



# **Abuse of right in migration cases before the EFTA Court**

**Bernd Hammermann, Judge of the EFTA Court**

2022



# Outline

1. EEA law, Schengen and Dublin
2. The EFTA Court
3. Case law of the EFTA Court
  - a) on fundamental rights
  - b) on migration
  - c) on abuse of rights
4. Case law of the EFTA Court  
on abuse of rights in migration cases

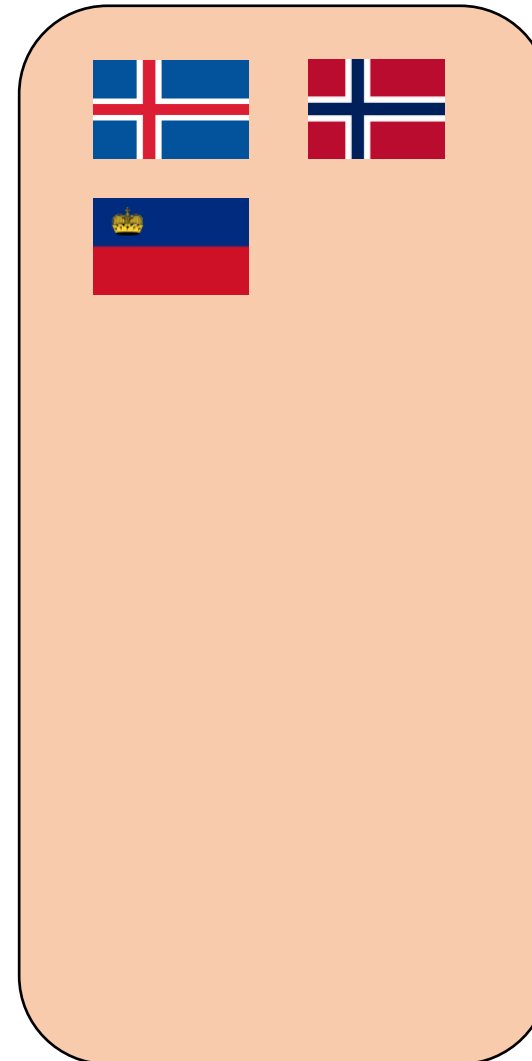


# 1. The European Economic Area (EEA) in 2022

EU Pillar in 2022 – 27 States



EFTA pillar in 2022 – 3 States





# 1. Today's EEA EFTA States



## Republic of Iceland

-  **Government:** Parliamentary Republic
-  **Capital:** Reykjavik
-  **Area:** 103 000 km<sup>2</sup>
-  **Population:** 365 000 (31 December 2019)
-  **Currency:** Icelandic króna (ISK)
-  **GPD:** 21 660 (2017, in million EUR)



## Principality of Liechtenstein

-  **Government:** Constitutional Monarchy
-  **Capital:** Vaduz
-  **Area:** 160 km<sup>2</sup>
-  **Population:** 38 557 (31 December 2019)
-  **Currency:** Swiss franc (CHF)
-  **GPD:** 5 631 (2016, in million EUR)



## Kingdom of Norway

-  **Government:** Constitutional Monarchy
-  **Capital:** Oslo
-  **Area:** 384 802 km<sup>2</sup>
-  **Population:** 5 372 355 (31 December 2019)
-  **Currency:** Norwegian krone (NOK)
-  **GPD:** 354 287 (2017, in million EUR)



# 1. The objective of the EEA Agreement

The objective of

- establishing a dynamic and homogeneous European Economic Area,
- based on common rules and equal conditions of competition and
- providing for the adequate means of enforcement including at the judicial level,
- and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties

(4<sup>th</sup> recital EEA Agreement)



# 1. The Scope of the EEA Agreement

## Within scope:

- ✓ Economic co-operation
- ✓ Four fundamental freedoms
- ✓ State aid and competition rules
- ✓ Flanking horizontal policies:  
consumer protection, company law, environment, social policy, statistics, research and technological development, education, training and youth, employment, tourism, culture, civil protection, enterprise, entrepreneurship and SMEs

## Out of scope:

- EU's citizenship
  - EU's Area of Freedom, Security and Justice
  - EU's Common Foreign and Security Policy
- = > no common rules on asylum and migration
- special cases:
    - Schengen
    - Dublin



# 1. Schengen

- Initially the Schengen treaties and the rules adopted operated independently of EC law.
- In 1999 they were incorporated into European Union law by the Amsterdam Treaty with opt-out option
- Iceland and Norway (1996), Switzerland (2009) and Liechtenstein (2011) concluded association agreements and became part of the Schengen Area (22 EU countries and 4 EFTA States)



