

Case

E-28/15

Yankuba Jabbi



**The Norwegian Government, represented
by the Immigration Appeals Board**

*(Directive 2004/38/EC – Right of residence – Derived rights for third
country nationals)*

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Report for the Hearing

Summary of the Judgment

- 1 The exercise of free movement persons is conditional. In particular, EU law requires that economically inactive persons have sufficient resources for themselves and their family members so as not to become a burden on the social security system of the host State. That condition is intended to protect the host State's fiscal interests by placing a person's own resources on a like footing with the financial contributions to the social security system made as a result of employment in the labour market. A condition of comprehensive sickness insurance cover also applies.
- 2 In the EEA context, Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC ("the Directive") provides that all EEA nationals shall have the right of residence on the territory of another EEA State for more than three months if they fulfil one of the conditions set out in points (a) to (d). At issue in the case was Article 7(1)(b). That provision grants a right of residence provided that (i) the EEA national has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host State during the period of residence and (ii) has comprehensive sickness insurance cover in the host State. Pursuant to Article 7(2), that right of residence shall extend to family members who are not nationals of an EEA State, accompanying or joining the EEA national in the host State.

- 3 When an EEA national makes use of his right to free movement, he may not be deterred from exercising that right by an obstacle to the entry and residence of a spouse in the EEA national's home State. Accordingly, when an EEA national who has availed himself of the right to free movement returns to his home State, EEA law requires that his spouse is granted a derived right of residence in that State.
- 4 However, a derived right of residence for a third country national in the spouse's home State is conditional. In addition to the requirements of sufficient resources and health insurance, the following conditions must be fulfilled. First, the residence of the EEA national in the host State must have been genuine such as to enable family life in that State. The duration of the residence in the host State must exceed a continuous period of three months. Second, pursuant to Article 35 of the Directive, EEA States may, subject to the principle of proportionality and procedural safeguards provided for in the Directive, adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in case of abuse of rights or fraud, such as marriages of convenience. Third, restrictions on rights granted by the Directive may be justified by reasons of public policy, public security or public health pursuant to Article 27(1) of the Directive.
- 5 Where an EEA national, pursuant to Article 7(1)(b) and Article 7(2) of the Directive, has created or strengthened a family life with a third country national during genuine residence in an EEA State other than that of which he is a national, the provisions of that directive will apply by analogy where that EEA national returns with the family member to his home State.

Judgment of the Court

26 July 2016¹

(Directive 2004/38/EC – Right of residence – Derived rights for third country nationals)

In Case E-28/15,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo District Court (Oslo tingrett), in the case between

Yankuba Jabbi

≡and≡

The Norwegian Government, represented by the Immigration Appeals Board

concerning the interpretation of Article 7(1)(b) in conjunction with Article 7(2) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,

1 Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

The Court

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur), Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Yankuba Jabbi (“the plaintiff”), represented by Arild Humlen, advokat, and Elise Nygård, advokatfullmektig;
- the Norwegian Government, represented by the Immigration Appeals Board (“the defendant”), represented by Pål Wennerås, advokat, Office of the Attorney General (Civil Affairs), acting as Agent;
- the Government of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Carsten Zatschler, Maria Moustakali and Marlene Lie Hakkebo, members of its Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Elisabetta Montaguti and Michael Wilderspin, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the defendant, represented by Pål Wennerås; the Liechtenstein Government, represented by Dr Andrea Entner-Koch and Thomas Bischof; ESA, represented by Maria Moustakali and Marlene Lie Hakkebo; and the Commission, represented by Elisabetta Montaguti and Michael Wilderspin, at the hearing on 19 April 2016, gives the following

Judgment

I LEGAL BACKGROUND

EU LAW

- 1 Article 20 of the Treaty on the Functioning of the European Union (“TFEU”) reads:
 1. *Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*
 2. *Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:*
 - (a) *the right to move and reside freely within the territory of the Member States;*
 - (b) *the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;*

- (c) *the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;*
- (d) *the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.*

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

2 Article 21(1) and (2) TFEU reads:

- 1. *Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.*
- 2. *If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.*

EEA LAW

3 Article 28 of the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) provides as follows:

- 1. *Freedom of movement for workers shall be secured among EC Member States and EFTA States.*

2. *Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*
3. *It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
 - (a) *to accept offers of employment actually made;*
 - (b) *to move freely within the territory of EC Member States and EFTA States for this purpose;*
 - (c) *to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
 - (d) *to remain in the territory of an EC Member State or an EFTA State after having been employed there.*

...

4 Council Directive 90/364/EEC of 28 June 1990 on the right of residence (“Directive 90/364”) was referred to at point 6 of Annex VIII to the EEA Agreement.

5 Recitals 1, 2, 3, 4 and 5 of Directive 90/364 read:

Whereas Article 3 (c) of the Treaty provides that the activities of the Community shall include, as provided in the Treaty, the abolition, as between Member States, of obstacles to freedom of movement for persons;

Whereas Article 8a of the Treaty provides that the internal market must be established by 31 December 1992; whereas the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty;

Whereas national provisions on the right of nationals of the Member States to reside in a Member State other than their own must be harmonized to ensure such freedom of movement;

Whereas beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State;

Whereas this right can only be genuinely exercised if it is also granted to members of the family;

6 Article 1 of Directive 90/364 reads:

- 1. Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.*

The resources referred to in the first subparagraph shall be deemed sufficient where they are higher than the level of resources below which the host Member State may grant social assistance to its nationals, taking into account the personal circumstances of the applicant and, where appropriate, the personal circumstances of persons admitted pursuant to paragraph 2.

