



ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 02.09.2024

Written observations by the Kingdom of Norway

represented by Ms Lotte Tvedt, advocate at the Office of the Attorney General for Civil Affairs, and Mr Fredrik Bergsjø, adviser at the Ministry of Foreign Affairs, acting as agents, in

Case E-15/24

in which Borgarting Court of Appeal has requested a preliminary ruling pursuant to Article 34 of Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on the interpretation of Directive 2004/38 and Article 28 of the EEA Agreement.

...

1 INTRODUCTION

- (1) Borgarting lagmannsrett (Borgarting Court of Appeal) has requested the EFTA Court to give an advisory opinion on the interpretation of 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 ("Directive 2004/38/EU") and Article 28 of the Agreement on the European Economic Area ("the EEA Agreement").
- (2) In essence, the questions concerns whether it is contrary to EEA law that a child for whom the parents have joint parental responsibility cannot relocate to another EEA State together with the custodial parent without either the consent of the other parent or a court decision.
- (3) The questions read as follows:

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?

- (4) In the Government's view, it is appropriate to consider the case under Article 28 of the EEA Agreement. The Government considers that the national provision in question constitutes a restriction on the custodial parent's right to free movement under Article 28 EEA, but that such a restriction is both suitable and necessary to protect the rights of the child, and to balance the rights of the child and the custodial and the non-custodial parent respectively.
- (5) In the Government's view, Articles 4 and 7 of Directive 2004/38 do not apply in the case at hand. While Article 4 may impose obligations on the host EEA State, the national provision in question does not restrict an EEA national's right to leave Norway. On the other hand, Article 7 does not impose obligations on the home EEA State. At any rate, a potential right under the Directive does not go beyond what follows from Article 28 of the EEA Agreement.

2 THE RELEVANT FACTS AND NATIONAL LAW

- (6) The Court of Appeal has in Section 2 of its request for an advisory opinion set out the factual background of the case. In summary, A and B share parental responsibility for their joint child, C, born in 2016. C has permanent residence with their mother, A, in Norway. Both A, B and C are Norwegian nationals. A originates from a third-country outside EEA and moved to Norway 10 years ago and has acquired Norwegian citizenship, whilst C is born in Norway.
- (7) A wants to relocate to Denmark where she has a job offer and a partner who she wants to move in with. B has not consented to the relocation of C to Denmark.
- (8) The Court of Appeal has referred to the relevant Norwegian legislation in Section 3 of its request for an advisory opinion. It follows from Section 36 of the Act relating to Children and Parents of 8 April 1981 No. 1 ("the Children Act") that 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 decision on custody is taken by the court in accordance with Section 36(2).

- (9) Where, as in this case, 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, including where the child shall live inside Norway, cf. Section 37 of the Children Act.
- (10) As pointed out by the Court of Appeal, Section 37 must be read in conjunction with Section 40 of the Children Act, which reads:

Section 40. Children relocating or staying 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.

- (11) Further, it follows from Section 56(1), third sentence of the Children Act that:

Actions regarding international relocation with the child may be brought [before the courts] by a parent with parental responsibility or by a parent who is claiming parental responsibility concurrently.

- (12) Hence, relocation of the child to another country requires either consent from both parents or a decision from the national courts.

- (13) If one of the parents intends to relocate within Norway or abroad, and access with the other parent has been determined by agreement or decision, the parent who intends to relocate with the child must notify the other parent no later than three months prior to relocation and request mediation pursuant to Section 51 if the parents disagree regarding relocation, cf. Section 42a(2) of the Children Act. This prerequisite applies irrespective of whether the relocation is domestic or international.

- (14) All decisions regarding i.e. international relocation must comply with Section 48 of the Children Act, which reads:

Section 48. *The best interests of the child*

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.

3 ARTICLE 28 OF THE EEA AGREEMENT

3.1 Introduction

- (15) It is clear from the request from the advisory opinion that A is a worker within the meaning of Article 28 EEA, as she has received or accepted a job offer in Denmark. The second question posed by Borgarting Court of Appeal also concerns whether a national provision which requires that the relocation of a child to another country requires either the consent of the non-custodial parent with shared parental responsibility or a court decision is contrary to Article 28 of the EEA Agreement.

