The 'special relationship' between the EU and the EEA EFTA States and the free movement of persons in an extended area of freedom, security and justice

Case C-897/19 PPU, *Ruska Federacija v. I.N.*, judgment of the CJEU (Grand Chamber) of 2 April 2020, EU:C:2020:262

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1. Introduction

The continued success of the European Economic Area (EEA) greatly depends on the European Court of Justice (ECJ) extending its interpretations of EU internal market law to situations governed by the EEA Agreement.[1] Ever since the seminal Grand Chamber judgment in *Ospelt*, the Court has done just that, thereby enabling "the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the EFTA States".[2] Within the scope of the EEA Agreement, citizens and economic operators from Iceland, Liechtenstein and Norway (the "EEA EFTA" States) thus enjoy essentially the same rights in the EU as their EU counterparts, while the three participating EFTA States find themselves "on the same footing as Member States of the European Union" for the purposes of the application of internal market rules.[3]

The ability of the ECJ to secure uniform interpretation of corresponding provisions of EU and EEA law is tested, however, in cases where the interpretation and/or application of the former is influenced by parts of EU law that are not to be found in the EEA Agreement. There are two main categories of such cases – the ones where the relevant provisions of EU law are covered by (an)other agreement(s) between the EU and the EEA EFTA States, and the ones where they are not. Examples of the former category are cases where the interpretation and/or application of EEA-relevant EU law is influenced by provisions of EU law that are reproduced in the agreements that link the EEA EFTA States of Iceland, Norway and/or Liechtenstein to the Schengen

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[1] OJ No L 1, 3.1.1994, p. 3. For an overview, see H.H. Fredriksen and C. Franklin, 'Of pragmatism and principles: the EEA Agreement 20 years on', 52 *CMLRev.* (2015), 629-684.
[2] Case C-452/01, *Ospelt*, EU:C:2003:493, para. 29.
[3] A stated by the Grand Chamber in Case C-81/13 *UK v Council*, EU:C:2014:2449, para. 59 (differentiating the EEA Agreement from the EEC-Turkey Association Agreement).

area,[4] the EU's common asylum system,[5] the EU's arrest warrant and surrender procedure,[6] the EU rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[7] etc. A hotly debated example from the latter category is the provisions on EU citizenship found in Articles 20ff. TFEU, relating in particular to the question of how far the lack of an EEA parallel to Article 21 TFEU can be "compensated"[8] by a dynamic interpretation of the Citizenship Directive (2004/38/EU),[9] or "made up for by other provisions of the EEA Agreement".[10]

When the Supreme Court of Croatia turned to the ECJ with the question of whether EU law offers an Icelandic citizen the same protection from extradition to a third State as the one the Court of Justice had granted to EU citizens on the basis of Articles 18 and 21 TFEU in the *Petruhhin* case,[11] the stage seemed to be set for a landmark judgment dealing with both categories of differences between EU and EEA law. However, as we shall see, the Court found a way to preserve homogeneity between EU and EEA law without having to deal with the fact that the *concept* of EU citizenship has no equivalent in EEA law, nor in any of the related agreements between the EU and Iceland.

That said, *I.N.* is still a landmark judgment. In establishing whether I.N., an Icelandic citizen, could be protected in the EU from extradition to Russia, the ECJ construes his free movement rights and their protection, in the light of several instruments governing the "special relationship" between Iceland and the Union, which as the Court opines "goes beyond economic and

[4] Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis, (OJ 1999 L 176, p. 36) and Protocol between the European Union, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis (OJ 2011 L 160, p. 3).

[5] Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the state responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway (OJ 2001 L 93, p. 40) and Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (OJ 2011 L 160, p. 39).

[6] Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (OJ 2014 L 343, p. 1) and the Convention of 27 September 1996 relating to Extradition between the Member States of the EU (OJ C 313, 23.10.1996, p. 12) (applicable to the EFTA States as Associated Schengen countries).

[7] The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2007 L 339, p. 3).

[8] As indeed argued by I.N in the case under review, see AG Tanchev's Opinion of 27 February 2020, EU:C:2020:128, para. 38.

[9] As incorporated into the EEA Agreement by EEA Joint Committee Decision No 158/2007 (OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17).

[10] As contended by the European Commission in the case under review, see AG Tanchev's Opinion of 27 February 2020, EU:C:2020:128, para. 70.

[11] Case C-182/15, *Petruhhin*, EU:C:2016:630. See the annotation by M. Böse, 'Mutual recognition, extradition to third countries and Union citizenship: *Petruhhin*', 54 *CMLRev.* (2017) 1781–1798.

commercial cooperation".[12] For the Court, the fact that the Icelandic citizen concerned "has the status as a national of an EFTA State, which is a party to the EEA Agreement, but also the fact that that State implements and applies the Schengen acquis, renders the situation of that person objectively comparable with that of an EU citizen to whom, in accordance with Article 3(2) TEU, the Union offers an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured".[13]

The Court of Justice thus envisages the "special relationship" between the EU and Iceland (and by extension Norway) in a holistic and integrated fashion, and on that basis reinforces the significance of the (free movement) rights its nationals enjoy in the EU legal order. By linking their situation more closely to that of EU citizens in terms of freedoms of movement, the *I.N.* ruling enriches the current status of Icelandic (and other EEA EFTA states') citizens in the EU legal order, and by extension of EU citizens in Iceland (and other EEA EFTA states). The Court thus develops the law of European integration beyond EU membership, which has been made more complex after the UK's withdrawal from the Union.

2. Factual and legal background

The facts of the case are both straightforward and extraordinary. I.N. is a former Russian official who fled Russia after being charged with corruption. According to I.N., the charges were brought against him in retaliation after he had revealed the corrupt practices of some of his superiors. On that basis, Iceland granted him asylum as a refugee in 2015 and then, four years later, Icelandic citizenship. Shortly after obtaining Icelandic citizenship,[14] I.N. was arrested by the Croatian border police while on holiday with his family. The arrest took place under an international wanted persons notice issued by Interpol's Bureau in Moscow.

As Russia sought I.N.'s extradition based on the 1957 European Convention on Extradition,[15] Croatian courts were confronted with the question of whether the protection against extradition to third countries established by the ECJ's in *Petruhhin* applies to citizens of an EEA EFTA and/or Schengen Associated State. In that case, the ECJ had held national rules on extradition that allows for the extradition of a Union citizen who is a national of another Member State, but not the Member States' own nationals, to give rise to a restriction of freedom of movement, within the meaning of Article 21 TFEU. On this basis, the Court inferred that a Member State which does not extradite its own nationals to a given third country, cannot extradite a national of another Member State either, as long as that other Member State has jurisdiction to prosecute that person for offences committed outside its national territory and does request his surrender, in accordance with the provisions of Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States. Thus:

[12] Para. 44 of the judgment examined in this annotation. The notion of 'special relationship' is also mentioned twice at para. 50.
[13] *Ibid.*
[14] In addition to his Russian citizenship.
[15] ETS No 024.

> *when a Member State to which a Union citizen, a national of another Member State, has moved receives an extradition request from a third State with which the first Member State has concluded an extradition agreement, it must inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it, in accordance with the provisions of Council Framework Decision … on the European arrest warrant and the surrender procedures between Member States, … provided that that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory*.

