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TO THE PRESIDENT AND THE MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 18 of the Statue of the EFTA Court, by

A

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1. INTRODUCTION

- (1) On 27 June 2023, Borgarting Court of Appeal submitted a request for an advisory opinion to the EFTA Court ("**Request for Advisory Opinion**") concerning the compatibility of the Norwegian Act relating to Children and Parents ("**the Norwegian Children Act**") with Directive 2004/38/EC ("**the Citizenship Directive**") and the EEA Agreement Article 28.

2. FACTUAL BACKGROUND

- (2) A (mother) and B (father) have joint parental responsibility over C (child) and currently live separately in Oslo, Norway. C was born in 2016, and A has the custodial right alone. A is a Norwegian national but is originally from outside of the European Economic Area and does not have any family or relatives in Norway, besides C.
- (3) A is given a job offer and an opportunity to pursue a career with Mondelez International in Denmark. A intends to relocate to Copenhagen with C, where they will move in with A's partner of two years and his two children. However, A is unable to accept the job offer and relocate to Denmark, because the national legislation requires her to obtain a consent from the non-custodial parent or, if the non-custodial parent refuses to give its consent, the custodial parent is required to obtain an approval from the national courts before moving to and residing in another Member State.
- (4) In the case at hand, B has refused to A's relocation to Denmark with C. Therefore, A was required by national legislation to obtain an approval from the national court before moving to Denmark. Oslo District Court did not grant an approval, and A remains unable to relocate to Denmark, where she intends on residing and working. A has appealed to Borgarting Court of Appeal which has submitted the Request for an Advisory Opinion.
- (5) As will be elaborated in section 3 below, the Norwegian Children Act distinguishes between situations where the custodial parent relocates within or outside of Norway. It is only in a situation where the custodial parent intends to reside abroad, including in another EEA Member State, that the parent must obtain a prior approval in order to relocate.

3. RELEVANT NATIONAL LEGISLATION

- (6) Pursuant to the Norwegian Children Act Sections 34 and 35, the parents, as a main rule, have joint parental responsibility over their mutual child. Moreover, it follows from Section 36 of the Act that the child can live with one or both parents. If the parents disagree on where the child shall live, the court shall decide which parent the child shall live with or if the child shall live with both parents. If the child lives with one parent, that parent has sole custody over the child.
- (7) In situations where the parents have joint parental responsibility over a child but only one parent has custody, it follows from the Norwegian Children Act Section 37, that the custodial parent can decide freely where in Norway the child shall live. However, pursuant to the Norwegian Children Act Section 40 second subsection, the custodial parent cannot relocate to another country, including EEA Member States, unless the non-custodial parent consents to the relocation. If the non-custodial parent does not give its consent, the national legislation requires the custodial parent to obtain the prior approval of the courts in order to relocate. In such cases, it follows from the Norwegian Children Act Section 48, that the court shall make its decision first and foremost based on an assessment of what is in the best interest of the child.
- (8) In summary, the referring court essentially asks whether a national legislation establishing such a requirement of prior approval is in conformity with the rights established by the EEA Agreement and by the measures adopted to give it effect. The referring court particularly refers

to the rights established by Articles 4, 7 and 27 of the Citizenship Directive and the EEA Agreement Article 28, and asks that the EFTA Court consider the difference in treatment where the custodial parent must obtain a prior approval in order to move to another EEA Member State, but can freely relocate within Norway.