Where the second subparagraph cannot be applied in a Member State, the resources of the applicant shall be deemed sufficient if they are higher than the level of the minimum social security pension paid by the host Member State.

2. *The following shall, irrespective of their nationality, have the right to install themselves in another Member State with the holder of the right of residence:*

(a) *his or her spouse and their descendants who are dependants;*

(b) *dependent relatives in the ascending line of the holder of the right of residence and his or her spouse.*

7 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/36/EEC (OJ 2004 L 158, p. 77, as corrected by OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34, and Norwegian EEA Supplement 2012 No 5, p. 243) (“the Directive”) was incorporated into the EEA Agreement at point 1 of Annex V and point 3 of Annex VIII to the Agreement by EEA Joint Committee Decision No 158/2007 of 7 December 2007 (OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17) (“the Joint Committee Decision”), which entered into force on 1 March 2009.

8 *Recitals 8 and 9 of the Joint Committee Decision read as follows:*

(8) *The concept of ‘Union Citizenship’ is not included in the Agreement.*

(9) *Immigration policy is not part of the Agreement.*

9 Article 1 of the Joint Committee Decision reads:

...

The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:

...

(b) The Agreement applies to nationals of the Contracting Parties. However, members of their family within the meaning of the Directive possessing third country nationality shall derive certain rights according to the Directive.

(c) The words “Union citizen(s)” shall be replaced by the words “national(s) of EC Member States and EFTA States”.

...

10 *Attached to the Joint Committee Decision was a Joint Declaration by the Contracting Parties to the decision. That declaration reads:*

The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights

such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.

- 11 *Recital 1 in the preamble to the Directive reads as follows:*

Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

- 12 *Recital 3 in the preamble to the Directive reads as follows:*

Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

- 13 *Recital 5 in the preamble to the Directive reads as follows:*

The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of “family member” should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

- 14 *Article 1 of the Directive reads as follows:*

This Directive lays down:

- (a) *the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by nationals of EC Member States and EFTA States and their family members;*

...

15 Article 2 of the Directive provides:

For the purposes of this Directive:

...

2. *“family member” means:*

- (a) *the spouse;*

...

3. *“host Member State” means the Member State to which a national of EC Member States and EFTA States moves in order to exercise his/her right of free movement and residence.*

16 Article 3(1) of the Directive reads:

This Directive shall apply to all nationals of EC Member States and EFTA States who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

17 Article 6 of the Directive, which addresses the right of residence for up to three months, states:

1. *Nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.*

2. *The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the national of EC Member States and EFTA States.*

18 Article 7 of the Directive, which addresses the right of residence for more than three months, provides as follows:

1. *All nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of longer than three months if they:*
 - (a) *are workers or self-employed persons in the host Member State; or*
 - (b) *have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or*
 - (c) *– are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and*
– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

- (d) *are family members accompanying or joining a national of EC Member States and EFTA States who satisfies the conditions referred to in points (a), (b) or (c).*
2. *The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the national of EC Member States and EFTA States in the host Member State, provided that such national of EC Member States and EFTA States satisfies the conditions referred to in paragraph 1(a), (b) or (c).*

...

NATIONAL LAW

- 19 In Norway, the Directive has been implemented by the Act of 15 May 2008 No 35 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm (*lov 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her*) (“the Immigration Act”).
- 20 Chapter 13 of the Immigration Act (Sections 109 to 125) contains special rules relating to foreign nationals covered by the EEA Agreement. Paragraph 2 of Section 110 of the Immigration Act reads:
- Family members of an EEA national are subject to the provisions of this chapter as long as they accompany or are reunited with an EEA national. Family members of a Norwegian national are subject to the provisions of this chapter if they accompany or are reunited with a Norwegian national who returns to the realm after having exercised the right to free movement under the EEA Agreement or the EFTA Convention in another EEA country or EFTA country.*

- 21 Section 112 of the Immigration Act, which concerns the right of residence for more than three months for EEA nationals, reads:

An EEA national has a right of residence for more than three months as long as the person in question:

- (a) is employed or self-employed,*
- (b) is to provide services,*
- (c) is self-supporting and can provide for any accompanying family member and is covered by a health insurance policy that covers all risks during the stay, or*

...