The Court also established that "where a Member State receives a request from a third State seeking the extradition of a national of another Member State, that first Member State must verify that the extradition will not prejudice the rights referred to in Article 19 of the Charter of Fundamental Rights of the European Union".[16]

Focusing on Iceland's status as a Schengen Associated State, rather than its status as an EEA EFTA State, the Supreme Court of Croatia was of the view that I.N. had exercised his right to free movement within the Schengen area. Noting the recent entry into force of the Agreement between Iceland (and Norway) and the EU on a surrender procedure, and adding that Croatia does not extradite its own nationals to Russia, the Supreme Court asked the ECJ whether Article 18 TFEU was to be interpreted as giving I.N. the same protection against extradition as that enjoyed by EU citizens.

Before the ECJ, it quickly became clear that Iceland's status as an EEA EFTA State had to be taken into consideration. The pleadings of the parties, institutions and most governments who submitted written and/or oral observations suggested that the basis for any analogous application of *Petruhhin* was to be sought in the free movement rights of the EEA Agreement, either Article 36 EEA (freedom to go to another EEA State in order to receive (tourist) services) or the Citizenship Directive, rather than in Iceland's status as a Schengen Associated State.[17]

As to whether the reasoning in *Petruhhin* could be transferred to EEA law or not, opinions differed. I.N. obviously argued for an affirmative answer, whereas the Russian government took a different view. Of the three EU Member States who took part in the proceedings, Croatia and Greece supported analogous application of *Petruhhin* in the EEA, whereas Ireland's interest in the case apparently lie elsewhere – namely, as an opportunity to ask the ECJ to re-visit and overrule *Petruhhin* altogether.[18]

For the status and future prospects of the EEA project as such, the positions taken respectively by the European Commission, the EFTA Surveillance Authority (ESA) and the two EEA EFTA States that submitted observations – Iceland and Norway, are of particular importance. Before the ECJ, the Commission, the ESA and the Icelandic government all agreed that the reasoning in *Petruhhin* should be extended to the EEA. Particularly noteworthy, given its role as the key

[16] See the operative part of Case C-182/15, *Petruhhin*, EU:C:2016:630.
[17] See the commendable informative summary of the written and oral observations in AG Tanchev's Opinion of 27 February 2020, EU:C:2020:128, paras. 34-77.
[18] The *Petruhhin* case law indeed continues to be disputed as apparent again in Opinion of AG Hogan in Case C-398/19 *BY,* EU:C:2020:748.

EU institution in the everyday life of the EEA Agreement, was the Commission's insistence that even though certain pieces of the *Petruhhin* puzzle were missing, these could be made up for by other provisions of EEA law. Highlighting the object and purpose of the EEA Agreement; the 'privileged relationship' between the EU, the Member States and the EEA EFTA States; the EFTA Court's expansive interpretation of the Citizenship Directive in *Gunnarsson*[19] and *Jabbi*[20] and the EU-Norway/Iceland Surrender Procedure Agreement as an instrument that is "equivalent" to the EU Framework Decision on the European arrest warrant and the surrender procedures between EU Member States, the Commission concluded that *Petruhhin* should be extended to the EEA.

In striking contrast, the observations of the government of Norway were far more reserved. At the hearing, Norway highlighted that there is no provision in the EEA Agreement equivalent to Article 21 TFEU and argued that it was solely for the Croatian Supreme Court to decide if I.N. was a recipient of services under Article 36 EEA. The Norwegian government also took the view that the Citizenship Directive was of no relevance to the case, as it does not regulate extradition requests and criminal law falls outside the scope of the EEA Agreement altogether.

Norway further contended that the EU-Iceland/Norway Surrender Procedure Agreement is "a regular international treaty" that forms no part of EEA law, and which cannot be interpreted in the same way as the EU Framework Decision on the European arrest warrant and the surrender procedures between EU Member States. Even if the wording is similar, the context and objective is different. It was suggested that the Surrender Procedure Agreement lacks both the mutual trust objective of the EU Framework Decision and the overarching objective of an area of freedom, security and justice without internal frontiers stated in Article 3(2) TEU. Whereas Article 1(2) of the EU Framework Decision refers to "the principle of mutual recognition", the Surrender Procedure Agreement only refers to "mutual confidence" in its preamble. As a result, the priority that the ruling in *Petruhhin* gives to a request based on the EU Framework Decision above any request from a third country, should not be extended to requests based on the Surrender Procedure Agreement. Returning to the EEA Agreement, the Norwegian government also found it pertinent to state that the obligation to facilitate cooperation enshrined in Article 3 EEA is less far-reaching than the principle of sincere cooperation of Article 4 TEU.[21]

In short, the view of the Norwegian government was that the EEA Agreement should be interpreted as not offering an Icelandic (or Norwegian!) citizen the same protection against extradition from Croatia to Russia as that which EU law offers EU citizens.

3. The Opinion of the Advocate General

In his Opinion to the Grand Chamber, AG Tanchev highlighted the 'multi-layered' complexity of the case, and thus indirectly the complexity of the legal relationship between the EU and the EEA EFTA States more generally.[22] However, the Advocate General quickly identified Article

[19] Case E-26/13 *Gunnarsson* [2014] EFTA Ct. Rep. 254.
[20] Case E-28/15 *Jabbi* [2016] EFTA Ct. Rep. 575.
[21] Paras 57-59 of the Opinion.
[22] Paras. 78 ff. of the Opinion.

36 EEA as the proper legal basis to solve the case, noting that the material put before the Court at the hearing made clear that I.N. was a recipient of tourist services at the time of his arrest. As the ECJ has long acknowledged that Article 36 EEA is to be interpreted in line with what is now Article 56 TFEU,[23] and as the EFTA Court has affirmed the EEA-relevance of the ECJ's judgment in *Cowan*,[24] the AG concluded without further ado that Article 36 EEA includes the freedom for the recipients of services to go to other EEA States in order to receive services there, and that tourists are to be regarded as recipients of services.[25] Consequently, there was no need for AG Tanchev to assess whether the Schengen *acquis* as such entails a similar right to free movement (as apparently suggested by the Croatian Supreme Court in its referral), nor whether the Citizenship Directive does so (as argued by I.N., Iceland and the Commission, but strongly objected to by Norway).

The Advocate General then relied on *Petruhhin* to confirm that a restriction on free movement could be justified by the desire to combat the impunity of a person who is present in a territory other than that in which he has allegedly committed an offence.[26] This led him to the crux of the case: namely, whether the use of the Surrender Procedure Agreement that Iceland and Norway have concluded with the EU constitutes an alternative means to prevent impunity which is less prejudicial to the exercise of the right to freedom of movement than extradition to a third State. Or put differently, whether the ECJ's assessment of the EU Framework Decision on the European arrest warrant and the surrender procedures between EU Member States in *Petruhhin* could be extended to the Surrender Procedure Agreement.