# 1. Schengen

- Competent courts for interpreting the Schengen acquis
  - the ECJ and national courts of Iceland, Liechtenstein, Norway and Switzerland
- uniform application and interpretation
  - to be achieved by a constant review of the case law of the ECJ and national courts by a “**Mixed Committee**” (see Articles 9 – 11 of each of the Association Agreements with Iceland and Norway and with Switzerland, applicable to Liechtenstein by the Accession Protocol)





# 1. Dublin

## The Dublin Convention

- signed on 15 June 1990 initially by 12 EC countries
- In 2003 the Dublin II Regulation was adopted replacing the Dublin Convention in all EU member, for Denmark in 2006
- Iceland and Norway (2001), Switzerland (2008) and Liechtenstein (2011) concluded agreements concerning the criteria and mechanisms for establishing the responsible state for examining a lodged request for asylum
- In 2013 the Dublin III Regulation (No. 604/2013) replaced Dublin II (except for Denmark)

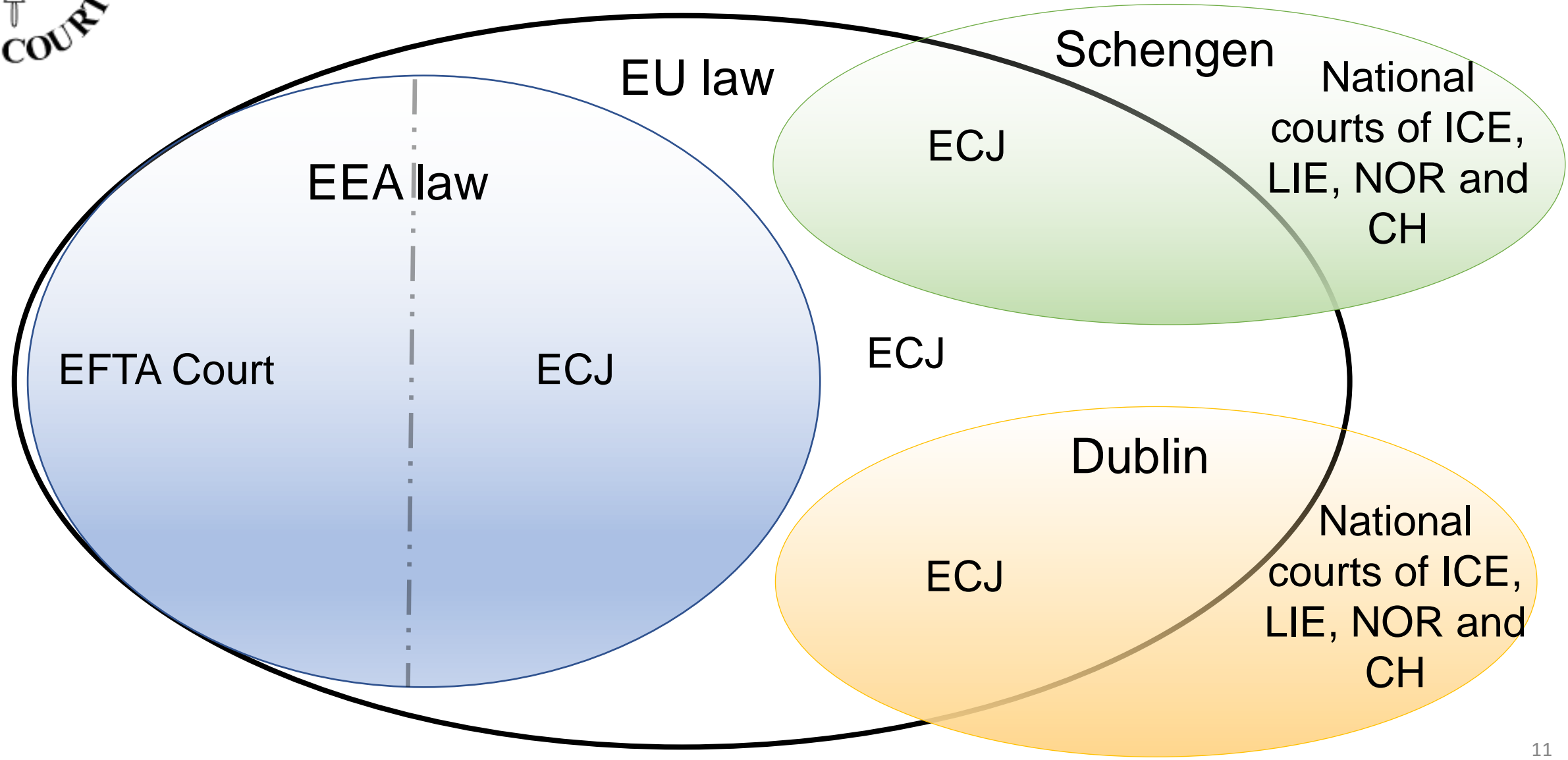


# 1. Dublin

- Competent courts for interpreting the Dublin rules
  - the ECJ and national courts of Iceland, Liechtenstein, Norway and Switzerland
- uniform application and interpretation
  - to be achieved by a constant review of the case law of the ECJ and national courts by a
    - “**Joint Committee**” (Articles 6 – 8 of the Agreements with Iceland and Norway) or a
    - “**Mixed Committee**” (Article 5 – 7 of the Agreement with Switzerland, applicable to Liechtenstein by Article 3 of the relevant Protocol with Liechtenstein)



# 1. Applicable law and competent courts





## 2. The EFTA Court Structure and Procedure



Páll Hreinsson



Per Christiansen



Bernd Hammermann

- **Structure:**
  - 1 Judge from each country – 2 *ad hoc* judges per country
  - 3 *cabinets* consisting of a judge, legal secretaries and personal assistant
  - *Cabinet* system as opposed to a pool system
- **Procedure:**
  - **Advisory Opinions** – not *strictly* binding
  - **Direct Actions** – actions for annulment (EEA/EFTA State v ESA; private operator v ESA); State aid cases, competition law cases and infringement proceedings (ESA v EEA/EFTA State)



### 3. a) Case law of the EFTA Court on Fundamental Rights

- Only one reference to fundamental rights in the first recital of the EEA Agreement:

*“CONVINCED of the contribution that a European Economic Area will bring to the construction of a Europe based on peace, democracy and **human rights**;*”

- but clear reference in the EFTA Court’s case law:

- *E-8/97 TV 1000*

Reference to freedom of expression in Article 10 ECHR Reference to case law of the ECtHR in the *Handyside* decision (ECtHR, No 5493/72)

- *E-2/03 Ásgeirsson*

Provisions of the EEA as well as the SCA are to be interpreted in the light of fundamental rights. The ECHR as well as the case law of the ECtHR are important sources to determine the content of these rights



### 3. a) Case law of the EFTA Court on Fundamental Rights

- E-3/13 and E-20/13 *Fred. Olsen and Others*  
Fundamental rights apply in all situations covered by EEA law
  - E-1/20 *Kerim*  
EEA law is not only to be interpreted in the light of fundamental rights.  
Fundamental rights are part of the general principles of EEA law
- Obligation of the EEA States to ensure that both the interpretation and application of legal acts incorporated into the EEA Agreement do not conflict with fundamental rights protected by EEA law



### 3. b) Case law of the EFTA Court on migration

- Denial of entry of EEA nationals on grounds of public policy or public security
  - E-15/12 *Wahl*
  - Article 27 of Directive 2004/38/EC
- Expulsion and exclusion on grounds of public security
  - E-2/20 *L*
  - Articles 27, 28, 32 and 33 of Directive 2004/38/EC
- Family reunification of EEA nationals and sectoral adaptations to the EEA Agreement
  - E-2/19 *D and E*
  - Article 7(1)(a) of Directive 2004/38/EC



### 3. b) Case law of the EFTA Court on migration

- Derived rights for third country nationals
  - E-28/15 *Jabbi*
  - Article 7(1)(b) in conjunction with Article 7(2) of Directive 2004/38/EC
- Derived rights for third country nationals and abuse of rights
  - E-1/20 *Kerim*
  - E-4/19 *Campbell*
  - Article 7(1)(b), read in conjunction with Article 7(2) and Article 35 of Directive 2004/38/EC
- Independent rights of residence of children in education and derived rights of third country nationals and abuse of rights
  - E-16/20 *Q and others*
  - Article 10 of Regulation 492/2011 and Articles 7(1)(b) and 12(3) and Article 35 of Directive 2004/38/EC