3.2 Whether there is a restriction

- (16) It follows from Article 28 of the EEA Agreement that workers have the right to move and reside freely within all EEA States. This right also includes the right to seek employment in other EEA States.

- (17) The ECJ has held that:¹

any national measure [...], where that measure, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty.

- (18) It is common ground that the national legislation at issue differentiates between the situation of the relocation of a child on national territory and that involving the relocation of a child to another (EEA) State. Whilst it is sufficient that the custodial parent notifies the non-custodial parent who has joint parental responsibility and initiate mediation, relocation to another EEA State requires either the consent of the non-custodial parent who has joint parental responsibility or a court decision.

¹ Case C-19/92 Kraus paragraph 32.

- (19) This difference in treatment as well as its effects are likely to impede or render the freedom of movement of EEA national workers less attractive. Hence, the measure in question constitutes a restriction under Article 28 of the EEA Agreement.
- (20) The Government will, however, stress that the restriction in question does not constitute direct discrimination in breach of Article 4 of the EEA Agreement. The provision applies equally to Norwegian citizens and citizens of other EEA States.

3.3 Justification of a restriction

- (21) The right of free movement of EEA nationals is not unconditional. For the sake of good order, the Government recalls that that it is for the national court to carry out the concrete assessment of whether the restriction in question is compatible with Article 28 of the EEA Agreement based on the Court's general findings.
- (22) Restrictions that are applicable without discrimination on grounds of nationality may be justified if it pursues one of the legitimate aims listed in Article 28 of the EEA Agreement or is justified by overriding reasons in the public interest. The measure must, as we will return to below, also be proportionate.²
- (23) This case does not, however, merely concern A's right to free movement, but also B and C's fundamental rights. Regarding the relevance of family life in balancing the interests for the purposes of the principle of proportionality, the Court has held that:³

It is settled case law that fundamental rights form part of the general principles of EEA law. The Court has held that the provisions of the European Convention on Human Rights, which enshrines in Article 8(1) 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 [...].

- (24) Although this was said in relation to Directive 2004/38, it also holds true regarding Article 28 of the EEA Agreement.⁴
- (25) There is little doubt that an unconditional right for A to unilaterally decide that C is to be relocated to Denmark, without B's consent or an objective assessment of what is in the best

² See, e.g., case E-4/04 Pedicel paragraph 56 and case E-8/20 Criminal proceedings against N paragraphs 91–95.

³ Case E-2/20 L paragraph 50.

⁴ See, mutatis mutandis, case E-14/15 Holship paragraph 123 and case E-1/20 Kerim paragraphs 41–44.

interests of the child by a national court, is likely to restrict both B's and C's rights to both family and private life under Article 8 of the ECHR.

- (26) In cases concerning national measures which constitutes a restriction on the freedom of movement for reasons of protecting fundamental rights, the ECJ has required the competing interests to be reconciled and that a fair balance is struck.⁵ Furthermore, the national authorities enjoy a wide margin of discretion in this regard.⁶ Hence, in the assessment of whether the restriction in question is justified, it must also be ascertained whether the rights of both A, B, and C to family life and, as regards A also freedom of movement, are sufficiently balanced.
- (27) As regards the justification of the measure in question, the ECJ has consistently held that the protection of the child is a legitimate interest which, in principle, may justify a restriction on a fundamental freedom guaranteed by the TFEU.⁷ In particular, the ECJ has recognised the protection of the right of parental responsibility and the rights of the child, and the prevention of and combatting international child abduction in view of the practical difficulties in securing the return of a child retained abroad, including when the child is in another Member State, as legitimate interests that may justify a restriction of the free movement of Union citizens.⁸
- (28) Further, it is also apparent from the ECJ's case-law that it is not indispensable that measures laid down by a Member State to protect the rights of the child correspond to a conception shared by all Member States as regards the level of protection and the detailed rules relating to it. As that conception may vary from one Member State to another on the basis of, inter alia, moral or cultural views, Member States must be recognised as having a definite margin of discretion.⁹
- (29) This must equally hold true regarding restrictions on the free movement under Article 28 of the EEA Agreement.
- (30) It follows directly from Section 48 of the Children Act that decisions on relocation to another country first and foremost shall have regard for the best interests of the child. What is in the child's best interests depends on a concrete, future oriented assessment of all relevant aspects of the case. It should be emphasised that the assessment under Section 40(4) shall not only take into account Section 48 of the Children Act, but also Article 3 of the United Nations Convention on the Rights of the Child to which Norway is a party.
- (31) It follows, as a preliminary conclusion, that the contested measures may in principle be justified for overriding reasons of public interest.