Sharing Norway's views that "the principle of mutual trust, as it has come to evolve in the European Union since the Lisbon Treaty of 2007, has no application in EEA law" and that "Article 3(2) TEU has no counterpart in the EEA Agreement',[27] the Advocate General parted with the Norwegian government in finding that such differences between EU and EEA law was of no relevance to I.N.'s case. He opined that the ruling in *Petruhhin* should not be understood to suggest that recourse to an European Arrest Warrant is the only alternative on which an accused can rely when a Member State invokes avoidance of impunity as a justified limitation to free movement and, furthermore, that the EU-Iceland/Norway Surrender Procedure Agreement indeed provides an alternative that guarantees against impunity to the same or at least similar extent as extradition.[28]

Nevertheless, as Iceland had not formally requested the surrender of I.N., the Advocate General considered it premature to rule on whether Croatia should send I.N. back to Iceland.[29] Instead, he turned his attention to the fundamental rights protecting I.N. from exposure to conditions of inhuman and degrading treatment or punishment.[30] As noted by the Advocate General, I.N. was

[23] See, e.g., Case C-678/11, *Commission v Spain*, EU:C:2014:2434, para. 66.
[24] Case E-13/11, *Granville*, [2012] EFTA Ct. Rep. 400, para. 37.
[25] Paras. 84 ff. of the Opinion.
[26] Paras. 92 ff.
[27] Para. 97.
[28] Paras. 98 ff.
[29] Para. 122.
[30] Paras. 111 ff.

protected from an extradition exposing him to inhuman and degrading treatment by no less than three legal instruments – the European Convention of Human Rights (ECHR), the EU Charter of Fundamental Rights (CFR) and the EEA Agreement. As far as the third of those instruments is concerned, the EEA Agreement, AG Tanchev acknowledged that the European Court of Human Rights recently voiced some scepticism as to the fundamental rights protection offered by EEA law,[31] but then tacitly distanced himself from that view by highlighting that the EFTA Court has long recognised the ECHR as an important source of EEA law, and that this binds the EEA States to fundamental rights when they derogate from EEA law.[32] Noting that the case-law of the ECJ makes clear that the prohibition of inhuman or degrading treatment laid down in Article 4 CFR corresponds to that laid down in Article 3 ECHR, AG Tanchev concluded that the (thorny) issue of differences in the standard of protection by the three instruments did not arise in I.N.'s case. In a noteworthy supplementary remark, he held that Article 6 ECHR too protected I.N. against extradition if there was a real risk of him being exposed to a flagrant denial of justice in Russian courts, and added that Article 47 of the EU Charter ought to be interpreted accordingly.[33]

For the Advocate General, the final question was the importance that the Croatian Supreme Court had to attach to the fact that Iceland had granted I.N. asylum on the ground that he was at risk of suffering inhuman and degrading treatment in Russia. This led to a detailed assessment of the agreements that links Iceland, directly and indirectly, to the EU's common asylum system. Highlighting Iceland's participation in the Dublin III Regulation, the Eurodac Regulation, and the European Asylum Support Office, and drawing in Iceland's status as a Schengen Associated State, he opined that Croatia and Iceland are bound to an obligation of mutual trust that presupposes that the Dublin III Regulation is correctly applied in Iceland and establishes a presumption that Iceland's decision to grant I.N. asylum was sound.[34]

4. The ruling of the Court of Justice

The ruling of the Grand Chamber mostly follows the approach of the Advocate General, but puts even more emphasis on the close character of the relationship between Iceland and the EU. The ECJ avoids any remarks that may be understood to 'talk down' the EEA Agreement or any of the other agreements that link Iceland to EU law, and strengthens even further the evidentiary value of an asylum decision made by the authorities of an EEA/EFTA State that participates in the common European asylum system.

[31] Para. 113, with a reference to the ECtHR's judgment in *Konkurrenten.no v. Norway*, Application No 47341/15, in which that court, by way of an *obiter dictum*, opined that 'although the EFTA Court has expressed the view that the provisions of the EEA Agreement "are to be interpreted in the light of fundamental rights" in order to enhance coherency between EEA law and EU law […], the EEA Agreement does not include the EU Charter of Fundamental Rights, or any reference whatsoever to other legal instruments having the same effect, such as the Convention' (para. 43).

[32] Para. 115, with a reference to Case E-14/15, *Holship*, [2016] EFTA Ct. Rep., para. 123.

[33] Para. 117.

[34] Paras. 101-110 and 123.

Unlike the Advocate General, the Court of Justice also felt it pertinent to recall, by way of an introduction, that Articles 18 and 21 TFEU only apply to EU nationals.[35] These provisions can thus not be the legal bases for a *Petruhhin*-like protection for third states' nationals, not even nationals of an EEA EFTA and Schengen State like Iceland. This, however, does not mean that rights associated with these provisions cannot be applicable in other legal contexts, based on other legal instruments, such as e.g. the EEA Agreement.

Turning to the case at hand, the ECJ stated that:

> *… the Republic of Iceland has a special relationship with the European Union, which goes beyond economic and commercial cooperation. It implements and applies the Schengen acquis, as the referring court observes, but it is also a party to the EEA Agreement, participates in the common European asylum system and has concluded the Agreement on the surrender procedure with the European Union.*[36]

This special relationship framed the subsequent interpretation of the EEA Agreement, as the Grand Chamber confirmed that the EEA Agreement aims at "the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the EFTA States" and that it is for the ECJ to ensure that common EU/EEA rules are interpreted uniformly.[37] This led it to conclude, as suggested by the Advocate General, that Article 36 EEA is to be interpreted in line with Article 56 TEU and therefore includes the freedom for EEA nationals to go to other EEA States in order to receive tourist services there.[38]

Even more importantly, the ECJ proceeded to let the proportionality test under Article 36 EEA be influenced by the other agreements between the EU and Iceland and, conversely, to let the interpretation of those agreements be determined by the "special relationship" of which the EEA Agreement is the cornerstone. Rather than distinguishing between the EEA Agreement on the one hand and the other agreements on the other, as suggested by the Norwegian government, the ECJ opted for a holistic approach where all the agreements form part of one special relationship, and where this informs the interpretation of them all – in line with their common objective to extend various parts of EU law to the relevant EEA EFTA State(s).

Accordingly, by way of an introduction to the assessment of whether *Petruhhin* could be applied by analogy in the EEA, the ECJ found it:

> *appropriate to add that not only the fact that the person concerned has the status as a national of an EFTA State, which is a party to the EEA Agreement, but also the fact that that State implements and applies the Schengen acquis, renders the situation of that person objectively comparable with that of an EU citizen to whom, in accordance with Article 3(2) TEU, the Union offers*

[35] Judgment, paras. 40-41.
[36] Para. 44.
[37] Para. 50.
[38] Paras. 52-53.

> *an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured.*[39]

This holistic approach informs also the assessment of the evidentiary value of the asylum decision made by Icelandic authorities in I.N.'s case. As mentioned above, the Advocate General opined that Croatia and Iceland are bound to an obligation of mutual trust that presupposes that the Dublin III Regulation is correctly applied in Iceland and establishes a presumption that Iceland's decision to grant I.N. asylum was sound. The ECJ goes even further, however, when it states that in the absence of "significant changes" in the situation in Russia, "the *existence* of a decision of the Icelandic authorities granting [I.N] asylum must […] lead the competent authority of the requested Member State, such as the referring court, to refuse extradition, pursuant to application of Article 19(2) of the Charter" (emphasis added).[40] The ECJ thus obliges the Croatian Supreme Court to recognise the Icelandic decision, taking for granted that Iceland's participation in the Common European Asylum puts it on the same footing as the EU Member States, including when it comes to mutual recognition of asylum decisions.