4. LEGAL ANALYSIS

4.1 Introduction

- (9) The questions raised by the referring court concerns the fundamental freedom of movement for persons. Firstly, it affects the freedom of movement for Union citizens and, secondly, it affects the freedom of movement for workers. While the concept of free movement for workers only applies to economically active persons, the concept of free movement for Union citizens is also extended to economically inactive persons, see, to that effect, case E-26/13 *Gunnarsson*, paragraph 75.
- (10) Article 21 of the Treaty on the Functioning of the European Union (“TFEU”) establishes the right to free movement and residence for Union citizens, while Article 45 establishes the right to free movement for workers. Article 28 of the EEA Agreement corresponds to Article 45 of the TFEU, and the right to free movement and residence of Union citizens is established by the Citizenship Directive and it is settled case law that it avails EEA nationals the same rights as EU nationals.
- (11) In this regard, the EFTA Court has held that it is of no consequence that the rights established by the Citizenship Directive were adopted by the Union legislature on the basis of Article 21 TFEU on Union Citizenship, see, to that effect, *Gunnarsson*, paragraph 79 to 82. The Citizenship Directive is incorporated into the EEA Agreement and establishes that EEA nationals may avail themselves of the freedom of movement and residence as Union Citizens, see, to that effect, the EFTA Court’s judgement in E-28/15 *Jabbi*, paragraph 63 and 64.
- (12) In *Jabbi*, the EFTA Court considered, inter alia, the applicability of case C-456/12 *O. and B.*, EU:C:2014:135. In *O. and B.*, the ECJ held that the Citizenship Directive applies by analogy where a Union citizen returns to its EU State of origin after having exercised its rights in another EU State pursuant to and in conformity with the conditions set out in that Directive. The ECJ reached its conclusion based on Article 21 TFEU, a legal basis not existing in the EEA. In *Jabbi*, the EFTA Court ruled that, in order to ensure effectiveness and to achieve homogeneity in the area of the free movement of persons, an equal level of protection of the right to free movement of persons within the EEA must apply, see, to that effect, *Jabbi*, paragraph 65 and 66. Against that background, the EFTA Court reached the conclusion that, when an EEA national has exercised its rights pursuant to and in conformity with the Citizenship Directive, the provisions of the Directive applies when the EEA national returns to its EEA State of origin, see, to that effect, *Jabbi*, paragraph 82.
- (13) Moreover, it should be noted that the EFTA Court has later held that the EEA legal context remains unaltered since *Jabbi*, and accordingly, has found no reason to depart from the understanding of homogeneity and effectiveness as expressed in that judgment, see, to that effect, case E-4/19 *Campbell* paragraph 58. Based on the EFTA Court’s rulings in *Jabbi*, *Gunnarsson* and *Campbell*, it must be clear that the concept of free movement of Union citizens applies homogeneously to EEA nationals.
- (14) Applied to the case at hand, it must therefore be assessed whether Section 40 of the Norwegian Children Act is compatible with A’s freedom of movement (i) as a Union Citizen and (ii) as a

worker. In the following, a legal analysis of the two questions referred to the EFTA Court will be presented on behalf of A.

4.2 The first question

- (15) By its first question, the referring court asks whether it is compatible with the rights established by the Citizenship Directive that the national legislation stipulates that in situations where the parents of a child have joint parental responsibility but only one parent has custody, the custodial parent must obtain the consent of the non-custodial parent or the prior approval of the national court in order to relocate with the child to another EEA Member State, but no such requirement of prior approval exists for a relocation within Norway.
- (16) The Citizenship Directive lays down the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members, cf. Article 1(1)(a). A is a Norwegian national and, hence, she is a "Union citizen" for the purposes of this Directive, cf. Article 2(1). The EEA Joint Committee Decision incorporating the Citizenship Directive into the EEA Agreement defines the term Union citizens, for the purposes of the EEA Agreement, as nationals of EU States and EFTA States, see, to that effect, *Jabbi* paragraph 63.
- (17) The Citizenship Directive aims at facilitating and strengthen Union citizenship as the fundamental status of nationals of Member States when exercising their fundamental freedom of movement. Moreover, it rests on the assumption that, if the right of all Union citizens to move and reside freely within the territory of the Member States shall be exercised, it must also be granted to their family members, irrespective of nationality, see, to that effect, recitals 2-5 of the preamble of the Citizenship Directive.