II FACTS AND PROCEDURE

- 22 The plaintiff is a Gambian national. On 1 February 2012, he married Inger Johanne Martinsen Amoh (the sponsor), a Norwegian national, in Spain. They stayed together in Spain from September 2011 to October 2012. According to the referring court, Ms Amoh did not engage in economic activity during her stay in Spain, but the plaintiff claims that she had her own funds for the stay. It is disputed whether Ms Amoh met the conditions for receiving a work assessment allowance during her stay in Spain, but it is undisputed that she was entitled to receive a disability pension there.
- 23 The parties differ on the documentation submitted concerning Ms Amoh's stay in Spain and her connection to Norway during the stay.
- 24 On 20 November 2012, the plaintiff applied for residence in Norway as the spouse of an EEA national, that is of Ms Amoh. The Directorate of Immigration decided on 19 February 2014 that the plaintiff did not meet the conditions for residence in Norway under

Chapter 13 of the Immigration Act and expelled him from Norway. Upon appeal, that decision was upheld by the Immigration Appeals Board decision of 13 May 2014. The plaintiff subsequently requested a reversal of the decision, but his request was rejected by the Appeals Board decisions of 8 July 2014 and 15 January 2015.

25 Following those decisions, the plaintiff instigated proceedings before Oslo District Court, claiming that he has a derived right of residence in Norway as a result of his wife's stay in Spain and subsequent return to Norway.

26 By a letter of 9 November 2015, registered on 18 November 2015, the District Court referred the following question to the Court:

Does Article 7(1)(b), cf. Article 7(2), of Directive 2004/38/EC confer derived rights of residence to a third country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen?

27 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III ANSWER OF THE COURT

OBSERVATIONS SUBMITTED TO THE COURT

28 The plaintiff argues that he has a derived right of residence in Norway following his wife's stay in Spain and her subsequent return to Norway, based on Article 7(1)(b) and Article 7(2) of the Directive.

- 29 According to the plaintiff, Article 7(1)(b) regulates the right of residence in another EEA State for EEA nationals who are not economically active. That person's family members, who are not EEA nationals, derive their right of residence from Article 7(2).
- 30 The main objective of the EEA Agreement, according to the plaintiff, was to expand the European Union's internal market to the EFTA States, by establishing a dynamic and homogeneous European Economic Area, based on common rules. The plaintiff concludes that the objective of homogeneity must be decisive when it comes to the interpretation of Article 7(1)(b) of the Directive.
- 31 The plaintiff notes that, under EU law, derived rights in situations such as in the present case, may be based on the concept of Union citizenship laid down in Articles 20 and 21 TFEU, following the judgment of the Court of Justice of the European Union ("ECJ") in *O. and B.* (C-456/12, EU:C:2014:135). The plaintiff acknowledges that the concept of Union citizenship is without parallel in EEA law. He nevertheless claims that the right of free movement must be uniform throughout the EEA.
- 32 The plaintiff argues that the judgment in *O. and B.* provides reasons for interpreting and applying the Directive in accordance with Article 21 TFEU and thereby in accordance with the principle of homogeneity. Without such an interpretation, the right to free movement by EEA nationals would be hindered. In further support of this, the plaintiff refers to the case law of the Court (Case E-26/13 *Gunnarsson* [2014] EFTA Ct. Rep. 254).
- 33 For those reasons, the plaintiff proposes that the Court should answer the question referred in the affirmative.

- 34 The defendant, supported by Liechtenstein, argues that the question referred has already been answered in *O. and B.* There, the ECJ held that the Directive does not confer derived rights of residence for third country nationals in the Member State of which their sponsors are nationals, and that such a derived right could only be established on the basis of Article 21(1) TFEU.
- 35 The defendant points out that the EEA Agreement does not contain a provision corresponding to Article 21 TFEU. Furthermore, the defendant stresses that in *Gunnarsson* the Court observed that the Directive cannot introduce rights into the EEA Agreement based on the concept of Union citizenship in Article 21(1) TFEU.
- 36 The defendant states that, since it is common ground that Ms Amoh did not pursue an economic activity in Spain, the provisions on the free movement of persons in the main part of the EEA Agreement, Articles 28, 31 and 36, do not apply. Ms Amoh's residence in Spain could therefore only have been based on Article 7(1)(b) of the Directive, subject to the conditions of that provision. It is disputed whether Ms Amoh fulfilled all of those conditions.
- 37 The defendant acknowledges that the homogeneous interpretation and application of common rules is essential for the effective functioning of the internal market within the EEA. The principle of homogeneity therefore leads to a presumption that provisions framed in the same way in the EEA Agreement and in EU law are to be construed in the same way (reference is made to Case E-2/06 *ESA v Norway* [2007] EFTA Ct. Rep. 164, paragraph 59). Conversely, the Court has repeatedly dismissed invitations to rely upon, by way of analogy or interpretation, provisions of EU law which have not been made part of EEA law. The defendant maintains that, accordingly, the principle of homogeneity dictates that the provisions of the Directive, which are rules common to the EEA and the EU, are interpreted uniformly and in conformity with the judgment in *O. and B.* In contrast, the rights established in that judgment on the basis of

Article 21(1) TFEU may not be transposed by analogy when interpreting the Directive.