The subsequent assessment of the Surrender Procedure Agreement follows the same path. Disregarding the Norwegian government's view of that agreement as a "regular international treaty" that cannot be interpreted in the same way as the EU Framework Decision on the European arrest warrant and the surrender procedures between EU Member States, the ECJ equates those two instruments in the assessment of the protection that the free movement rights of EU/EEA law offers against extradition to third States. In the ECJ's laconic observation, the provisions of the Surrender Procedure Agreement are "very similar to the corresponding provisions of Framework Decision".[41]

The ECJ concludes that, should the Croatian Supreme Court come to the conclusion that significant changes in the human rights situation in Russia has opened up for extradition of I.N., the *Petruhhin* ruling is to be applied by analogy. Thus:

> *when a Member State, to which a national of the Republic of Iceland has moved, receives an extradition request from a third State with which the first Member State has concluded an extradition agreement, it is in principle obliged to inform the Republic of Iceland and, should that State so request, surrender that national to it, in accordance with the provisions of the Agreement on the surrender procedure, provided that the Republic of Iceland has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory.*[42]

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[39] Para. 58.

[40] Paras. 63-68.

[41] Para. 74. It should be added that there are certain differences between the Framework Decision and the Surrender Procedure Agreement, notably related to the reach of the obligation to surrender one's own nationals, but this is of no relevance to the case at hand.

[42] Para. 76. If this latter condition is fulfilled in I.N.'s case may well be questioned as the alleged crime was committed in Russia at a time when I.N. had no connection to Iceland. At the hearing, Iceland stated 'it might have jurisdiction to try I.N.', but that this was a matter for the decision of the independent public prosecutor, see para. 54 of the AG's Opinion in the case. Given the ECJ's clear instructions to solve the case based on recognition of

5. Comments

5.1 EU relations with EEA EFTA States: from bits and pieces to a more coherent whole

The *I.N.* case makes clear just how complex the legal relationship between the EU and the EEA EFTA States has become. That complexity is the result of those States having sought to connect themselves to many aspects of the EU legal order that are not covered by the EEA Agreement primarily through new agreements rather than through revisions and expansion of the EEA scope,[43] and of the EU accepting this approach.

With a somewhat self-centred yet refreshingly critical perspective, the independent Norwegian EEA Review Committee of 2010-2012 thus described that phenomenon in its final report to government:

> *The accumulation of Norway's agreements could be described as a particularly "Norwegian" form of association with the EU, similar to a patchwork quilt, which has gradually grown as new agreements have been added on to it, with no overall framework or plan. In fact, Norway's relationship with the EU consists of a multiplicity of diverse agreements and provisions that are not formally connected, and that have evolved over time without having been planned, and with no clearly formulated design for what it should end up like.*[44]

As well demonstrated by the *I.N.* case, however, there really is no such a thing as a separate "Norway Model" but rather a joint Icelandic-Norwegian one: Iceland and Norway essentially share the same patchwork quilt. Much the same holds true for Liechtenstein, although her quilt does differ on some points.[45] Consequently, the *holistic* approach which the ECJ adopted in *I.N.* is of considerable interest to all of the three EEA EFTA States, and indeed beyond.[46]

As made clear by the ruling, the Court of Justice views the collection of EU-Iceland/Norway arrangements in a far less unconnected fashion than envisaged by the Norwegian government in its pleadings. Underscoring the "special" character of the relationship (French: "relations

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the Icelandic asylum decision rather than on analogous application of *Petruhhin*, the reach of Icelandic criminal law is unlikely to have any practical significance.

[43] As made possible by Article 118 EEA as well as the EEA contracting parties quite liberal approach to the scope of the Agreement's Protocol 31 on cooperation in specific fields outside the four freedoms. For a recent example of the use of Protocol 31 to widen cooperation between the EU and the EEA EFTA States within the EEA framework, see EEA Joint Committee Decision 269/2019 on the participation of Iceland and Norway in the EU's efforts to reduce greenhouse gas emissions.

[44] Official Norwegian Reports NOU 2012:2 *Outside and Inside – Norway's agreements with the European Union* (unofficial translation of chapter 3, December 2012).

[45] See section 5.4 below.

[46] Particularly Switzerland, see further section 5.4 below.

privilégiées"),[47] "based on proximity, long-standing common values and European identity", the ECJ organises its constitutive parts in a more coherent legal whole, as a neatly knitted blanket of subjective rights that covers nationals of the EFTA States concerned.

This holistic approach is logical from an EU law point of view. Concluded by the Union, the various agreements with (all or any of) the EEA EFTA States constitute parts of the same, integrated EU legal order. As elements of EU law, [48] they all fall within the jurisdiction of the ECJ, particularly under Art. 267 TFEU.[49] In the case at hand, the Croatian Supreme Court submitted questions on the interpretation of the EU-Iceland/Norway Schengen Association Agreement, but received an answer based on a different legal instrument, namely the EEA agreement. To the ECJ, this was probably just an ordinary fulfilment of its general duty under the preliminary ruling procedure "to interpret all provisions of EU law which national courts require in order to decide the actions pending before them even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts".[50]

Approaching and organising the different agreements as a systemic legal whole is indeed critical for the effectiveness of the distinct and yet related legal sub-systems they establish, and ultimately of the overall "special relationship" they underpin. Akin to the EEA Agreement and its essential objective of extending the Single Market to the three EEA EFTA States, the Schengen, Dublin III, and Surrender agreements all purport to extend the application of specific, and yet connected pieces of EU law to the associated states.[51] Although established through separate agreements, more recent additions like the Surrender Procedure Agreement, have progressively complemented existing arrangements partly to reflect, and to incorporate in the relationship, the substantive expansion and deepening of the EU legal order.[52] The build-up of those additional agreements follows a functionalist logic, to which the preamble of the Agreement on the Surrender procedure, recalled in the judgment, alludes when mentioning that the "current relationships among the Contracting Parties *require* close cooperation in the fight against crime" (emphasis added). Seen in this perspective, the parts of the EU legal order that are being extended to e.g. Iceland and Norway, which are interwoven with other EU rules, are designed

[47] In the English language versions of the various agreements between the EU and the EFTA States, the relationship is sometimes characterized as "privileged" (e.g. in the EEA Agreement) and sometimes as "special" (e.g. in the Schengen Association Agreements). In French, "relations privilégiées" is consistently used, and this is reflected in the French version of the judgment at hand. As the ECJ opted for 'special' rather than 'privileged' in the English language version of the judgment, so do we in this annotation.

[48] In line with Article 216(2) TFEU.

[49] Naturally, that jurisdiction applies solely with regard to the EU; the ECJ has no jurisdiction to rule on the interpretation of the Union's agreements with the EEA EFTA States as regards their application in the latter states, see section 5.3 below.