Article 4 of the Citizenship Directive

- (18) In its Request for an Advisory Opinion, the referring court refers to Article 4 of the Citizenship Directive, which establishes that a Union citizen has the right to leave the territory of the Member State it resides in to travel to another Member State.
- (19) In order to ensure effectiveness of the right of all Union citizens to move and reside freely within the territory of the Member States, the Citizenship Directive covers all components of the freedom of movement, including both a right to exit one Member State and a corresponding right to reside in another Member State.
- (20) Pursuant to Article 4 of the Directive, no restrictions can be imposed on the right to exit one Member State to travel to another Member State. In the matter at hand, the question is whether national legislation restricts A's right to reside in another Member State, which is regulated by Article 7 of the Directive and, therefore, that Article will be the focus in these written observations.

Article 7 of the Citizenship Directive

- (21) The referring court refers to Article 7 of the Citizenship Directive, which establishes that a Union citizen shall have the "right of residence on the territory of another Member State" for a period of longer than three months if they are, inter alia, "workers" in the host Member State, see Article 7(1)(a).

- (22) In the matter at hand, the question is whether Section 40 of the Norwegian Children Act infringes on A's right of residence pursuant to Article 7(1)(a) of the Citizenship Directive and, if so, whether that restriction can be justified.
- (23) According to the wording of Article 7(1), the right of residence applies "on the territory of another Member State". However, "taking up residence in another State presupposes a move from the EEA State of origin" and, therefore, the right of residence must be understood "such that it also prohibits the home State from hindering the person concerned from moving to another EEA State", otherwise the right to reside in another EEA State would be rendered ineffective, see, to that effect, *Gunnarsson* paragraph 77; *Jabbi* paragraphs 74 and 75; and, by comparison, C-430/10 *Gaydarov*, EU:C:2011:749, paragraphs 25 and 28; C-33/07 *Jipa*, EU:C:2008:396, paragraph 18.
- (24) In *Gunnarsson*, the EFTA Court considered the compatibility of provisions in the Icelandic tax legislation where the option of pooling personal taxes in connection with the assessment of income tax was only available for pensioners living in Iceland. The Court concluded that Article 7 of the Citizenship Directive "prohibits the home State from hindering such a person from moving to another EEA State", see, to that effect, paragraph 77. Moreover, the EFTA Court noted that "[a] less favourable treatment of persons exercising the right to move than those who remain resident amounts to such a hindrance", see, to that effect, paragraph 82.
- (25) Furthermore, in case E-5/23 *LDL*, the EFTA Court observed that "measures which have the effect of impeding or rendering less attractive the right of the persons concerned to enter or leave that territory" are restrictive pursuant to the Citizenship Directive, see, to that effect, paragraph 66. In *LDL*, the EFTA Court assessed whether an obligation to quarantine in a quarantine hotel impeded the rights of a Swedish national, who had been residing and working in Norway for a period of more than three months, pursuant to Article 7(1)(a) of the Citizenship Directive.
- (26) In the case at hand, the Norwegian Children Act provides a less favorable treatment of persons exercising the right to move compared to those who remain resident. A custodial parent of a child, which it has joint parental responsibility over, must obtain the non-custodial parent's consent or the court's prior approval in order to move to another EEA State while no such requirement exist for a custodial parent's right to relocate within Norway. The requirement of a prior approval renders it less attractive for a custodial parent to leave Norway in order to reside in another EEA State and take work there.
- (27) By comparison, the same logic is applied in relation to the other fundamental freedoms of the internal market. The ECJ has consistently held that national legislation which makes the right to establish or provide services in a Member State contingent upon a prior authorization, constitutes a restriction on the right to free movement because it impedes or renders less attractive the exercise of that freedom, see, to that effect, case C-54/99 *Église de Scientologie* EU:C:2000:124, paragraph 14; and C-249/15 *Kurt Daell*, EU:C:2018:21, paragraphs 30-32.
- (28) Thus, it must be concluded that the Norwegian Children Act by differentiating between relocation in Norway and to other EEA Member States, renders a less favorable treatment of persons exercising the right to move compared to those who remain resident, which amounts to a hindrance in the freedom of movement for Union citizens as established by Article 7(1)(a).