⁵ Case C-112/00 Schmidberger paragraphs 77–81.

⁶ Ibid paragraph 82.

⁷ Case C-454/19 ZW paragraph 40.

⁸ Case C-454/19 ZW paragraphs 37 and 41.

⁹ Case C-454/19 ZW paragraph 42.

- (32) It then remains to ascertain whether the restriction is proportionate.
- (33) The two limbs of the proportionality principle entail that the national measure must be appropriate (suitable) for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it. The suitability requirement may also involve an assessment of whether the national measures fail to attain the objectives in a consistent and systematic manner,¹⁰ which may overlap with the requirement of non-discrimination.
- (34) With regard to the suitability of the measure in question, it cannot be questioned that the requirement of either consent from the other parent with joint parental responsibility or a court decision in general contributes to ensure the above-mentioned aims.
- (35) The prohibition on discrimination in EEA law requires that comparable situations must not be treated differently and that different situations must not be treated in the same manner.¹¹ In the Government's view, domestic and international relocations of a child are not comparable situations and should hence not be treated similarly.
- (36) Firstly, relocating to another EEA State has an impact on where proceedings regarding parental responsibility, custody, cross-border relocations, access rights etc. can be brought. This follows from the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measure for the protection of the child ("the Hague Convention").
- (37) The Hague Convention is based on the United Nations' Convention on the Rights of the Child. It follows from the Recital to the Hague Convention:

The States signatory to the present Convention,

Considering the need to improve the protection of children in international situations,

Wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children,

Recalling the importance of international co-operation for the protection of children,

Confirming that the best interests of the child are to be a primary consideration,"

- (38) According to Article 5 of the Hague Convention, when a child moves to another state, it is the state of the new habitual residence of the child that has jurisdiction. All EU Member States are contracting parties to the Convention.

¹⁰ Case E-8/20 Criminal proceedings against N paragraph 103.

¹¹ Case E-26/13 Gunnarsson paragraph 84.

- (39) Secondly, international relocation may also have an impact on the remaining parent's opportunities to exercise their parental responsibility. According to Article 15 in the Hague Convention, the authorities of the contraction states shall apply their own law in exercising their jurisdiction. It also follows from Article 17 of the Hague Convention that the exercise of parental responsibility is governed by the law of the child's habitual residence, and if the child moves it is governed by the law of the state of the new habitual residence. This poses a risk of diminishing the remaining parent's parental rights where the child is relocated to a State where the custodial parent has more comprehensive rights and responsibilities than in Norway.
- (40) Thirdly, a relocation to another EEA State will necessarily entail grater changes for the child's everyday life with regard to i.e. language, culture, education, etc than what would be the case if the child relocates domestically.
- (41) Fourthly, it would also have an impact on the opportunities for visiting and contact between the remaining parent and the child. Visits would require either the remaining parent or the child (often accompanied by the custodial parent) to travel to another country.
- (42) In summary, the fact that there are different requirements regarding domestic and international relocation is based on legislative and factual differences between the two, and does not entail that the national measures fail to attain the objectives in a consistent and systematic manner.
- (43) For the sake of good order, it should be mentioned that the Ministry of Children and Families has proposed changes regarding custody for children in case of a break up between the child's parents. The Ministry has proposed a stipulation of a main rule which entails the continuation of joint custody in situations where the parents have lived together. This means i.e. that the decision of relocation of the child domestically requires the consent of both parents with custody. This would in practice entail that more parents would have to agree also with regard to domestic relocation. The fact that the Ministry has decided to propose these changes does not, however, change the fact that domestic and international relocation are two different situations that may be treated differently.
- (44) The necessity requirement entails that the measure in question must not go beyond what is necessary to attain the legitimate objective which it pursues.¹²
- (45) The Government submits that the measure in question does not go beyond what is necessary to ensure the aims in question. Parents have the primary responsibility to resolve a disagreement concerning international relocation. If they fail to reach an agreement, they are required to attend one hour of mediation. They can also be offered six more hours of mediation. The purpose of mediation is to enable parents to find a solution that is in the best interest of the child. The requirement of court consent only applies if the parents do not