[50] Paras. 43-45 of the ruling.

[51] As recalled by the Court at para 9 of the judgement, the EU-Iceland/Norway Schengen arrangements foresee that the Schengen acquis referred thereto is 'accepted, implemented and applied by [the Republic of Iceland and the Kingdom of Norway]'.

[52] On the notion of "integration agreement", see M Maresceau, "Les accords d'intégration dans les relations de proximité de l'Union européenne", in C. Blumann (ed.), *Les frontières de l'Union européenne*, Brussels, Bruylant, 2013, pp. 151-192.

to apply not only homogeneously throughout the geographical area they cover, but also coherently with the rules they supplement.[53]

The collection of agreements between the EU and Iceland (as well as Norway) corresponds to the evolution of the EU legal order itself, including its *de-pillarisation*.[54] The substantive widening of the relationship, epitomised by the increasing number of instruments governing it, and its deepening as typified by the extension of mutual recognition and trust in the context of the Surrender Procedure Agreement,[55] entail an integrated, as opposed to siloed operation of its sub-systems, particularly because they involve the extension of complex subjective rights, and require their equal protection.

In sum, the ECJ builds upon its previous EEA-related case-law further to underscore and articulate the special character of the Union's relationship with EEA EFTA States of which the EEA agreement is a critical (but not the only) part. Referring to notions of "proximity, long-standing common values and European identity" stated in the latter agreement, the Court embeds the relationship, both substantively and systemically, in a wider process of European integration without EU membership, which has been made more complex after the UK's withdrawal from the Union. The ruling indeed contributes to fleshing out the distinct category of relationship the *pouvoir constituant* alluded to in drafting Article 8 TEU, which mandates the EU to develop "special relations with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterized by close and peaceful relations based on cooperation".[56]

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[53] Further on this, see C. Hillion, "Integrating an Outsider: An EU Perspective on Relations with Norway" (2011) 16 *European Foreign Affairs Reviews*, pp. 489–520; and "Norway and the changing Common Foreign and Security Policy of the European Union", Norwegian Institute of International Affairs, NUPI Report 1, 2019.

[54] It should indeed be recalled that the Schengen Agreement with Norway and Iceland was one of the very few "cross-pillar" agreements concluded by the Community *and* the EU. Further, see R A Wessel, "Cross-Pillar Mixity: Combining Competences in the Conclusion of the EU International Agreements" in C. Hillion & P. Koutrakos (Eds.), *Mixed Agreements in EU Law Revisited,* Oxford: Hart Publishing, 2010, pp. 30-54.

[55] The apparent linguistic distinction between mutual trust and mutual confidence (see para 59) is not as potent an argument as it may seem. The respective preambles of the EAW and of the Surrender Procedure Agreement refer both to the notion of "confidence". It should also be recalled that "mutual trust" and "mutual confidence" are both translated as "confiance mutuelle" in French language version of EU documents. It is thus the notion of "confiance mutuelle" that is referred to both in the Preamble of the Surrender Procedure Agreement with Norway and Iceland and in, e.g., Opinion 2/13 on the draft accession agreement to the ECHR, which is often cited as an authority on the significance of the principle of mutual trust within the EU. This suggests that the principle of "mutual trust" as it has "come to evolve in the European Union", has at least some application in the special relationship between the EU and the EEA EFTA states, of which the EEA Agreement is a cornerstone (cp. AG Opinion at para 97). The view that the principle of mutual trust does not apply to third states (as per para 129 of Opinion 1/17 *CETA,* EU:C:2019:341) should indeed be nuanced. In this connection, see the Opinion of AG Kokott in C-488/19 *Minister of Justice and Equality v J.R.*, EU:C:2020:738.

[56] Further on this provision, see e.g. C. Hillion, "Anatomy of EU norms export towards the neighbourhood – the impact of Article 8 TEU" in P. van Elsuwege and R. Petrov (eds.) *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union - Towards a Common Regulatory Space?* (London: Routledge, 2014) pp. 13-20.

Importantly, and notwithstanding the Norwegian government's attempt to argue otherwise, the Court's 'EU-like' approach to the various agreements appears to be fully in line with their formal character as international treaties. Article 31 of the Vienna Convention on the Law of Treaties[57], which express, to this effect, general customary international law, state that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and *in the light of its object and purpose* (emphasis added). The object and purpose of not only the EEA Agreement, but also of the other agreements that associate the EEA EFTA States to various parts of EU law, are just that, namely to extend those parts of EU law, as interpreted by the ECJ, to those States.[58]

Consequently, the 'gravitational pull' of the homogeneity objective of the EEA Agreement is now so strong that if the EEA EFTA States really want any future agreement with the EU to reproduce only the wording, not the content, of a given part of EU law, they will have to say so explicitly (why the EU would want to enter into such an agreement is another matter). [59] Without any such explicit reservation, the EEA EFTA States must be prepared for the ECJ to develop also their obligations in ways that they might not have foreseen and might not always like – as demonstrated well by the Norwegian government's futile attempt in *I.N.* to avoid the "transfer" of *Petruhhin* to the EEA.[60] The fact that more or less ground-breaking developments of ECJ case-law will often be rooted in an over-arching objective of European integration to which the EEA EFTA States have not formally subscribed, does not hinder that case-law being transferred to the various agreements linking the EEA EFTA States to EU law. Put simply, acceptance of such developments is effectively part of their "special relationship" with the EU.

This approach is also warranted by reasons of legal certainty. The higher the number of exceptions in, and between the agreements that link the EEA EFTA States to EU law, the harder it will be to make the various agreements work in practice. The experts in the governments of the EEA EFTA States may perhaps feel able to handle a high number of detailed and fine-tuned exceptions, but for everybody else this will be different. Unsurprisingly, awareness of the peculiarities of EEA law may not be as high in the EU-pillar of the EEA as the three small EEA EFTA States would want it to be, and this is equally true for their other agreements with the EU. What the judgment in *I.N.* confirms, is that the ECJ approaches these agreements on the presumption that they indeed do extend the application of EU law to the relevant EEA EFTA States, so that the burden of proof lies with anyone arguing for a different solution in any given case. For the continued success of the EEA, this 'default' is important. It allows for EU-institutions, EU member states, EU companies and EU citizens to trust that the law is essentially the same throughout the EEA, thus fostering legal certainty and limiting administrative and

[57] Of 23 May 1969, United Nations Treaty Series, vol. 1155, p. 331.

[58] See, e.g., Mads Andenæs, "Sovereignty", in: Baudenbacher (ed.), *The Fundamental Principles of EEA Law*, Springer 2017, 91-108, at p. 96-97, arguing that the Vienna Convention's emphasis on the object and purpose of a treaty allows for homogeneity between EU and EEA law even if the starting point for the interpretation of the EEA Agreement was to be taken in Article 31 VC.

[59] On other expressions of this gravitational pull and related challenges, see T. Bekkedal, "Third State participation in EU agencies: Exploring the EEA precedent", (2019) 56 *CMLRev*. 381 – 416.

