case law cited).

66 The Court reiterates that the restriction in this case is not only that a parent with sole custody, but joint parental responsibility, must seek consent from the non-custodial parent before relocating abroad, but that in the absence of such consent the custodial parent must get a court approval prior to the relocation. A national court will then assess whether the relocation is in the best interests of the child.

67 ESA and the Commission argue, in essence, that it is not necessary for Norway to require a prior court approval before relocation abroad, because the mutual recognition of judicial decisions and the mutual trust between EEA States mitigate any

potential challenges (compare, to that effect, the judgment in *ZW*, C-454/19, cited above, paragraph 48). ESA and the Commission emphasise that both Norway and Denmark are parties to the 1980 and 1996 Hague Conventions and the 1931 Nordic Family Law Convention. In addition, they highlight the "special relationship" between the European Union, its Member States and the EEA EFTA States.

68 The Court recalls that the EEA Agreement reaffirms, as stated in its second recital, this special relationship, which is based on proximity, long-standing common values and European identity. It is in the 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. In that perspective, a number of provisions in the EEA Agreement are intended to ensure that the interpretation of that agreement is as uniform as possible throughout the EEA (compare the judgment of 2 April 2020 in *I.N.*, C-897/19, EU:C:2020:262, paragraph 50).

69 This special relationship goes beyond the internal market. In this respect, the Court of Justice of the European Union ("ECJ") has cited the Schengen *acquis*, the common European asylum system and the Agreement on the surrender procedure as relevant sources of obligations relating to this special relationship (compare the judgment in *I.N.*, C-897/19, cited above, paragraph 44). As such, it is clear that international agreements beyond the EEA Agreement itself are relevant in determining the extent of this special relationship (compare the judgments of 19 July 2012 in *Veronsaajien oikeudenvalvontayksikkö*, C-48/11, EU:C:2012:485, paragraph 37, and of 28 October 2010 in *Établissements Rimbaud SA*, C-72/09, EU:C:2010:645, paragraphs 43 and 44).

70 The Court recognises that, through their participation in other agreements in the area of freedom, security and justice, the EEA EFTA States and the EU Member States have expressed their mutual confidence in the structure and functioning of their legal systems and their ability to guarantee a fair trial (compare the judgment of 17 March 2021 in *JR*, C-488/19, EU:C:2021:206, paragraph 60). Even though Council 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 is not applicable in the EEA EFTA States (nor in Denmark), ESA and the Commission submit that decisions regarding a child will nevertheless be upheld and enforced when a child relocates to another EEA State. In this regard, the Court emphasises that Norway and Denmark are parties to the 1931 Nordic Family Law Convention and the 1996 Hague Convention, explicitly regulating these matters.

71 The Court agrees with the submissions by ESA and the Commission to the effect that decisions regarding a child will be upheld and enforced when a child relocates from Norway to Denmark. Thus, an argument that a change of jurisdiction *per se* makes it necessary to require a court permission prior to relocating abroad to ensure that the child can maintain regular contact with both parents cannot succeed when considered

in isolation. However, the mere fact that a court in another EEA State may provide equivalent levels of recognition and enforcement of established rights to that provided by a Norwegian court does not entail that the two situations may not be distinguished.

72 As previously observed, the principle of the best interests of the child implies the existence of positive obligations on an EEA State to ensure that the best interests of the child is a primary consideration in all decisions concerning children. Subject to the referring court's verification, it appears that the Norwegian legislation considers it to be in the child's best interest that major decisions in the child's life, such as relocation abroad – but also relating to changes to the type of school that the child attends and changes of faith communities – are taken by those with parental responsibility. If parents with joint parental responsibility cannot agree, Norwegian law prescribes that a national court must assess whether the relocation is in the child's best interest. The question for the referring court is therefore whether a requirement of prior consent or court approval goes beyond what is necessary to ensure this objective.

73 The Court observes that a requirement to obtain consent or permission by a Norwegian court prior to relocating abroad may be necessary to ensure the best interests of the child irrespective of whether Norway retains jurisdiction under Article 7 of the 1996 Hague Convention in a situation of a wrongful removal or retention of a child to another State Party to that Convention.

74 Assuming that there is no wrongful removal or retention when a child relocates abroad in the situation such as that in the main proceedings, this assumption implies that the State in which the child habitually resides changes in accordance with Article 5(2) of the 1996 Hague Convention. It follows that the EEA State to which the child relocates will have jurisdiction over any disputes regarding the child, including the question of relocation itself. The EEA State to which the child relocates may have a different perception of what is in the best interests of the child enshrined in its family law to that of Norway.

