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Judgment in Case E-25/25 *AE and Others (Surrogacy)*

LACK OF RECOGNITION OF CHILDREN BORN THROUGH SURROGACY MAY CONSTITUTE A RESTRICTION ON THE FREE MOVEMENT OF PERSONS

In a judgment delivered today, the Court answered questions referred to it by Reykjavík District Court (*Héraðsdómur Reykjavíkur*) concerning the interpretation of Directive 2004/38/EC ('the Directive') and Article 28 of the EEA Agreement on the right to free movement of persons. In particular, the questions concerned whether the right to free movement of persons requires an EEA State to recognise under its national law a legal parent-child relationship validly established in another EEA State.

The main proceedings concern a family of four, consisting of a married same-sex couple, AE (national of Iceland, Sweden and the U.S.A.) and YM (national of France and the U.S.A.), and their two children, SM and TM, each conceived using the semen of one of the fathers and an egg from a third woman through surrogacy arrangements carried out in the United States of America. The family moved to Sweden, where a national court confirmed the fathers' paternity on the basis of a ruling by a superior court in the State of California (U.S.A.). When the parents sought to have the children registered in the Icelandic registry, however, the competent national authority refused to register TM as AE's son, although AE is an Icelandic national, on the grounds that surrogacy is prohibited in Iceland. When the Icelandic authorities were asked about adoption as an alternative, they replied that this would hardly be an option as long as the family lived in Sweden and was fully recognised there. Against that background, the fathers, on behalf of themselves and their son, challenged the refusal before the referring court, inter alia, on the basis that it conflicted with the right to free movement under the EEA Agreement.

The Court recalled, at the outset, that the Directive defines a family member of an EEA national, inter alia, as 'direct descendants' of the EEA national. Moreover, given the objective of the Directive, the term 'direct descendant' under Article 2(2) must be interpreted as covering any parent-child relationship, whether biological or legal. The Court recalled in that regard that provisions of EEA law must be interpreted in the light of fundamental rights forming part of the general principles of EEA law and that the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union are important sources for determining the scope of those rights. The Court found that the relationship between the child and each of the two persons with whom he leads a family life in the host State is protected under EEA law. EEA States are therefore required under the Directive to recognise as a direct descendant of an EEA national a child whose parent-child relationship with that EEA national enjoys legal recognition in another EEA State for the purposes of exercising the primary right to free movement of persons and the secondary legislation relating thereto.

The Court further observed that, while it is for the legislature of each EEA State to organise its national registry, to set the conditions for the grant of nationality and to decide whether to allow surrogacy under national law, EEA States must nevertheless comply with applicable EEA law when exercising those powers. The EEA States must, in particular, comply with the provisions of the EEA Agreement giving EEA nationals the right to move and reside within the territory of the EEA States by recognising, for that purpose, the civil status of persons that has been

established in another EEA State in accordance with the law of that other EEA State. Since the Icelandic father had exercised his right to free movement in order to take up employment in Sweden, a refusal to register the child constituted a restriction on his right to freedom of movement as a worker under Article 28 EEA. The Court observed in that regard that the status of family members forms the basis of numerous rights and obligations arising from both EEA and national law, so that a failure to recognise that family relationship could create serious obstacles to family life in Iceland, ranging from uncertainty surrounding the child's right of residence, custody, particularly in the event of a divorce, and social security to matters relating to marriage and inheritance.

The Court thereafter considered whether such a restriction on free movement could be justified. The Court recalled that any measure restricting the free movement of persons must be proportionate to the legitimate objective pursued and comply with fundamental rights. In this regard Iceland submitted that registration was refused on the ground that Icelandic law does not allow surrogacy as a matter of public policy. The Court observed, however, that while there is no consensus in the EEA on the recognition of surrogacy, the consequences of non-recognition do not only affect the intended parents, but the child itself. Moreover, an obligation to recognise the civil status does not entail a duty to provide for surrogacy under national law. Accordingly, while EEA States are not obliged to opt for registration of the details contained in birth certificates legally established abroad, other means must not render the implementation of the rights conferred by EEA law impossible or excessively difficult and must serve the child's best interests in an appropriate manner by producing similar effects.

Against that background, the Court observed that the possibility of registering the family at the same domicile upon moving to Iceland was not a sufficient alternative, as such registration would not confer full rights under national law. As regards adoption, however, the Court found that such an alternative procedure could, in principle, comply with the provisions at stake, provided that the procedure is 'prompt and effective' and enables a decision to be taken rapidly, so that the child is not kept for a lengthy period in a position of legal uncertainty. Moreover, the recognition procedure cannot disregard the fact that a legal parent-child relationship has already been lawfully established in the host State, but must take into account, inter alia, the biological ties within the family, the time elapsed, the family life already established and the full recognition in the host State.

It is ultimately for the referring court to consider whether such a case-by-case assessment can be adequately carried out within the framework of a registration procedure, or whether it is necessary to require a separate adoption procedure in the best interests of the child. In any event, the referring court must ensure that any procedure can be implemented promptly and effectively in accordance with the child's best interests.

The advisory opinion is a step in the proceedings pending before the national court. Reykjavík District Court will now resume its proceedings and decide the case pending before it in light of the Court's judgment.

The full text of the judgment is available on the Court's website: https://eftacourt.int/cases/e-25-25/.

This press release is an unofficial document and is not binding upon the Court.