[60] The effects of the judgment in the EFTA-pillar of the EEA are discussed in section 5.3 below.

other transactional costs considerably. This is not to suggest that there are no remaining differences between EU and EEA law, nor that any such differences are unjustified and ought to be eliminated by way of teleological interpretation. There might well be cases where the EEA EFTA States and the EU agree to deviate from the template provided by EU law, but after *I.N.* they need to make sure to do so explicitly.

5.2 A situation 'objectively comparable' to EU citizenship: the new status of EEA-Schengen States' nationals?

Notwithstanding the importance of the judgment for the relationship between the EEA EFTA States and the EU, it may prove to be even more meaningful for the status of nationals of these states in EU law and, conversely, of EU citizens in the latter states. The essence of the Grand Chamber judgment may indeed be that the ECJ is prepared to consider not only the EEA EFTA States but also (and perhaps even primarily) their citizens as 'insiders' rather than 'outsiders'.

The basis for this contention is the Court's view that the situation of Icelandic nationals is "objectively comparable with that of an EU citizen to whom, in accordance with Article 3(2) TEU, the Union offers an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured".[61] The statement, which is reiterated in the concluding paragraph of the ruling,[62] is remarkable because it establishes an explicit connection between EEA EFTA nationals and EU citizens for the purpose of free movement. The statement is also intriguing because its function in resolving the case is not obvious.

Having identified Article 36 EEA as the relevant provision to address the Croatian Supreme Court's query, the ECJ could arguably have confined itself to note that that provision is to be interpreted in line with Article 56 TFEU and thus protects all EEA nationals from being hindered whilst exercising their right to travel to another EEA State in order to receive services there, in application of the *Cowan* case law.[63] This would have been more in line with the approach of the Advocate General, whose only reference to Article 3(2) TEU was a short nod to the Norwegian government's view that this provision has no counterpart in the EEA Agreement.[64]

The "objectively comparable" pronouncement is all the more perplexing as the Court derives it from a *combination* of the Schengen Association and the EEA Agreement. As with the parallel drawn to the EU's area of freedom, security and justice, it is not clear that invoking the

[61] Para. 58 of the judgment.

[62] Para. 75 of the judgment.

[63] Referring to the *Cowan* ruling, the Court recalled that "freedom to provide services, within the meaning of Article 56 TFEU, includes the freedom for the recipients of services to go to another Member State in order to receive a service there, without being obstructed by restrictions, and that tourists must be regarded as recipients of services", and then considered in *I.N.* that "that same interpretation must be given as regards the freedom to provide services guaranteed in Article 36 of the EEA Agreement", see paras 52 and 53 of the judgment.

[64] Para. 97 of the Opinion.

Schengen Association Agreement was necessary in order to solve the case. It is indeed striking that there are no further references to it later in the judgment. Having concluded that extradition may be justified in view of the objective of fighting impunity, the overall assessment of proportionality focuses on whether the surrender agreement could provide a more appropriate means to achieve the proposed objective.[65]

One possible interpretation of the Court's reference to Iceland's application of the Schengen *acquis*, and the derived parallel to the EU's area of freedom, security and justice, is that it was considered necessary to compensate for the fact that there is no provision in the EEA Agreement mirroring Article 21 TFEU. The latter provision was after all the legal basis applied in *Petruhhin*, a fact that was indeed central to the Norwegian government's opposition to a "transfer" of the ruling to the EEA setting. In his Opinion, the Advocate General had also voiced scepticism towards the EEA-relevance of the case-law "elaborated by the Court exclusively based on Article 21 TFEU"[66], while the Court itself stated in a preliminary point that that provision "does not apply to a national of a third State".[67] Rather than wading right into the controversial debate in the EFTA-pillar of the EEA on whether the lack of an EEA-parallel to Article 21 TFEU can be compensated for by a dynamic interpretation of the Citizenship Directive,[68] the ECJ seemingly found a way around the problem by mentioning Iceland's application of Schengen rules. By combining Iceland's association to the single market (through the EEA Agreement) and to the Schengen acquis, the Grand Chamber was able to consider the free movement rights of I.N. to be objectively comparable to the free movement rights of EU citizens in the Union's area of freedom, security and justice, thus permitting the application by analogy of the citizenship-based *Petruhhin* ruling to I.N.

On that interpretation, I.N. would not have benefited from the application of the *Petruhhin* case law had Iceland as an EEA EFTA state not also applied the Schengen *acquis* because then his situation would not have been comparable to that of an EU citizen. The EEA agreement alone would not have sufficed to allow that application by analogy, based on the notion that the absence of the concept of EU citizenship in EEA law potentially entail more limited free movement rights compared to those enjoyed by EU citizens, and thus a more limited protection. Equal treatment between EEA EFTA nationals and EU citizens as far as free movement is concerned thus hinges on a gap-filling legal instrument to perform the same role as the one seemingly played by Schengen in the case at hand, for the ECJ citizenship-based case law concerning free movement to be extended to the EEA context.

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[65] Paras. 69 ff. of the judgment.

[66] Para. 91 of the Opinion.

[67] Para. 41 of the judgment.

[68] At the time of the ECJ's deliberations in *I.N.*, the EFTA Court was confronted with a request for an advisory opinion from the Supreme Court of Norway which essentially asked for reconsideration of the interpretation of the Citizenship Directive established in Case E-28/15 *Jabbi*. The Norwegian government made sure to inform the ECJ of this pending case, and essentially invited the Grand Chamber to pre-empt the EFTA Court's decision by ruling that rights based solely on Article 21 TFEU fall outside of the scope of the EEA Agreement, see para. 56 of the AG Opinion. As the ECJ tacitly declined to do so, the EFTA Court could later stand its ground, cf. the Advisory Opinion of 13 May 2020 in Case E-4/19 *Campbell*, to which we will briefly return in section 5.3 below.

Looking at the other parts of the I.N ruling, however, another interpretation is also possible. The combined reference to Schengen and the EEA could be viewed as establishing no less than a new status for the nationals of Iceland (and Norway) in EU law.

As alluded to earlier, neither the "objectively comparable" element, nor Iceland's application of the Schengen *acquis* seems to have had any operational role in the ECJ's reasoning leading to analogous application of *Petruhhin*. Arguably, the absence of citizenship in the EEA did not have to be compensated for as it was simply irrelevant in deciding on the case; the solution being based on an application of classic free movement approach under the EEA Agreement (as indeed suggested by the Advocate General).[69]

An alternative interpretation of the Court's reference to Iceland's association to the Schengen area could then be that the ECJ is taking advantage of the opportunity offered by the Croatian Supreme Court's question to cast some light on the Schengen Agreement's enrichment of the EEA-based free movement rights of Icelanders (and by extension Norwegians).

On this interpretation, the Schengen *acquis* deepens the freedom of movement already enjoyed by Icelanders (and Norwegians) under the EEA agreement, and enhances their status by making their "situation …objectively comparable to that of EU citizens". Iceland's nationals not only enjoy the extensive market-based freedom of movement derived from the EEA, but also a Schengen based freedom to move, like EU citizens, within the AFSJ, an area without internal borders.