¹² Case C-454/19 ZW paragraph 44.

reach an agreement. The court will also mediate between the parents in an attempt to find a solution.

- (46) The measure ensures that the child's best interest is considered on a case-by-case basis, and that both parents are involved in significant decisions affecting the child's welfare. It follows from the principle of joint parental responsibility, that both parents have a say in important decisions regarding the child. Relocation with a child to another state can have substantial implications for the child's life and affect the contact between the child and the other parent.
- (47) By requiring agreement between the parents, or court consent, the measure prevents disputes and ensures transparency, and provides clear legal guidelines securing that the best interest of the child is considered. It does not impose unnecessary restrictions on day-to-day parenting decisions, especially as the system ensures that each case that reaches the court's are decided based on an individual overall assessment.
- (48) Other measures would not be equally effective or ensure the required level of protection. The Government do try to facilitate for parents reaching a joint decision on international relocation through both information on how to ensure the best interests of the child after a termination of the parents' relationship and through mediation. If the parents cannot reach a decision, it is necessary to ensure the rights of the child that a third party – in this case the courts – are authorised to make the final decision based on an objective and individual assessment.
- (49) On this background, the Government maintains that the measure in question is justified based on overriding reasons of public interest. Furthermore, the measure ensures that B and C's fundamental rights are balanced with A's right to free movement. It should be kept in mind that this balancing may lead to the acceptance of a relocation to another country as well as not.

4 DIRECTIVE 2004/38/EU

4.1 Introduction

- (50) As set out in paragraph 15 above, A is a worker within the meaning of Article 28 EEA. Accordingly, the assessment of whether the national provision in this case constitutes a restriction, should be assessed pursuant to Article 28 EEA, not the Directive 2004/38. Further, as set out in more detail below, the Government submits that neither Article 4 nor Article 7 are applicable in the case at hand. Should those articles apply, the national provision in question is nevertheless justified on the same basis as under Article 28 EEA.

4.2 Application of Article 4 of the Directive

- (51) Article 4(1) of Directive 2004/38 confer on EEA nationals a right to leave the territory of an EEA State to travel to another EEA State. The ECJ has held that Article 4(1) expressly provides – without requiring the prior exercise of the right to move and reside freely – that all Union

citizens with a valid identity card or passport are to have the right to leave the territory of a Member State to travel to another Member State.¹³