- 38 ESA, supported by the Commission, submits that the purpose of establishing a derived right of residence for family members of EEA nationals is to ensure that the right to free movement within the EEA is real and effective.
- 39 ESA acknowledges that the purely hypothetical prospect of exercising the right to freedom of movement does not establish a sufficient connection with EEA law to justify the application of that law's provisions. Consequently, derived rights of residence of third country national family members in principle only exist where these are necessary to ensure that the EEA national can exercise his or her free movement and residence rights effectively.
- 40 ESA argues that the parties seem to differ on the documentation concerning Ms Amoh's stay in Spain and her connection to Norway during that stay. ESA acknowledges that, on the basis of the information provided in the request for an advisory opinion, it appears that Ms Amoh did not exercise her right to free movement as a worker. However, ESA states that, if she was a worker, which the referring court must assess, then the plaintiff would have a derived right of residence in the host State pursuant to Article 7 of the Directive, as well as in the home State on the basis of Article 28 EEA.
- 41 Proceeding on the basis that Ms Amoh was not economically active during her stay in Spain, ESA states that Article 7(1)(b) only requires that she must have sufficient resources not to become a burden on the Spanish social assistance system during her period of residence, and that she must have comprehensive sickness insurance cover in Spain during that time. According to ESA, this establishes that the rights guaranteed by Article 7 of the Directive are also applicable in circumstances where the EEA national is non-economically active.

- 42 Turning to the applicability of Article 7 of the Directive to the home State of an EEA national, ESA submits that the Court found in *Gunnarsson* that Article 7(1)(b) can be invoked by non-economically active EEA nationals who have exercised their free movement rights against their EEA State of nationality. ESA maintains that the same principle is at stake in this case. For any residence right to be truly effective, the home State must also be prohibited from hindering the exercise of the right. Similarly, the opportunities offered by the Directive could not be fully effective if a national of an EEA State could be deterred from availing himself of them by obstacles raised on his return to his country of origin by legislation penalising the fact that he has used them.
- 43 Despite the fact that Union citizenship does not exist under the EEA Agreement, ESA argues for a result that ensures homogeneity. The scope of free movement rights granted to EFTA nationals should be the same as for EU nationals. The lack of a citizenship concept in the EEA Agreement entails that the Directive should be accorded a more important role in the EEA context. Its scope must therefore be broadened on the basis of the principle of effectiveness.
- 44 ESA submits that the derived rights of third country family members of returning Norwegian nationals must be examined under EEA law on the premise that non-economically active nationals can invoke Article 7(1)(b) of the Directive against their own EEA State and that economically active EEA nationals derive their corresponding rights from Articles 28, 31 and 36 EEA. In both instances, the substance of the rights should be the same. ESA concludes that the plaintiff should thus be able to invoke Article 7(2) of the Directive.
- 45 The Commission submits that, although the question referred only mentions an interpretation of the Directive, it should be expanded to encompass the issue of whether, where the third country national spouse of an EEA national has acquired a derived right of residence

in another EEA State on the basis of Article 7(1)(b) in conjunction with Article 7(2) of the Directive, the EEA Agreement equally confers such a derived right of residence on that family member when he accompanies the EEA national to reside in the EEA State of which she is a national.

- 46 The Commission provides three reasons why the result in the case of *O. and B.* does not apply to the present case. First, the conclusion in that case, which purports to be based on *McCarthy I* (C-434/09, EU:C:2011:277), fails to take account of the fact that the latter case concerned a wholly internal situation. Second, the ECJ's holding in *O. and B.* concerning the applicability of the Directive must be read in conjunction with the ECJ's conclusion in the same judgment on the possibility of applying the Directive by analogy. Third, *O. and B.* cannot be regarded as the last word on this issue. More precisely, in *McCarthy II* (C-202/13, EU:C:2014:2450), the ECJ indicated that the Directive may indeed be applicable to situations such as that of the present case. The Commission contends that the Court should apply the same methodology to the present case and adds that such a result would be consistent with *Gunnarsson*.
- 47 Should the Court not agree with the preceding arguments, the Commission claims that the reference to a right under Article 21(1) TFEU in *O. and B.* has to be seen in the context of the case law on which that statement was based, in particular the judgments in *Singh* (C-370/90, EU:C:1992:296) and *Eind* (C-291/05, EU:C:2007:771). Hence, the reference in *O. and B.* to Article 21 TFEU does not mean that the principles laid down in *Singh* and *Eind*, which are based on free movement rather than citizenship, no longer apply. This case law, which concerned circumstances before the Directive entered into force, still applies to the interpretation of EEA law where an EEA national has previously exercised the right of free movement as a worker. However, in the present case, the question is based upon the premise that the EEA national had acquired a right of residence in

Spain as a non-economically active person. Such situations have been dealt with by the Court in *Gunnarsson*, and the logic of the Court in that case can therefore be adopted in the present case.

FINDINGS OF THE COURT

48 The referring court asks, in essence, whether a third-country national who is a family member of an EEA national who, upon returning from another EEA State resides in the EEA State in which the EEA national is a citizen, has a derived right of residence under EEA law in that EEA State.

GENERAL REMARKS

49 The free movement of persons is one of the fundamental freedoms of the EU internal market. A shared and well-functioning labour market was considered important to the realisation of the goals of economic development and integration in the incipient EU cooperation. Therefore, at that time, the States of the European Coal and Steel Community agreed to remove any restriction based on nationality upon employment in the coal and steel industries on workers who were their nationals.

50 A shared labour market would not function adequately if migrant workers were prevented from maintaining established family life. Such a limitation would have acted as a deterrent to labour market mobility. Therefore, from an early stage of integration, a worker and his family members were enabled to maintain their family life when the worker was employed outside of his State of origin, that is his home State.