Such an articulation of a new status for those nationals within the EU legal order, based on the Schengen agreement as another constitutive element of the special relationship, partly recalls what the ECJ did in *Grzelczyk*,[70] following the introduction of Union Citizenship in EU primary law. The Court famously referred to the then new Treaty provisions to coin the notion that "Union citizenship is destined to be the fundamental status of nationals of the Member States", a new status going beyond the one hitherto developed in the context of the single market, and becoming a basis for the development of further and deeper rights.

I.N. could thus be seen as a *Grzelczyk* moment for nationals of the EEA EFTA states in terms of their position under EU law: not in the sense that the Court is extending citizenship to nationals of EEA-Schengen states, but in the sense that it endows them with a richer status than the one hitherto assumed in EEA law alone, and with it a factor of dynamism in the articulation of their rights under EU law. The special relationship between the EU and the *EEA-Schengen* states establishes a citizen-like status for nationals of those countries within the EU legal order (as far as free movement is concerned, not political rights).

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[69] Arguably, Article 21 TFEU in *Petruhhin* serves to trigger a classic free movement analysis; the justification/proportionality analysis of the restriction at hand could have equally been conducted on the basis of the TFEU provisions on services.

[70] Case C-184/99, *Grzelczyk,* EU:C:2001:458. Further on the significance of this case see e.g. N. Nic Shuibhne, "The Developing Legal Dimensions of Union Citizenship", in Arnull and Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP, 2015), pp. 477-507, M. Dougan, "The constitutional dimension to the caselaw on Union citizenship" (2006) 31 *E.L.Rev* 613.

5.3 It takes two for a relationship to be special: the consequences of I.N. in the EFTA-pillar of the EEA

According to the two-pillar structure of the EEA, the ECJ has no jurisdiction in the EFTA-pillar of the EEA.[71] Thus, the judgment in *I.N.* does not bind the EEA EFTA States. Nevertheless, under Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), the EFTA Court shall pay "due account" to the principles laid down by the relevant rulings of the ECJ, and the judgment in *I.N.* falls squarely within that category.[72] Based on more than 25 years of experience with the workings of the EEA, it may safely be held that the EFTA Court will do its utmost to follow the interpretation of Article 36 EEA laid down in *I.N.* The understanding and tacit acceptance of this is the very reason why the Norwegian government and the EFTA Surveillance Authority exercised their right to take part in the proceedings before the ECJ in *I.N.*

At first sight, the ECJ's holistic approach to the patchwork of agreements between the EU and the EEA EFTA States may cause difficulties for the EFTA Court. Despite its name, the EFTA Court's jurisdiction is limited to the EFTA-pillar of the EEA Agreement – it has no jurisdiction over the EEA EFTA States application of any of their other agreements with the EU. It is therefore far from straight-forward for the EFTA Court to rely on the Schengen Association Agreement in its approach to the EEA Agreement, in the way the ECJ appears to have done in *I.N.* However, as far as the interpretation of Article 36 EEA is concerned, the situation is essentially the same as in cases where the Court of Justice develops its understanding of EEA-relevant EU law in light of provisions of EU law that are not part of the EEA Agreement. As mentioned in above,[73] it has long been recognised that the EEA Agreement's objective of extending the EU internal market to the EEA EFTA States can only be achieved if the interpretation of the corresponding provisions of the EEA Agreement keeps pace with such developments of EU law.

The situation is more complicated, however, if the ECJ indeed is about to develop a general right of free movement for all EEA nationals, based on a combined reading of the EEA Agreement and the Schengen Association Agreement.[74] If the EEA EFTA States' association to the Schengen area is to be considered an indispensable part of the legal basis for such a right, the EFTA Court will not be able to simply adopt the ECJ's reasoning. It can take the Schengen Association Agreement into account as part of the context when interpreting the EEA Agreement, but it cannot derive rights and obligations from an agreement over which it has no jurisdiction. This does not suggest, however, that the EFTA Court will not be able to reach the same

[71] As noted by the Court in Case C-321/97, *Andersson*, EU:C:1999:307, paras. 28-29.

[72] In most cases, the ECJ case-law applied by the EFTA Court concern interpretation of the TFEU and/or secondary EU legislation, requiring the EFTA Court to consider its EEA-relevance. This is different in the case at hand, as the ECJ dealt directly with the interpretation of the EEA Agreement. That also such rulings are covered by the EFTA Court's obligation to pay due account to ECJ case-law, follows directly from the wording of Article 3(2) SCA.

[73] Section 5.1.

[74] See section 5.2 above.

outcome as the ECJ. Indeed, in its recent Advisory Opinion in *Campbell*, the EFTA Court paraphrased the Court of Justice's case-law to the effect that the freedom of movement for workers, as enshrined in Article 28 EEA, is (only) "a specific expression of the general right to move and reside freely within the EEA".[75] The opinion says nothing about the legal basis for this general right to free movement, which in the context of EU law of course is to be found in Articles 20 and 21 TFEU. However, based on the EFTA Court's approach in other cases, the Court seems poised to reveal a general, unwritten EEA law principle of free movement, deduced from the various provisions in the Main Part of the Agreement on the free movement of workers, self-employed and service providers and recipients, the many EU legal acts in the annexes concerning free movement of other categories of people, an EEA-specific reading of the Citizenship Directive and, more generally, the stated purposes and the legal structure of the EEA Agreement.[76] Despite its apparent reliance upon the Schengen Association Agreement, the ECJ's judgment in *I.N.* certainly bolsters the EFTA Court's stand in *Campbell*.[77]

Less complicated for the EFTA Court is the ECJ's reliance in *I.N.* on the Surrender Procedure Agreement in the proportionality test under Article 36 EEA. It is settled law that the proportionality test has to take into account the legal context in which e.g. the freedom to provide or receive services operates. Relevant international agreements will form part of that context, as confirmed by both the ECJ and the EFTA Court in several cases.[78]

The legal basis in the EFTA-pillar of the EEA to solve a case like that of *I.N.* would also differ as to the protection against extradition to a third country where an EEA national would risk exposure to inhuman or degrading treatment. The ECJ's reliance upon Article 19(2) of the Charter of Fundamental Rights will not be available to the EFTA Court for the simple fact that the Charter has not been incorporated into the EEA Agreement or in any other way formally recognised by the EEA EFTA States. The ECJ did not dwell on this in *I.N.* since Article 19(2) CFR applies to everyone, i.e. also nationals of the EEA EFTA States, as soon as their situation falls within the scope of application of EU law.[79] As noted by the Advocate General, however, the EFTA Court has long recognised fundamental rights as unwritten general principles of EEA

[75] Case E-4/19, *Campbell*, para. 58. See further C. Franklin and H.H. Fredriksen, "Differentiated Citizenship in the European Economic Area", in: Kosta and Thym (ed.), *Research Handbook on EU Citizenship* (forthcoming).
[76] The latter is the phrase used in *Sveinbjörnsdóttir,* where the EFTA Court deduced an unwritten principle of State liability from the purposes and structure of the EEA Agreement (Case E-9/97, para. 47).
[77] It may be added that the EFTA Court's approach has the advantage of not being dependent upon the involved EEA States being associated to the Schengen area, thus avoiding the complications the ECJ's approach might have been faced with if I.N. had been on holiday in Ireland rather than Croatia.
[78] An EEA-relevant example from the ECJ is Case C-48/11, *A*, EU:C:2012:485, para. 37 (bilateral agreement on mutual administrative assistance in the field of taxation). A converse example from the EFTA Court is Case E-5/10, *Kottke*, para. 51, where the proportionality test had to take into account the fact that Liechtenstein is *not* a party to the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[79] As was the case for I.N. (as recalled by the Court in paras 54 and 63 of the ruling) thus requiring that the Croatian authorities apply the Charter, in line with Article 51(1) CFR (whereby the Charter applies to "the institutions, bodies, offices and agencies of the Union … *and to the Member States only when they are implementing Union law*" (emphasis added)).

law, based in particular on the fact that all of the EEA States are parties to the ECHR.[80] Thus, as the protection offered by Article 19(2) CFR essentially corresponds to that offered by Article 3 ECHR, the EFTA Court would probably be able to follow also this part of *I.N.*, despite the fact that the Dublin III Regulation is outside its jurisdiction.