75 In such a situation, Norway can only uphold its positive obligation to ensure its perception of the best interests of the child if a decision on whether the relocation is in the child's best interests is taken by a Norwegian court prior to the relocation, which will involve contemplation of all relevant aspects of the child's potential situation outside of Norway.

76 Even assuming that Norwegian courts retain jurisdiction, a requirement to obtain court permission prior to the relocation may be necessary to ensure the best interests of the child. In this regard, the Court notes that it would not be in the best interests of the child to relocate to another State and then to move back to Norway subsequently if the relocation is not deemed to be in the best interests of the child by a Norwegian court. This consequence of relocating back and forth between two countries would seem likely to be particularly detrimental in a context where the Norwegian legislation, upon the confirmation of the referring court, has deemed a relocation abroad to be a significant decision in the child's life.

77 Under both assumptions, however, the Court underscores the importance of procedures involving children being treated as a priority.

78 Furthermore, while in all decisions concerning children, their best interests are of paramount importance and must be afforded significant weight, such interests cannot be considered alone (compare the ECtHR judgment of 9 July 2021 in *M.A* v *Denmark*, CE:ECHR:2021:0709JUD000669718, § 133). In this regard, the Court recalls that, where an EEA State invokes overriding requirements in the public interest in order to justify rules which are liable to obstruct the exercise of freedom of movement, such justification, provided for by EEA law, must be interpreted in the light of the general principles of EEA law, and in particular, of fundamental rights. Thus, the national rules in question may fall under the exceptions provided for only if they are compatible with fundamental rights (see the judgment of 9 July 2014 in *Fred. Olsen*, Joined Cases E-3/13 and E-20/13, paragraph 226). This will entail that, in determining compliance with EEA law, and in particular, in order for the restriction on the freedom of workers to move within the EEA under Article 28 EEA to be justified, the referring court must take into account A's fundamental freedom under EEA law, as well as the best interests of C and potentially the right to family life of B.

79 It follows that the answer to the second question must be that Article 28 EEA must be interpreted as not precluding, in principle, national rules which make the right of a parent with sole custody who exercises joint parental responsibility over a child to move with that child to reside and work in another EEA State conditional on the custodial parent obtaining consent of the non-custodial parent or issuing proceedings with a view to obtaining permission from a court, where that condition is conceived and applied in a manner that is suitable to achieve the chosen level of protection to safeguard the best interests of the child and does not go beyond what is necessary to attain that objective.

80 Subject to the referring court's assessment of the objectives of national law, requiring that the custodial parent obtains consent from the non-custodial parent or court permission prior to relocating abroad when the parents have joint parental responsibility over the child appears not to be suitable and necessary to attain the objective of the child maintaining contact with both parents. However, the requirement may be suitable and necessary to attain the objective that important decisions in the child's life are taken by those with parental responsibility.

81 The Court recalls, in this regard, that maintaining contact with both parents is one of the factors that must be evaluated – on a case-by-case basis, and taking into account the personal and family circumstances in the particular case at issue – in determining the best interests of the child. Equally, ensuring that decisions concerning a child's welfare are taken by the adult guardians exercising parental responsibility also represents a relevant factor to be evaluated – again, on a case-by-case basis, and taking into account the personal and family circumstances in the particular case at issue – in determining the best interests of the child. However, it is also clear that other issues, including, but not limited to, the child's mental and physical health, educational needs, developmental requirements, and links to other family members

such as siblings are important elements which must be balanced with the free movement rights under Article 28 EEA.

82 For the case-by-case assessment conducted by the referring court not to go beyond what is necessary to ensure the best interests of the child, the referring court must take account of both the custodial parent's freedom to move within the EEA as well as the best interests of the child and may not rely on a presumption that it is always in the child's best interests to remain in Norway.

Question 1 – Directive 2004/38/EC

83 By its first question, the referring court asks, in essence, whether it is compatible with Directive 2004/38/EC that a parent with sole custody, but joint parental responsibility, must obtain consent from the non-custodial parent or the permission of a national court before relocating abroad while the custodial parent can relocate within Norway without prior permission.

84 The Court recalls that, with regard to an EEA national who has not pursued an economic activity, Article 7(1)(b) of Directive 2004/38/EC confers on an EEA national the right to move freely from the home EEA State and take up residence in another EEA State. An EEA State may not deter its nationals from moving to another EEA State in the exercise of the freedom of movement under EEA law. According to the Court's settled case law, a right to move freely from the home EEA State to another EEA State cannot be fully achieved if that person may be deterred from exercising the freedom by obstacles raised by the home State to such a move (see the judgment of 27 June 2014 in *Gunnarsson*, E-26/13, paragraph 82, and the judgment of 26 July 2016 in *Jabbi*, E-28/15, paragraphs 75 and 79 and case law cited).