- 51 Subsequently, the free movement of persons was broadened. Thus, legislation extended the concept of free movement. In particular, the concept came to include students and other economically inactive persons. Students are seeking education with a view to entering the labour market and other economically inactive persons have, in the majority of cases, participated in the labour market.
- 52 The exercise of free movement of persons is conditional. In particular, EU law requires that economically inactive persons have sufficient resources for themselves and their family members so as not to become a burden on the social security system of the host State. That condition is intended to protect the host State's fiscal interests by placing a person's own resources on a like footing with the financial contributions to the social security system made as a result of employment in the labour market. A condition of comprehensive sickness insurance cover also applies.
- 53 The scope of free movement of persons was specified by case law. In *Singh*, cited above, the ECJ set out the right of a worker to return to his home EU State with family members. The ECJ observed that a worker could be deterred from exercising his right to free movement if his family members were not permitted to enter and reside with him when he returned to his home EU State. That effect should be seen as an obstacle to leaving his home State in the first place. Therefore, an EU national who has exercised his right to free movement in order to work in another EU State can rely on EU law when returning to his home State with a spouse from a third country. According to *Eind*, cited above, an EU national may also rely on EU law upon returning as an economically inactive person to his home State with a family member from a third country, provided he exercised his EU rights.

- 54 The Single European Act was adopted in 1986. Its goal was, inter alia, to achieve an internal market without borders. This was built upon by the Maastricht Treaty of 1992. The Maastricht Treaty introduced the concept of Union citizenship. This concept is now expressed in Part II of the TFEU. Every person holding the nationality of an EU State is a Union citizen. Union citizenship is additional to national citizenship of an EU State and entails certain rights under EU law. According to Article 21(1) TFEU, a Union citizen shall have a right to move and reside freely within the territory of the EU States, subject to the limitations and conditions laid down in EU law. Other provisions of Part II of the TFEU entitle Union citizens to political rights including certain electoral rights and a right of petition to the European Parliament including access to the European Ombudsman.
- 55 Union citizenship comprises the free movement of persons. The ECJ has stated that Union citizenship is destined to be the fundamental status of nationals of the Member States (see, for example, the judgment in *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31).
- 56 The Directive was adopted in 2004. It repealed and replaced a number of EU legal acts including the following: Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Directive 72/194/EEC on extending to workers exercising the right to remain in the territory of a Member State after having been employed in that State, Directive 90/364/EEC on the right of residence, Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity, Directive 93/96/EEC on the right of residence for students, and Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community.

- 57 Recitals 3 and 5 in the preamble to the Directive express the need to codify and review existing legal instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons, in order to simplify and strengthen the right of free movement and residence of all Union citizens. Furthermore, it is stated that if the right of all Union citizens to move and reside freely within the territory of the EU States is to be exercised under objective conditions of freedom and dignity, it should also be granted to their family members, irrespective of nationality.
- 58 The Directive is based on Articles 12, 18, 40, 44 and 52 of the Treaty establishing the European Community. The corresponding provisions in the TFEU are Article 18 on non-discrimination on grounds of nationality, Article 21 on Union citizens' right to free movement and residence, Article 46 on measures to bring about freedom of movement for workers, Article 50 on the issue of directives to attain the freedom of establishment and Article 59 on the issue of directives to achieve the liberalisation of a specific service.
- 59 The legal development described above was reflected in the EEA Agreement, when it entered into force on 1 January 1994. According to the fifth recital of the Preamble to the EEA Agreement, the Contracting Parties are determined to provide for the fullest possible realisation of the four freedoms, including the free movement of persons, within the whole EEA. The objective of abolition of obstacles to the free movement of persons is also reflected in Article 1(2) EEA and the then Article 3(c) of the Treaty Establishing the European Economic Community ("EEC").
- 60 Article 28 of the EEA Agreement, in Part III on Free Movement of Persons, Services and Capital, corresponds to Article 48 EEC, now Article 45 TFEU. Article 28 EEA gives workers the right of freedom of movement. The freedom entails the abolition of any discrimination

based on nationality between workers of EU and EFTA States as regards employment, remuneration and other conditions of work and employment in the EEA market. The freedom forms part of the core of the EEA Agreement. The consideration of homogeneity therefore carries substantial weight.

- 61 Directives 90/364/EEC, 90/365/EEC and 93/96/EEC were part of the EEA Agreement at the time of its entry into force and were referred to in Annex VIII to the EEA Agreement on freedom of establishment. Therefore, EEA law included the freedom of movement of persons as workers and as economically inactive EEA nationals, in both cases including their family members.
- 62 The Court notes that a gap between the two EEA pillars has emerged since the signing of the EEA Agreement in 1992. This gap has widened over the years. The EU treaties have been amended four times since then, while the EEA Main Agreement has remained substantially unchanged. This development has created certain discrepancies at the level of primary law. Depending on the circumstances, this fact may have an impact on the interpretation of the EEA Agreement.
- 63 The EEA Joint Committee Decision incorporating the Directive into the EEA Agreement defines the term Union citizens, for the purposes of the EEA Agreement, as nationals of EU States and EFTA States. Accordingly, EEA nationals may avail themselves of the freedom of movement of persons under EEA law and thus move freely within the internal market on conditions established by EEA law.
- 64 The Contracting Parties stated in a joint declaration attached to that decision that Union citizenship has no equivalent in the EEA Agreement and that the EEA Agreement does not provide a legal basis for political rights. However, the Contracting Parties also agreed that rights granted by the Directive to third country nationals who are family members of an EEA national, exercising the right to

free movement under the EEA Agreement, must be included since these rights are corollary to the right of free movement of nationals of EU States and EFTA States. It cannot be assumed that the Contracting Parties intended the introduction of Union citizenship in EU law to restrict further evolution of the free movement of persons in the EEA.