Article 27 of the Citizenship Directive

- (29) The right of free movement of Union citizens is not unconditional and may be subject to the limitations and conditions imposed by the EEA Agreement and by the measures adopted to give it effect, compare, for example, *Jipa* paragraph 21 and *Gaydarov* paragraph 29.
- (30) Any restriction of the freedom of movement and residence under the Citizenship Directive must comply with the requirements laid down in Chapter VI of the Directive, see, to that effect, *LDL* paragraph 56. Pursuant to Article 27(1) of the Directive, Member States are not allowed to restrict the freedom of movement of Union citizens or their family members on grounds other than public policy, public security or public health. The scope of this provision is not limited to the right of entry, but covers all components of the freedom of movement, see, to that effect, *LDL* paragraph 64 and C-128/22 *Nordic Info*, EU:C:2023:951, paragraphs 56 and 57.
- (31) In the matter at hand, it can be ruled out that the restrictive measure established by Section 40 of the Norwegian Children Act is imposed on public health grounds, meaning that the restrictive measure must comply with the provisions of Chapter VI of the Directive pertaining to restrictions on the grounds of public policy or public security.
- (32) 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”, see Article 27(2) first paragraph of the Citizenship Directive. The second paragraph of that Article establishes that, for a restriction to be justified on grounds of public policy or public security, the personal conduct of the individual concerned must represent “a genuine, present and sufficiently serious threat” affecting one of the fundamental interests of society. Moreover, it is underlined that justifications “isolated from the particulars of the case” or that “rely on considerations of general prevention” shall not be accepted, see, to that effect, *Jipa* paragraph 24 and *Gaydarov* paragraph 34.
- (33) While it is clear from settled case law that Member States essentially retain the freedom to determine the requirements of public policy, public security or public health in accordance with their national needs, “those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union”, see, to that effect, *Jipa* paragraph 23 and *Gaydarov* paragraph 32.
- (34) In the case at hand, the measure restricting a Union citizen’s right of residence pursuant to Article 7(1)(a) of the Citizenship Directive, is not related to the personal conduct of the individual concerned. The national legislation provides for a difference in treatment depending on whether a custodial parent intends on relocating domestically or to another Member State, and the justification solely relies on considerations of general prevention, which cannot be accepted pursuant to Article 27 of the Citizenship Directive.
- (35) The consideration of general prevention that is called upon in the preparatory works of the Norwegian Children Act, is to ensure the parents right to maintain contact with the child which is presumed to be in the child’s best interest. However, the restrictive measure at hand, where the custodial parent is always required to obtain prior approval before moving to another EEA State but is never required to do so before moving within Norway, does not, in and of itself, ensure the attainment of contact between the parents and the child. The requirement of a prior approval is solely contingent upon a national border being crossed, and it applies irrespective of whether the relocation has an effect on the child’s interests and its ability to maintain contact with both parents.

- (36) Hence, the justification of the restrictive measure established by Section 40 of the Norwegian Children Act has nothing to do with the particulars of a case and, therefore, it cannot be accepted pursuant to Article 27 of the Citizenship Directive. Moreover, the justification is based on the assumption that it will always be more difficult for the child to maintain contact with both its parents in a situation where the custodian relocates to another state compared to when the custodian relocates domestically. Such an assumption is fundamentally flawed, and has been pointed out in a recent Official Norwegian Report, where the committee found that there is not necessarily a difference in relocating domestically and abroad considering the child's ability to maintain contact with both parents, see, to this effect, points 56, 57 and 62 below.
- (37) Thus, a restrictive measure such as the one at hand renders it less attractive for *any* custodial parent to leave Norway to reside in another EEA State, and the restriction is not justified by reference to the personal conduct of the individual concerned and a demonstration of how it represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. For these reasons, the restrictive measure cannot be justified pursuant to the conditions as established by Article 27 of the Citizenship Directive and, thus, it must be considered incompatible with EEA law.
- (38) Due to the applicability of Article 7 of the Citizenship Directive, there is no need to examine Article 28 EEA separately, see, to that effect, *Gunnarsson*, paragraph 93 and *LDL* paragraph 57 and 58 where the EFTA Court held that "neither Article 28 EEA nor Article 36 EEA provides for a more extensive right for an individual such as LDL to enter and reside in an EEA State such as Norway than the [Citizenship] Directive", see paragraphs 50 and 58.
- (39) In conclusion, it is not compatible with the rights established by the Citizenship Directive that the national legislation stipulates that in situations where the parents of a child have joint parental responsibility but only one parent has custody, the custodial parent must obtain the consent of the non-custodial parent or the prior approval of the national court in order to relocate with the child to another EEA Member State, but no such requirement of prior approval exists for a relocation within Norway.
- (40) However, as the referring court has raised the question pertaining to Article 28 EEA, we will present some comments in the following detailing how the Norwegian Children Act also amounts to a restriction on the freedom of movement of workers which cannot be justified.