In spite of all this, however, there are tensions between the ECJ's holistic approach to the patchwork of agreements between the EU and the EEA EFTA States on the one hand, and the fact that the jurisdiction of the EFTA Court is limited to the EEA Agreement on the other. The EEA EFTA States will probably reply that this is all quite unproblematic as their own national courts do have jurisdiction over the whole patchwork, guaranteeing EU nationals in the EEA EFTA States essentially the same level of protection as the ECJ offers to EEA EFTA nationals in the EU.[81] The future of the special relationship between the EU and EEA EFTA States hinges on the EU's trust in this set-up.

5.4 The reach of Court's integrated approach: What does it take for a relationship to be "special"?

The "special relationship" that the Court sees between Iceland and the EU is clearly extendable to Norway, given the fact that Norway is a party to all of the agreements relied upon in *I.N.* to justify this characterization. However, already for the third of the three EEA EFTA States, Liechtenstein, the assessment is a bit more complicated. The country is not a party to the Surrender Procedure Agreement that proved to be decisive in *I.N.* Still, as a Schengen Associated State, it is bound by the 1996 Extradition Convention, which at long last entered into force in 2019. Whether this is sufficient to extend the ruling in *I.N.* to a Liechtenstein citizen in a similar situation, particularly in light of Liechtenstein's reservations to the Convention[82], remains to be seen. Given the centrality of the EEA agreement in the ecosystem of the EU-Iceland relationship in the Court's reasoning in *I.N.*, it is arguable that the "special relationship" should be extended to Liechtenstein as well, but that there may nevertheless be cases where differences between the 1996 Schengen Extradition Convention and the Surrender Procedure Agreement renders it difficult to attain the EEA Agreement's objective of not only homogeneous interpretation, but also homogeneous application of EU and EEA law throughout the EEA.[83]

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[80] Para. 115, with a reference to Case E-14/15, *Holship*, [2016] EFTA Ct. Rep., para. 123. See further R. Spano, "The EFTA Court and Fundamental Rights", 13 *European Constitutional Law Review* (2017), pp. 475-492.

[81] See in this respect the Order issued by the Supreme Court's Appeals Selection Committee of 13 March 2020, HR-2020-553-U, addressing the question of whether extradition of a Polish citizen to Poland would violate Article 6 ECHR:

[82] Supra, fn. 6. Liechtenstein has notified the following declaration: 'In accordance with Article 6(3) of the EU Convention on Extradition, the Principality of Liechtenstein declares that it will grant extradition in connection with a fiscal offence only for acts or omissions which may constitute an offence in connection with excise, value-added tax or customs.'

[83] Along the lines of the judgment in Case C-72/09, *Établissements Rimbaud*, EU:C:2010:645, where the lack of an agreement with Liechtenstein on administrative cooperation in tax matters caused the Court to conclude that its

More complicated still is the assessment of the EU's relationship to the fourth EFTA State, viz. Switzerland. A key question will be just how important the EEA Agreement is to the "special relationship" which the ECJ sees between the EU and Iceland. Is the Switzerland-EU agreement on free movement of persons, which does give Swiss citizens the right to travel to EU Member States in order to receive services there,[84] combined with Switzerland's participation in the Common European Asylum System and the Schengen Association Agreement (including the abovementioned 1996 Extradition Convention), sufficient to guarantee a Swiss citizen in a similar situation the protection against extradition that the ECJ granted to I.N.?

The case-law on the various agreements between the EU and Switzerland provides no clear answer. On the one hand, in the series of *UK v. Council* (social security) cases of 2013-2014, the Court of Justice took a common approach for the EEA and the EU-Switzerland arrangement, which contrasted with the one taken towards the Ankara agreement.[85] On the other hand, in *Grimme* the ECJ emphasized that Switzerland, by its refusal to join the EEA, "did not subscribe to the project of an economically integrated entity with a single market, based on common rules between its members, but chose the route of bilateral arrangements between the Community and its Member States in specific areas."[86] This was followed up, e.g., in *Hengartner and Gasser* and *Picard,* where the ECJ interpreted provisions of the EU-Switzerland agreement on the free movement of persons differently from the EU rules applicable to similar situations (freedom to provide services and freedom of establishment), thus refusing to extend to Switzerland the approach taken in relation to the EEA EFTA States.[87]

Although less "special" than the EU - EEA EFTA States relationship, will the EU-Switzerland arrangements be considered special enough to warrant the extension of *I.N.* also to Swiss nationals? And if not, will the institutional set up envisaged by the still unsigned EU-Switzerland Framework Agreement make a difference in this regard?[88] Future case-law will hopefully clarify whether the *I.N.* approach can indeed be extended to other EU relations with other European states, i.e. non-EEA / non-EFTA, and their nationals, and if so under what conditions. To be sure, extending the "special" treatment to looser relationships, involving less constraints and responsibilities for the EU partners in terms of homogeneity requirements, might risk undermining the sustainability of integrated systems like the EEA and Schengen association.

Halvard Haukeland Fredriksen[89] *and Christophe Hillion*[90]

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case-law concerning Article 63 TFEU on the free movement of capital could not be transferred in full to Article 40 EEA.

[84] For an introduction in the English language, see Matthias Oesch, *Switzerland and the European Union – General Framework, Bilateral Agreements, Autonomous Adaptation*, Dike/Nomos 2018, p. 86.

[85] Cases C-431/11, *UK v Council*, EU:C:2013:589 (EEA); C-656/11, *UK v Council*, EU:C:2014:97 (Switzerland) and Case C-81/13, *UK v Council*, EU:C:2014:2449 (Turkey).

[86] Case C-351/08, *Grimme*, EU:C:2009:697, para. 27.

[87] Case C-70/09, *Hengartner and Gasser*, EU:C:2010:430; Case C-355/16, *Picard*, EU:C:2018:184

[88] https://www.fdfa.admin.ch/dea/en/home/verhandlungen-offene-themen/verhandlungen/institutionelles-abkommen.html

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[90] University of Oslo, NUPI, and SIEPS. I am grateful to Niamh Nic Shuibhne for all the helpful discussions. The usual disclaimer applies.