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The EFTA Court's judgment in Case E-15/24 A v B: from recognition of the "special relationship" between the EU and the EEA EFTA States to a reference to the EU Charter of Fundamental Rights

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On 12 December 2024, the EFTA Court issued in Case E-15/24 *A v B* an advisory opinion upon request of the Norwegian Borgarting Court of Appeal. Under Norwegian law, when the parents of a child share parental responsibility, but only one of the parents enjoys custody over the child, the custodial parent cannot move with the child to another EEA State without the non-custodial parent's consent, or, by absence of such consent, prior authorisation by a court. Conversely, custodial parents do not need prior consent or authorisation if they were to move within Norway. In light of A's wish to leave Norway to join her new partner and take up employment in Denmark, together with her child, the question arises whether the prior consent or authorisation requirement constitutes a violation of her free movement of workers rights in Article 28 EEA and her rights derived from Directive 2004/38/EC (the so-called 'Citizenship Directive'). The EFTA Court concluded that the requirement of prior consent or authorisation is not, in principle, in breach of Article 28 EEA or Directive 2004/38/EC, provided that this requirement is designed 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. To determine whether the consent or authorisation requirement does not go beyond what is necessary, the referring court must balance the parent's free movement rights with the best interests of the child, thereby acknowledging that it may not always align with the child's best interests to remain in Norway.

While the EFTA Court's answer to the questions referred might be worth a blog post in and of itself, this post focusses on two particularly noteworthy passages in the advisory opinion. First, the EFTA Court's recognition of the best interests of the child as a general principle of EEA law, not only by reference to the European Convention on Human Rights (ECHR) and the UN Convention on the Rights of the Child, but also to the Charter of Fundamental Rights of the EU. Next, the EFTA Court's endorsement of the ECJ's statement in Case C-897/19 PPU *I.N.* that the EU, its Member States and the EEA EFTA States enjoy a "special relationship", and its potential implications for future cases.

The best interests of the child as a general principle of EEA law – relevance of the EU Charter?

The EFTA Court found that the best interests of the child may justify a restriction of both the free movement of workers in Article 28 EEA and the rights enshrined in Directive 2004/38/EC. In this respect, it reiterated its earlier case law that EEA law is to be interpreted in light of fundamental rights, which constitute general principles of EEA law, and that, for the purpose of their interpretation, the ECHR and the judgments of the European Court of Human Rights constitute important sources. The EFTA Court added to this that incorporating the best interests of the child in all actions relating to children is also prescribed by the UN Convention on the Rights of the Child – a treaty ratified by all EEA States. More remarkably, however, the EFTA Court furthermore noted 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", before concluding that "in light of the above" – i.e. a joint reading of those international instruments – the best interests of the child represents a fundamental principle that forms part of the general principles of EEA law.

The EFTA Court's reference to Article 24(2) of the Charter is particularly noteworthy since the Charter has not been incorporated in the EEA Agreement, nor has it in any other way been recognised by the EEA EFTA States. In addition, a reference to the ECHR and the UN Convention on the Rights of the Child, as international instruments ratified by *all* EEA States, might have been sufficient to recognise the best interests of the child as a general principle of EEA law. Arguably, the EFTA Court's reference to Article 24(2) of the Charter may be explained by the referring court's reference to this provision in its request for an advisory opinion. Nonetheless, the reference remains remarkable, in particular in light of the arguments put forward by the Norwegian Government in another case of the same date as *A v B*, Case E-16/23 *EFTA Surveillance Authority v The Kingdom of Norway*. In this infringement case, the Norwegian Government reminded the EFTA Court during the oral hearing that "the Charter is not part of the EEA Agreement." This reminds of the Norwegian Government's submissions in Case E-10/14 *Enes Deveci* that "an automatic application of the Charter, which is not incorporated in the EEA Agreement, would challenge State sovereignty and the principle of consent as the source of international legal obligations."

The EFTA Court's observation regarding Article 24(2) of the Charter reminds moreover of its statement in Case E-15/10 *Posten Norge*, in which it noted that, next to Article 6 ECHR, Article 47 of the Charter also gives expression to the principle of effective judicial protection – without however clarifying the value of the Charter in EEA law, or drawing any concrete conclusions from this observation. Arguably, the abovementioned Case E-16/23 *EFTA Surveillance Authority v The Kingdom of Norway* provided the EFTA Court with an opportunity to (partially) clarify the position and value of the Charter in EEA law, insofar the EFTA Surveillance Authority (ESA) argued that Recital 31 of Directive 2004/38/EC requires the EEA States to interpret and apply the provisions of that Directive in line with the Charter, including Article 24(2) on the best interests of the child. ESA put forward that, even though the Charter is not part of the EEA Agreement, this entails that the EEA EFTA States shall nonetheless respect the general principles underlying the fundamental rights and freedoms laid down in the EU Charter.