- (52) Accordingly, the ECJ has held that Article 4 of Directive 2004/38 “governs the conditions under which not only nationals of other Member States may leave the territory of a Member State but also those under which nationals of that Member State may do so”.¹⁴ Article 4, therefore, imposes obligations on the EEA State of which the EEA national is a national of insofar that they are present there at the material time.
- (53) The right to leave the territory of an EEA State, however, only concerns the right to exit or depart from the territory of that State. This follows from a literal interpretation of the wording “leave”. This interpretation is also supported by its context. Article 4(1) refers to the right to leave to “travel” to another EEA State, as opposed to, e.g., stay or reside in another EEA State. The right of entry and residence on the territory of another EEA State is regulated in Articles 5, 6 and 7 of Directive 2004/38. Further, Articles 4(2), 4(3) and 4(4) of the Directive concern obligations on EEA States in respect of identity cards and passports.
- (54) That interpretation is also clear from case-law. Article 4 is typically invoked in opposition to national provisions or decisions of national authorities seeking to limit or restrict the right to depart or exit the home State on grounds of public policy or public security.¹⁵ The ECJ has referred to Article 4 in cases concerning:
- a national provision by a Member State which permitted an administrative authority to prohibit a national of that State from leaving its territory on the ground that a tax liability had not been settled,¹⁶
 - an administrative measure by a Member State which prohibited a national of that State from leaving its territory and from being issued with a passport on the ground that he owed a considerable debt to a private legal person,¹⁷
 - an administrative decision by which a Member State prohibited a national of that State from leaving its territory on the ground that he had been convicted by a court of another country of a criminal offence of narcotic drug trafficking,¹⁸ and
 - national legislation that allowed a Member State to prohibit a national of that State to travel to another Member State for a period of up to three years on the ground that he had previously been repatriated from the latter State on account of his ‘illegal residence’ there.¹⁹

¹³ Case C-249/11 *Byankov* paragraph 32.

¹⁴ See case C-128/22 *Nordic Info BV* paragraph 60 and the case-law cited.

¹⁵ Guild, Tomkin and Peers: *The EU Citizenship Directive. A Commentary*, 2. ed. (2019) p. 93.

¹⁶ Case C-434/10 *Aladzhov*.

¹⁷ Case C-249/11 *Byankov*.

¹⁸ Case C-430/10 *Gaydarov*.

¹⁹ Case C-33/07 *Jipa*.

- (55) Section 40(4) of the Children Act does not prohibit A from leaving Norwegian territory in any way. On the contrary, A and C can leave Norway to travel to another (EEA) State, as regards C, see sections 41(1) and 40(2) of the Children Act.
- (56) Neither the wording, context or objective of Article 4 suggest that that the right to leave the territory of an EEA State encompass a right for an EEA national to relocate from the home EEA State to another EEA State and reside there on a permanent basis. In contrast, such more permanent arrangements are regulated in Article 7 of the Directive which, provides EEA nationals with rights vis-à-vis the host EEA State. Article 4 is, therefore, not applicable in the case at hand.

4.3 Application of Article 7 of the Directive

- (57) Article 7(1) of Directive 2004/38 confer on EEA nationals the right to reside on the territory of “another [EEA] State” for a period of longer than three months if they satisfy the conditions in litra a, b, or c. Pursuant to Article 7(2), this right shall extend to family members who are not nationals of an EEA State, accompanying or joining the EEA national in the “host [EEA] State”. It follows from the wording, context and purpose of Article 7(1) that it only imposes obligations on the host EEA State. This has been confirmed by case-law from the ECJ.²⁰
- (58) The EFTA Court has interpreted the Directive differently in two contexts.
- (59) First, the EFTA Court has interpreted Article 7 more broadly than the ECJ in the distinct situation of derived rights of residence for third-country nationals in the home EEA State of the EEA national after returning from another EEA state in which they have genuinely resided in accordance with Article 7.²¹ The present case does not concern that situation.
- (60) Second, the EFTA Court has, in case E-26/13 *Gunnarsson*, interpreted Article 7(1)(b) to confer not only the right of residence in the host EEA State, but also that it prohibited the home EEA State from hindering an EEA national from moving to another EEA State.²² In that case, however, the notion of hindrance concerned discrimination.²³ Further, the EEA national did not have free movement rights pursuant to Article 28 EEA.
- (61) *Gunnarsson* is to date the only case in which the EFTA Court has seemingly held that Article 7 in general imposes obligations on the home EEA State in the sense of prohibitions on hindering free movement. In that judgment, the EFTA Court explicitly distinguished one contrary ECJ case (*Turpeinen*)²⁴ on the grounds that its application of Article 21 TFEU could not be understood as rejecting the applicability of the Directive 2004/38.²⁵ Today, however, it is settled case-law that the ECJ does not interpret Article 7 of the Directive as

²⁰ See, mutatis mutandis, case C-456/12 O. and B. paragraphs 37–44.