4.3 The second question

- (41) By its second question, the referring court asks whether it is compatible with Article 28 EEA that the Norwegian Children Act stipulates that in situations where the parents have joint parental responsibility over a child but only one parent has custody, the custodial parent cannot relocate to another EEA State without the prior approval of either the non-custodial parent or the court, but no such requirement of prior approval exists for a relocation within Norway.

The applicability of Article 28 EEA

- (42) Pursuant to Article 28(3)(a) and (b), the freedom of movement for workers shall entail the right to accept offers of employment made and to move freely within the territory of EEA Member States for this purpose. It is settled case law that any EEA national who exercises the right of freedom of movement to seek employment or has been employed in an EEA State other than that of residence, falls within the scope of Article 28 EEA, see, to that effect, *Campbell* paragraph 50 and E-5/23 *LDL* paragraph 47.

- (43) Accordingly, a situation such as the one giving rise to the dispute in the main proceedings, falls, in principle, within the scope of Article 28 EEA. A is a Norwegian national, residing in Norway and seeks employment in Denmark where she has a standing job offer. Thus, it must be determined, first, whether national legislation such as that at issue in the main proceedings constitutes a restriction to the freedom of movement for workers and, secondly, if that is the case, whether that restriction is justified.

The existence of a restriction

- (44) The provisions relating to the free movement of persons are intended to facilitate the pursuit by EEA citizens of occupational activities of all kinds throughout the EEA, and preclude measures which might place EEA citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State, see, to that effect, C-137/04 *Rockler*, EU:C:2006:106, paragraph 17 and the case law cited. Thus, provisions which preclude or deter a national of a Member State from leaving its country of origin to exercise its right to freedom of movement constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned, see, to that effect *Rockler* paragraph 18 and the case law cited.
- (45) In that context, nationals of the Member States have the right to leave their Member State of origin to enter the territory of another Member State and reside there in order to pursue an activity there. As a result, the EEA Agreement precludes any national measure which is capable of hindering or rendering less attractive the exercise by EEA nationals of the fundamental freedoms guaranteed, see, to that effect, C-419/16 *Simma Federspiel*, EU:C:2017:997, paragraph 35 and the case law cited.
- (46) As discussed in points 21 to 28 above, a national legislation which makes the right to reside and take work in another Member State for a parent with sole custody over a child contingent upon the prior approval of the non-custodial parent or the court, is liable to preclude and, therefore, render less attractive, the right to pursue a job opportunity in another Member State. The national legislation brings about a discriminatory treatment based on the destination in the internal market the custodial parent intends on moving to.
- (47) Consequently, national legislation such as that in dispute in the main proceedings constitutes a barrier to the free movement of workers which is, as a rule, prohibited by Article 28 EEA.