Interesting is that ESA appeared to argue *not* that the EEA EFTA States should comply with the Charter directly, but only that they should comply with the *general principles underlying the fundamental rights and freedoms* enshrined in the Charter. Although such a distinction appears artificial, it might help mitigate the sovereignty concerns voiced by the EEA EFTA States, in particular in cases where the preamble of an act of secondary EU law incorporated in EEA law requires compliance with the Charter. In this regard, Protocol 1 to the EEA Agreement stipulates that, even though the preambles of EU acts are not adapted when incorporated into EEA law, they *are* relevant for the proper interpretation and application of the provisions of that act. Hence, although the reference to the Charter in the preamble of Directive 2004/38/EC may not render the Charter directly binding on the EEA EFTA States, its relevance as an "interpretative guideline" – as ESA dubbed it (see paras 71 and 126) – cannot be entirely ignored either.

Unfortunately, the EFTA Court did not respond to ESA's submissions on the relevance of the Charter in Case E-16/23 *EFTA Surveillance Authority v The Kingdom of Norway* – a clarification which may have further benefitted its reference to the Charter in *A v B*. In light of this, it is moreover noteworthy that, in *A v B*, the EFTA Court pointed out Article 24(2) of the Charter within its analysis of the compatibility of the prior consent requirement with Article 28 EEA, rather than in its assessment under Directive 2004/38/EC, even though the preamble of the latter explicitly mandates compliance with the Charter.

Recognition of the "special relationship" as a way to escape the EFTA Court's limited jurisdiction?

Another noticeable passage in the EFTA Court's judgment in *A v B* concerns the EFTA Court's endorsement of the ECJ's statements in Case C-897/19 PPU *I.N.* that the EU, its Member States and the EEA EFTA States share a

"special relationship". In *I.N.*, the ECJ underlined that the EEA Agreement reaffirms the special relationship between the EU, its Member States and the EFTA States, which is based on proximity, long-standing common values and European identity. It is furthermore in the light of that special relationship that the principal objectives of the EEA should be understood, i.e. the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA. According to the ECJ, this special relationship is not only shaped by the EEA EFTA States' participation in the EEA Agreement, but equally follows from their implementation and application of the Schengen *acquis*, their participation in the Common European Asylum System, and the conclusion of the Agreement on the Surrender Procedure.

Hence, as the EFTA Court unequivocally put in *A v B*, "[t]his special relationship goes beyond the internal market" and, as a consequence, "it is clear that international agreements beyond the EEA Agreement itself are relevant in determining the extent of this special relationship". Subsequently, the EFTA Court found, by implicitly referring to Recital 3 of the Agreement on the Surrender Procedure, that, through the conclusion of other international agreements within the field of 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 each other's legal systems and their ability to guarantee a fair trial. In combination with Norway and Denmark being a party to the 1931 Nordic Family Law Convention and the 1996 Hague Convention, the EFTA Court concluded that one could therefore be confident that decisions regarding a child will be upheld and enforced when a child moves from Norway to Denmark.

The EFTA Court's approach in *A v B* may help mitigate concerns over the tensions between the holistic approach adopted by the ECJ and the limited jurisdiction of the EFTA Court in cases involving different international agreements (see e.g. Halvard Haukeland Fredriksen and Christophe Hillion, p. 870-873). While the ECJ has jurisdiction with respect to all international agreements concluded between the EU and the EEA EFTA States, since they form an integral part of EU law (see e.g. Case C-897/19 PPU *I.N.*, para 49), the EFTA Court's jurisdiction is limited to the EEA Agreement. This begs the question how the EFTA Court would deal with a case similar to *I.N.*, in which different international agreements between the EEA EFTA States and the EU played a decisive role in the ECJ's decision. Not only did the ECJ find that the situation of an EEA EFTA citizen is "objectively comparable" to that of an EU citizen because of Iceland's membership of the EEA and the Schengen area, it also found that an individual should not be extradited to Russia if that person has been granted asylum by Iceland, due to its participation in the Common European Asylum System. Instead, preference should be given to surrender of that individual to Iceland on the basis of the Agreement on the Surrender Procedure.

In light of this holistic approach of the ECJ, and due to the limited jurisdiction of the EFTA Court, proposals have been made to make use of so-called 'docking' – i.e. the extension of the EFTA Court's jurisdiction to other international agreements concluded between the EU and the EEA EFTA States (see e.g. Thérèse Blanchet in 'The EFTA Court: Developing the EEA over Three Decades'). However, the EFTA Court's recognition in *A v B* of the "special relationship" existing between the EU, its Member States and the EEA EFTA States, and its observation that other international agreements may inform the extent of the EEA Agreement, appear to mitigate the immediate need for such an extension to a certain extent. Although future judgments will have to clarify the scope and implications of the EFTA Court's statements, it appears that the EFTA Court explicitly opened the door for a contextualised reading of the EEA Agreement, allowing it to take into account other agreements between the EU and the EEA EFTA States in a manner similar to the ECJ's holistic approach in *I.N.* Admittedly, such a contextualised reading of the EEA Agreement does not go so far as to open up the EFTA Court's docket for direct questions regarding the interpretation and application of those agreements in a self-standing manner. For that purpose, the idea of docking still deserves further consideration.