85 As such, the rights arising on the basis of Article 7 of Directive 2004/38/EC in the case in the main proceedings will correspond to those analysed above under Article 28 EEA.

86 As noted in paragraph 47, a restriction such as that in the main proceedings may be allowed only if it pursues an objective in the public interest, is appropriate for ensuring the attainment of that objective and does not go beyond what is necessary to attain that objective.

87 The Court notes that A has submitted that a restriction on the rights granted to EEA nationals under Directive 2004/38/EC may only be justified by the requirements laid down in Chapter VI of Directive 2004/38/EC. The Court emphasises that the interpretation of the Directive must take into account the context in which the Directive is situated in EEA law and the manner in which this context differs from the EU pillar (see the judgment of 13 May 2020 in *Campbell*, E-4/19, paragraph 56).

88 It should be recalled that, according to the ECJ's settled case law, national legislation which places certain of the nationals of a Member State at a disadvantage simply because they have exercised their freedom to move and to reside in another Member

State is a restriction on the freedoms conferred by Article 21(1) of the Treaty on the Functioning of the European Union ("TFEU") on every citizen of the Union. Furthermore, it is settled case law that opportunities offered by the TFEU in relation to freedom of movement for citizens of the Union cannot be fully effective if a national of a Member State can be dissuaded from using them by obstacles resulting from his or her stay in another Member State, because of legislation of his or her Member State of origin which penalises the mere fact that he or she has used those opportunities (compare the judgment of 22 February 2024 in *Direcția pentru Evidența Persoanelor și Administrarea Bazelor de Date*, C-491/21, EU:C:2024:143, paragraphs 41 and 42 and case law cited).

89 The Court observes that the ECJ has held that such a restriction, which restricts the exercise of that right, enshrined in Article 21 TFEU, can be justified in the light of EU law only if it is based on objective considerations of public interest, independent of the nationality of the persons concerned, and if it is proportionate to the legitimate objective of the provisions of national law (compare the judgment in *Direcția pentru Evidența Persoanelor și Administrarea Bazelor de Date*, C-491/21, cited above, paragraph 52 and case law cited).

90 Similarly, a restriction attributable to the State of origin, such as that in the main proceedings, can be justified with regard to the EEA Agreement and Directive 2004/38/EC if it is based on objective considerations of public interest independent of the nationality of the persons concerned and is proportionate to the legitimate objective of the national provisions (see the judgment in *Criminal proceedings against N*, E-8/20, cited above, paragraphs 85, 86 and 91 and case law cited, and compare the judgment of 26 October 2006 in *Tas-Hagen and Tas*, C-192/05, EU:C:2006:676, paragraph 33 and case law cited).

91 Moreover, the Court recalls that any interpretation of Directive 2004/38/EC must be exercised in light of and in line with fundamental rights and freedoms (see the judgment in *Kerim*, E-1/20, cited above, paragraphs 42 and 43). As previously noted, the principle of the best interests of the child is a general principle of EEA law and forms part of the right to respect for family life under Article 8 ECHR. It follows that measures restricting any of the rights enshrined in Directive 2004/38/EC may, in principle, be justified by the objective of ensuring the child's best interests if they are appropriate for ensuring the attainment of that objective and do not go beyond what is necessary to attain that objective.

92 As regards the proportionality analysis concerning a restriction under Directive 2004/38/EC the same considerations as under Article 28 EEA are applicable.

IV COSTS

93 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that

court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by Borgarting Court of Appeal hereby gives the following Advisory Opinion:

Article 28 EEA and Article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States 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 must be interpreted as not precluding, in principle, national rules which make the right of a parent with sole custody who exercises joint parental responsibility over a child to move with that child to reside and work in another EEA State conditional on the custodial parent obtaining consent of the non-custodial parent or issuing proceedings with a view to obtaining permission from a court, where that condition is conceived and applied in a manner that is suitable to achieve the chosen level of protection to safeguard the best interests of the child and does not go beyond what is necessary to attain that objective.

For the case-by-case assessment conducted by the referring court not to go beyond what is necessary to ensure the best interests of the child, the referring court must take account of both the custodial parent's freedom to move within the EEA as well as the best interests of the child and may not rely on a presumption that it is always in the child's best interests to remain in Norway.

Páll Hreinsson Bernd Hammermann Michael Reiertsen

Delivered in open court in Luxembourg on 12 December 2024.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President