- 65 In *O. and B.*, cited above, the ECJ held that Article 21(1) TFEU must be interpreted as meaning that where a Union citizen has created or strengthened family life with a third country national during genuine residence, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of the Directive, in a Member State other than that of which he is a national, the provisions of the Directive apply by analogy where that Union citizen returns, with the family member in question, to his Member State of origin. Therefore, the conditions for granting a derived right of residence to a third-country national who is a family member of that Union citizen, in the latter's Member State of origin, should not, in principle, be more strict than those provided for by that directive for the grant of a derived right of residence to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (see *O. and B.*, cited above, paragraph 61).
- 66 In the judgment, the ECJ reached its conclusion on a legal basis not existing in the EEA, whereas application of the Directive appears, for the most part, to have been rejected. Consequently, an unequal level of protection of the right to free movement of persons within the EEA could ensue. However, if the Court ensures the same level of protection in the EEA, it must explain why the ECJ's statement in *O. and B.* regarding the Directive cannot decide the matter.

67 In order to assess the impact of the legal findings in *O. and B.* for the interpretation of EEA law, that judgment must be read in its proper legal context. That context encompasses the concept of Union citizenship. The ECJ did not base its main conclusion on the Directive. Furthermore, the case law resulting from *Singh* and *Eind* was considered applicable under Article 21(1) TFEU to family members of Union citizens upon a return to the home State. The ECJ held that such a derived right seeks to remove obstacles for leaving the home State by guaranteeing that that citizen upon return to the home State will be able to continue the family life created or strengthened in the host State (see *O. and B.*, cited above, paragraphs 48 and 49).

ANSWER TO THE QUESTION REFERRED

- 68 In the Court's further analysis, emphasis must be placed on the fact that the free movement of persons forms part of the core of the EEA Agreement. The case at hand must be distinguished from *O. and B.* to the extent that that judgment is based on Union citizenship. Therefore, it must be examined if homogeneity in the EEA can be achieved based on an authority included in the EEA Agreement. Such an examination must be based on the EEA Agreement, legal acts incorporated into it and case law.
- 69 The case before the Court concerns a Norwegian national who has resided in Spain, where she married a third country national. Later she returned to Norway, where the third country national applied for family reunification.
- 70 In the fifteenth recital of the Preamble to the EEA Agreement, the Contracting Parties state that their objective is to reach and maintain a uniform interpretation and application of the EEA Agreement and those provisions of EU legislation substantially reproduced in its main part and annexes and, furthermore, to arrive

at an equal treatment of individuals and economic operators as regards the four freedoms. However, the same recital also states that a uniform interpretation and application of the EEA Agreement shall be achieved in full deference to the independence of the courts.

- 71 Without independence in its adjudication no court could claim legitimacy. Every court must exercise its jurisdiction based upon the relevant legal sources. An essential legal source for the Court is the case law of the ECJ and the General Court. That case law must nevertheless be read in its context. Normally, this does not pose particular problems because the context is the same. However, when it comes to the legal sources in this case, the ECJ has partly ruled out the application of the Directive and instead applied the concept of Union citizenship in evolution of the free movement of persons in the EU.
- 72 In the EEA context, Article 7(1) of the Directive provides that all EEA nationals shall have the right of residence on the territory of another EEA State for more than three months if they fulfil one of the conditions set out in points (a) to (d). At issue in the present case is Article 7(1)(b). That provision grants a right of residence provided that (i) the EEA national has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host State during the period of residence and (ii) has comprehensive sickness insurance cover in the host State. Pursuant to Article 7(2), that right of residence shall extend to family members who are not nationals of an EEA State, accompanying or joining the EEA national in the host State.
- 73 The Court assumes that the sponsor stayed legally in Spain for more than three months. If this is not the case, the sponsor cannot be said to have acted under EEA law for the purpose of creating a derived right as a family member for a third country national. It is for the referring court to establish the respective facts.