Whether the restriction can be justified

- (48) A measure restricting one of the fundamental freedoms guaranteed by the EEA Agreement may be justified only if it pursues a legitimate objective of public policy, public security or public health and respects the principle of proportionality. For that reason, such a measure must be appropriate for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it, see, to that effect, *Rockler* paragraph 22.
- (49) Moreover, it must be borne in mind that the freedom of movement for workers forms one of the foundations of the internal market and, therefore, it is settled case law that exceptions to and derogations from the principle of freedom of movement for workers must be interpreted strictly, see, to that effect, C-139/85, *Kempf*, EU:C:1986:223, paragraph 13. The ECJ has consistently held that "[i]t should be emphasized that the concept of public policy in the context of the community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that

its scope cannot be determined unilaterally by each member state without being subject to control by the institutions of the community", see, to that effect, C-41/74, *van Duyn*, EU:C:1974:133, paragraph 18.

- (50) Therefore, it must be noted that there is no reason for accepting a derogation from the principle of freedom of movement for workers established by Article 28 EEA, if such a derogation cannot be justified pursuant to the conditions established by the Citizenship Directive. As the EFTA Court held in *Jabbi*, Union citizenship comprises the free movement of persons, see paragraph 55 of that decision, and the rulings in *Jabbi*, *Gunnarsson* and *Campbell* establish that the concept of free movement of Union citizens applies homogeneously to EEA nationals, which must also be viewed in light of how the EFTA Court held in *Gunnarsson* and *LDL* that there is no need to examine Article 28 EEA separately where the Citizenship Directive applies.

Whether the restriction pursues a legitimate aim

- (51) Pursuant to the preparatory works of the Norwegian Children Act, the provision in Section 40 aims at ensuring the parents' right to maintain contact with the child. If one parent moves abroad with the child, the legislature presumes that it is liable to affect the remaining parent's possibility of maintaining contact with the child. In turn, maintaining contact with both parents, is presumed to be in the best interest of the child. For that reason, the national legislation requires a prior approval if a custodial parent intends on moving abroad, including to EEA Member States, but no such requirement exist for domestic relocations.
- (52) While the ECJ has consistently held that the protection of the child is a legitimate interest that may justify a restriction on the fundamental freedoms, see, to that effect, C-454/19 *ZW*, EU:C:2020:947, paragraph 40 and the case law cited, the national legislation at hand brings about a discriminatory treatment based on the destination in the internal market the custodial parent intends on moving to. The remaining question is therefore whether that restriction is appropriate for securing the attainment of the objective it pursues, and whether it goes beyond what is necessary in order to attain it.

Whether the restriction is suitable to achieve the aim pursued

- (53) The first question is whether the restriction at hand is appropriate for securing the attainment of the objective of the restrictive measure which, in essence, is facilitating contact with both parents.
- (54) A restrictive measure such as the one at hand, where the custodial parent is always required to obtain prior approval before moving to another EEA State but is never required to do so before moving within Norway, is not, in and of itself, appropriate for securing the child's contact with both parents. As is noted above, the requirement of a prior approval is solely contingent upon a national border being crossed, and it applies irrespective of whether the relocation has an effect on the child's interests and its ability to maintain contact with both parents.
- (55) In a situation where the custodial parent relocates within the same Member State, but to a remote location, it may in many cases be more difficult for the child to maintain contact with both parents compared to a situation where the custodial parent moves to a location in another Member State which is closer and/or more accessible, see, for a similar reasoning, case C-350/96, *Clean Car Autoservice*, EU:C:1998:205, paragraph 35.
- (56) This can be illustrated by the following example.