²¹ Case E-28/15 *Jabbi* and case E-4/19 *Campbell*.

²² Case E-26/13 *Gunnarsson* paragraph 82.

²³ *Ibid.* paragraphs 82 and 84.

²⁴ Case C-520/04.

²⁵ *Ibid.* paragraph 81.

encompassing similar obligations on the home Member State as follows from Article 21 TFEU.²⁶

- (62) Therefore, the Government would strongly advise against extending the EFTA Court's assessment in *Gunnarsson* to mean that Article 7 entail a kind of general *Dassonville* hindrance test applicable to the home EEA State.²⁷ That would mean a complete import of Article 21 TFEU into the EEA Agreement, which would fundamentally alter the scope and nature of the EEA Agreement in conflict with the principle of homogeneity. It could potentially even impose more significant obligations on the EFTA States than the EU Member States in so far as the conditions in Directive 2004/38, in several respects, are different than those in relation to Article 21 TFEU. In particular, the conditions for restricting the right to free movement in the Directive are different from those restricting rights which in the EU follows from Article 21 TFEU.
- (63) On this background, the Government submits that Article 7 of Directive 2004/38 cannot be interpreted in an EEA context as generally encompassing similar obligations on the home Member State as follows from Article 21 TFEU. Article 7, therefore, cannot prevent an EEA State from maintaining a national provision such as Section 40(4) of the Children Act. The fact that under that provision, the relocation of a child from Norway to another country requires either the consent of the other parent with parental responsibility or a court decision, does not constitute a restriction on the right to reside in another EEA State under Article 7.
- (64) Should the EFTA Court nevertheless find that Article 7 applies in the case at hand, the Government submits that Section 40(4) of the Children Act is still justified. As set out above, such a provision would in the EU be assessed pursuant to Article 21 TFEU, and not the Directive.²⁸ The assessment of Section 40(4) of the Children Act in the EEA cannot, accordingly, be limited to the provisions of chapter V of the Directive but must be the same assessment as that of restrictions on the rights in Article 21 TFEU in the EU.
- (65) It is well established case-law from the CJEU that a restriction on the right to freedom of movement for persons, which is independent of the nationality of the persons concerned, may be justified if it is based on objective considerations of public interest and is proportionate to a legitimate objective pursued by the provisions of national law.²⁹ As set out above, Section 40(4) of the Children Act is both suitable and necessary to protect the rights of the child, and to balance the rights of the custodial and the non-custodial parent respectively.

²⁶ See, mutatis mutandis, case C-673/16 Coman paragraph 18 and 23 and the case-law cited.

²⁷ I.e., that Article 7 should apply to any regulation in the home EEA State which are capable of hindering, directly or indirectly, actually or potentially, the right to reside in another EEA State.

²⁸ See, e.g., case C-454/19 ZW paragraph 36.

²⁹ See, to that effect, case C-673/16 Coman, C-353/06 Grunkin and Paul paragraph 29, C-359/13 Martens paragraph 34, and C-438/14 Bogendorff von Wolffersdorff paragraph 48.

5 ANSWER TO THE QUESTIONS REFERRED

(66) Based on the above, the Norwegian Government considers that the questions referred to the EFTA Court by the Borgarting Court of Appeal should be answered as follows:

Article 28 of the EEA Agreement does not preclude a national provision pursuant to which the relocation of a child for whom the parents have joint parental responsibility to another country requires either the consent of both the custodial and non-custodial parent or a court decision.

Articles 4 and 7 of Directive 2004/38 do not apply to a national provision pursuant to which the relocation of a child for whom the parents have joint parental responsibility to another country requires either consent of both the custodial and non-custodial parent or a court decision.

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Oslo, 02.09.2024

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