- 74 The conditional right of residence pursuant to Article 7 of the Directive applies “on the territory of another Member State”. That wording reflects the fact that an EEA national has a right of residence under EEA law in other EEA States. This right of residence can only be exercised if the EEA national actually moves from the home State.
- 75 Since Article 7(1)(b) confers on an EEA national the right to move freely from the home EEA State and take up residence in another EEA State, an EEA State may not deter its nationals from moving to another EEA State in the exercise of the freedom of movement under EEA law (see *Gunnarsson*, cited above, paragraph 82).
- 76 In the present case, the referring court has established that a Norwegian citizen has married a third country national and lived together with him in Spain and that the sponsor did not engage in economic activity during her stay there. At issue is whether a refusal of a derived right of residence in Norway for the third country national, upon the Norwegian citizen’s return to Norway, constitutes an obstacle to the Norwegian citizen’s freedom of movement under EEA law.
- 77 When a EEA national makes use of his right to free movement, he may not be deterred from exercising that right by an obstacle to the entry and residence of a spouse in the EEA national’s home State. Accordingly, when an EEA national who has availed himself of the right to free movement returns to his home State, EEA law requires that his spouse is granted a derived right of residence in that State (see, for comparison, *Eind*, cited above, paragraphs 35 and 36). Consequently, the possibility for individuals exercising their right of free movement to invoke this right against their home State has been recognised in the case law of the ECJ.

- 78 This case law concerns EEA nationals having pursued an economic activity in another EEA State. However, economically inactive EEA nationals may enjoy their right under Article 7(1)(b) to reside in another EEA State provided that they have sufficient resources for themselves and their family members, so as to not become a burden on the social security assistance system of the host State, and possess comprehensive sickness insurance cover.
- 79 The reasoning in the ECJ's *Eind* judgment is equally relevant when an inactive person, who has exercised the right to free movement under Article 7(1)(b) of the Directive, returns to his home EEA State with a spouse who is a third country national. A right to move freely from the home EEA State to another EEA State cannot be fully achieved if that person may be deterred from exercising the freedom by obstacles raised by the home State to the right of residence for a spouse (see, for comparison, *Gunnarsson*, cited above, paragraph 82).
- 80 However, a derived right of residence for a third country national in the spouse's home State is conditional. In addition to the requirements of sufficient resources and health insurance, the following conditions must be fulfilled. First, the residence of the EEA national in the host State must have been genuine such as to enable family life in that State. The duration of residence in the host State must exceed a continuous period of three months. Second, pursuant to Article 35 of the Directive, EEA States may, subject to the principle of proportionality and procedural safeguards provided for in the Directive, adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience. Upon a question from the bench, the Agent for the defendant stated that no abuse of rights has been alleged so far in the national proceedings. Third, restrictions on rights granted by the Directive may be justified by reasons of public policy, public security or public health pursuant to Article 27(1) of the Directive.

- 81 The Court adds that all the EEA States are parties to the European Convention on Human Rights, which enshrines in Article 8(1) the right to respect for private and family life. According to established case law, provisions of the EEA Agreement are to be interpreted in the light of fundamental rights (see Case E-4/11 *Arnulf Clauder* [2011] EFTA Ct. Rep. 216, paragraph 49 and case law cited).
- 82 The answer to the question referred must therefore be that where an EEA national, pursuant to Article 7(1)(b) and Article 7(2) of the Directive, has created or strengthened a family life with a third country national during genuine residence in an EEA State other than that of which he is a national, the provisions of that directive will apply by analogy where that EEA national returns with the family member to his home State.

IV COSTS

- 83 The costs incurred by the Liechtenstein Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

The Court

in answer to the question referred to it by Oslo District Court hereby gives the following Advisory Opinion:

Where an EEA national, pursuant to Article 7(1)(b) and Article 7(2) of Directive 2004/38/EC, has created or strengthened a family life with a third country national during genuine residence in an EEA State other than that of which he is a national, the provisions of that directive will apply by analogy where that EEA national returns with the family member to his home State.

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

*Delivered in open court in Luxembourg on
26 July 2016.*

Theresa Haas
Acting Registrar

Carl Baudenbacher
President

Report for the Hearing

in Case E-28/15

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo tingrett (Oslo District Court), in the case of

Yankuba Jabbi

≡and≡

The Norwegian Government

concerning the interpretation of Article 7(1)(b) in conjunction with Article 7(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/ECC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/36/EEC.¹

I INTRODUCTION

1 By a letter of 1 November 2015, registered at the Court on 18 November 2015, Oslo tingrett (Oslo District Court) made a request

1 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/ECC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/36/EEC, OJ 2004 L 158, p. 77, as corrected by OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34, as incorporated into the EEA Agreement at point 1 of Annex V and point 3 of Annex VIII, Norwegian EEA Supplement 2012 No 5, p. 243.

for an Advisory Opinion in a case pending before it between Yankuba Jabbi (“the plaintiff”) and the Norwegian Government (“the defendant”).

- 2 The case before Oslo tingrett concerns the validity of the Norwegian Immigration Appeals Board’s (“the Appeals Board”) decision of 13 May 2014, which rejected an application for residence by the plaintiff and expelled him from Norway, and the Appeals Board’s refusal to reverse that decision in its subsequent decisions of 8 July 2014 and 15 January 2015.

II LEGAL BACKGROUND

EEA LAW

- 3 Article 28 of the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) provides as follows:
 1. *Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
 2. *Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*
 3. *It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
 - (a) *to accept offers of employment actually made;*
 - (b) *to move freely within the territory of EC Member States and EFTA States for this purpose;*

- (c) *to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
- (d) *to remain in the territory of an EC Member State or an EFTA State after having been employed there.*

...