- (a) In Situation A, the custodial parent intends to move from Halden in Norway (where the other parent lives) to Strömstad in Sweden. The travel time between both parents is 30 minutes by car. In order for the custodian's relocation to be permitted, a prior approval is required under Section 40 of the Norwegian Children Act.
 - (b) In Situation B, the custodial parent intends to move from Halden in Norway (where the other parent lives) to Kirkenes in Norway. The travel time between both parents is 24 hours by car. In order for the custodian's relocation to be permitted, a prior approval is not required under Section 40 of the Norwegian Children Act.
- (57) It is evidently easier for the child to maintain contact with both parents in Situation A than in Situation B. Nevertheless, no a prior approval is required under Section 40 of the Norwegian Children Act for the relocation in Situation B, whereas such a prior approval is required in Situation A. The restrictive measure established by Section 40 of the Norwegian Children Act is based on a fundamentally flawed assumption that it will always be more difficult for the child to maintain contact with both its parents in the situation where the custodian relocates to another Member State compared to a situation where the custodian relocates within the same Member State.
- (58) From the above, it is apparent that it does not constitute a suitable restriction of the right to freedom of movement for workers under Article 28 EEA to require a prior approval for a custodian's relocation to another Member State, when no such prior approval is required for a relocation within the same Member State.
- (59) Based on the above alone, it can be concluded that the restriction imposed by the national provision is disproportionate and, therefore, incompatible with Article 28 EEA.
- Whether the restriction is necessary to achieve the aim pursued*
- (60) The second question is whether the restriction is necessary to achieve the pursued aim of facilitating that a child is able to maintain contact with both its parents.
- (61) The requirement of a prior approval under Section 40 of the Norwegian Children is triggered by whether the custodial parent intends on moving to another EEA State or not, and it is absolute. The restriction applies to any move to another EEA State irrespective of whether the relocation has an effect on the child's interests and its ability to maintain contact with both parents. Whether a national border has been crossed or not is neither suitable nor necessary for the attainment of the objective sought pursued.
- (62) In two Official Norwegian Report's¹ the Norwegian government has been advised to amend Section 40 in the Norwegian Children Act so that the requirement of a prior approval applies equally when the custodial parent intends to move with the child within Norway. One of the proposals² was that the legislation should be amended so that, instead of placing decisive importance on whether the relocation is to another state, the requirement for a prior approval should be linked to the travel distance and how it affects the child's ability to maintain the

¹ See NOU 2020: 14 Ny barnelev – Til barnets beste (New Children Act – for the best interests of the child) Section 11.4.3, and NOU 2024: 8 Likestillingens neste steg (The next step of equality) Section 11.2.6.

² See NOU 2020: 14 Section 11.4.3.2.

already existing contact with the non-custodial parent. That would be a less restricting and more appropriate measure to attain the objective sought pursued.

- (63) However, the Norwegian government has disregarded the advice and, in the new Children Act currently on public hearing with deadline on 8 September 2024, it has maintained that the requirement of prior approval shall only apply where the custodial parent intends to move to another state. However, there is no mention of the implications of EEA law and the compatibility of such a requirement with the conditions laid down in the Citizenship Directive or the EEA Agreement as such.
- (64) In this regard it must be noted that 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 that the measure is appropriate to attain the objective relied upon and does not go beyond what is necessary to attain it. Moreover, the 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, to that effect, *E-8/29 N v. Norway* paragraph 95 and the case law cited.
- (65) For the reasons as stated above, an absolute requirement for a custodial parent to obtain a prior approval in order to move to another Member State, without any consideration of how such a relocation will in affect the child's ability to maintain its relationship with both parents, while such a prior approval is not needed when relocating within the same Member State, goes beyond what is necessary to achieve the aim pursued.
- (66) Consequently, the restriction imposed by the national legislation in the matter at hand is disproportionate also on this ground and, therefore, incompatible with Article 28 EEA.

5. ANSWERS TO THE QUESTIONS

- (67) Based on the foregoing analysis, A submits that the questions referred should be answered as follows:
 - (I) It is not compatible with the rights established by the Citizenship Directive that the national legislation stipulates that in situations where the parents of a child have joint parental responsibility but only one parent has custody, the custodial parent must obtain the consent of the non-custodial parent or the prior approval of the national court, but the custodial parent remains free to relocate within Norway without prior approval.
 - (II) It is not compatible with the Article 28 of the EEA Agreement that the national legislation stipulates that in situations where the parents of a child have joint parental responsibility but only one parent has custody, the custodial parent must obtain the consent of the non-custodial parent or the prior approval of the national court, but the custodial parent remains free to relocate within Norway without such prior approval.

ADVOKATFIRMAET SCHJØDT AS



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