### 3. c) Case law of the EFTA Court on abuse of rights (Tax cases)

- E-15/16 *Yara International*
- “The Court recalls that EEA States remain free to enact rules which have the objective of precluding wholly artificial arrangements leading to tax avoidance [...] This is a corollary of **the prohibition of abuse of rights, an essential feature of EEA law**, which aims [...] at preventing companies [...] from attempting, under cover of the rights created by the EEA Agreement, to circumvent their national legislation, or improperly or fraudulently take advantage of provisions of EEA law [...] (para. 49)
- “[...] **Two elements** must be considered in this analysis. In addition to a **subjective element** consisting in the **intention of obtaining a tax advantage**, the **objective circumstances** must also attest to the **artificial character of the situation**. [...]” (para. 52)



## 4. Case law of the EFTA Court on abuse of rights in migration cases

Derived rights for third country nationals and **abuse of rights**

- E-4/19 *Campbell*
  - [...] first, a combination of **objective circumstances** in which, despite formal observance of the conditions laid down by the EEA rules, the purpose of those rules has not been achieved, and, second, a **subjective element** consisting in the intention to obtain an advantage from the EEA rules by artificially creating the conditions laid down for obtaining it [...] (para. 70)
  - “However, [...] the fact that an EEA national consciously seeks a situation conferring a right of residence in another EEA State does not in itself constitute abuse. Nor can such conduct constitute an abuse even if the spouse did not, at the time when the couple installed itself in another EEA State, have a right to remain in the EEA State of origin. [...]” (para. 71)



## 4. Case law of the EFTA Court on abuse of rights in migration cases

Derived rights for third country nationals and abuse of rights

- E-1/20 *Kerim*
  - “Article 35 of the Directive is an expression of the general principle of the prohibition of abuse of rights.[...]” (para. 36)
  - A determination of abuse of rights under EEA law is based on a cumulative test combining objective and subjective elements. The **objective element** requires that it be evident from the specific set of circumstances in question that, despite formal observance of the conditions laid down by the EEA rules, the purpose of those rules has not been achieved. [...] (para. 37)



## 4. Case law of the EFTA Court on abuse of rights in migration cases

Derived rights for third country nationals and abuse of rights

- E-1/20 *Kerim*
  - The **subjective element** implies bad faith, that is, an intent to abuse or circumvent provisions of EEA law or wrongfully obtain advantages that would ordinarily have resulted from a lawful use of rights under EEA law, in other words a legitimate and justified use of rights. [...] (para. 39)
  - [...] abuse of rights must therefore involve **bad faith** by the party concerned and at the same time artificially create the conditions required for obtaining such a benefit that result in failing to achieve the purpose of the Directive. (para. 40)



## 4. Case law of the EFTA Court on abuse of rights in migration cases

Derived rights for third country nationals and abuse of rights

- E-1/20 *Kerim*
  - *It is settled case law that the derived right of residence for a third-country national who is a family member of an EEA national exists in order to ensure that the EEA national can exercise effectively freedom of movement. **The purpose and justification of the derived right is based on the fact that a rejection thereof would interfere with the exercise of the rights provided for EEA nationals.** Therefore, the Directive grants rights to EEA nationals and their family members who during a genuine residence in an EEA State seek to create or strengthen family life [...] (para. 41)*



## 4. Case law of the EFTA Court on abuse of rights in migration cases

Derived rights for third country nationals and abuse of rights

- E-1/20 *Kerim*
  - “[...] it may be that a couple has entered into a marriage for a number of reasons, including but not limited to establishing a right of residence. That does not necessarily and inevitably mean that the marriage constitutes an abuse of rights, because the benefit is inherent in the exercise of the right.” (para. 41)



## 4. Case law of the EFTA Court on abuse of rights in migration cases

Derived rights for third country nationals and abuse of rights

- E-1/20 *Kerim*
  - [...] a **marriage of convenience** is often one in which the marriage was contracted in the absence of a genuine relationship between the parties and where the construct was purely artificial and entered into for the purposes of improperly obtaining a right under EEA law. [...] (para. 47)
  - [...] in circumstances in which reasonable doubts exist as to whether the marriage in question is in fact genuine, it is necessary [...] to establish, on the basis of a **case-by-case examination**, that at least one spouse in the marriage has essentially entered into it for the purpose of improperly obtaining the right of free movement and residence by the third-country national spouse rather than for the establishment of a genuine marriage. (para. 50)



## 4. Case law of the EFTA Court on abuse of rights in migration cases

Independent rights of residence of children in education and derived rights of third country nationals and abuse of rights

- E-16/20 *Q and others*
  - *In circumstances in which a **marriage of convenience is found to exist**, rights that would otherwise accrue in the host EEA State by virtue of a genuine marriage cannot be relied upon by a third-country national. (para. 64)*





***Thank you for your attention***

**Bernd Hammermann, Judge of the EFTA Court**

2022