4 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/ECC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/36/EEC (“the Directive”) was incorporated into the EEA Agreement at point 1 of Annex V and point 3 of Annex VIII to the Agreement by EEA Joint Committee Decision No 158/2007 (“Decision No 158/2007”) of 7 December 2007.² The decision entered into force on 1 March 2009.

5 Recital 1 in the preamble to the Directive reads as follows:

Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

6 Recital 3 in the preamble to the Directive reads as follows:

Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed

² OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17.

persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

7 Recital 5 in the preamble to the Directive reads as follows:

The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of “family member” should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

8 Article 1 of the Directive reads as follows:

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

...

9 Under the heading “Definitions”, Article 2 of the Directive provides:

For the purposes of this Directive:

1. *“Union citizen” means any person having the nationality of a Member State;*

2. *“family member” means:*

(a) the spouse;

...

3. *“host Member State” means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.*

10 Article 3(1) of the Directive reads:

This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

11 Article 6 of the Directive, which addresses the right of residence for up to three months, states:

1. *Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.*
2. *The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.*

12 Article 7 of the Directive, which addresses the right of residence for more than three months, provides as follows:

1. *All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:*
 - (a) *are workers or self-employed persons in the host Member State; or*
 - (b) *have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or*

- (c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
- have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or
- (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

...

- 13 Article 10(1) of the Directive reads:

The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called “Residence card of a family member of a Union citizen” no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

14 Article 16(1) of the Directive reads:

Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

15 Article 1 of Decision No 158/2007 reads:

...

The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:

...

(b) The Agreement applies to nationals of the Contracting Parties. However, members of their family within the meaning of the Directive possessing third country nationality shall derive certain rights according to the Directive.

(c) The words “Union citizen(s)” shall be replaced by the words “national(s) of EC Member States and EFTA States”.

...

16 Attached to Decision No 158/2007 was a Joint Declaration by the Contracting Parties to the decision. That declaration reads:

The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.

NATIONAL LAW³

17 In Norway, the Directive has been implemented by the Act of 15 May 2008 No 35 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm (“the Immigration Act”).⁴

18 Chapter 13 of the Immigration Act (Sections 109 to 125) contains special rules relating to foreign nationals covered by the EEA Agreement. Paragraph 2 of Section 110 of the Immigration Act reads:

Family members of an EEA national are subject to the provisions of this chapter as long as they accompany or are reunited with an EEA national. Family members of a Norwegian national are subject to the provisions of this chapter if they accompany or are reunited with a Norwegian national who returns to the realm after having exercised the

³ Translations of national provisions are unofficial.

⁴ *Lov om utlendingers adgang til riket og deres opphold her.* LOV-2008-05-15-35.

right to free movement under the EEA Agreement or the EFTA Convention in another EEA country or EFTA country.

- 19 Section 112 of the Immigration Act, which concerns the right of residence for more than three months for EEA nationals, reads:

An EEA national has a right of residence for more than three months as long as the person in question:

- (a) is employed or self-employed,*
- (b) is to provide services,*
- (c) is self-supporting and can provide for any accompanying family member and is covered by a health insurance policy that covers all risks during the stay, or*

...

III FACTS AND PROCEDURE

- 20 The plaintiff is a Gambian national. On 1 February 2012, he married Inger Johanne Martinsen Amoh, who is a Norwegian national, in Spain. They stayed together in Spain from September 2011 to October 2012. Ms Amoh did not engage in economic activity during her stay in Spain, but the plaintiff claims that she had her own funds for the stay. It is disputed whether Ms Amoh met the conditions for receiving a work assessment allowance during her stay in Spain, but it is undisputed that she was entitled to receive a disability pension there.
- 21 The parties differ on the documentation submitted concerning Ms Amoh's stay in Spain and her connection to Norway during the stay.

- 22 On 20 November 2012, the plaintiff applied for residence in Norway as the spouse of an EEA national, i.e. of Ms Amoh. The Directorate of Immigration decided on 19 February 2014 that the plaintiff did not meet the conditions for residence in Norway under Chapter 13 of the Immigration Act and expelled him from Norway. That decision was appealed and upheld by the Immigration Appeals Board's decision of 13 May 2014. The plaintiff subsequently requested a reversal of the decision, but his request was rejected by the Appeals Board's decisions of 8 July 2014 and 15 January 2015.
- 23 Following those decisions, the plaintiff instigated the proceedings before the referring court, claiming that he has a derived right of residence in Norway as a result of his wife's stay in Spain and subsequent return to Norway.
- 24 The following question was submitted to the Court:

Does Article 7(1)(b), cf. Article 7(2), of Directive 2004/38/EC confer derived rights of residence to a third-country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen?

IV WRITTEN OBSERVATIONS

- 25 Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:
- the plaintiff, represented by advokat Arild Humlen;
 - the defendant, represented by advokat Pål Wennerås, the Attorney General of Civil Affairs;

- the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Carsten Zatschler, Director, Maria Moustakali, Senior Officer, and Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Elisabetta Montaguti and Michael Wilderspin, members of its Legal Service, acting as Agents.

V SUMMARY OF THE ARGUMENTS SUBMITTED

THE PLAINTIFF

- 26 The plaintiff maintains that he has a derived right of residence in Norway following his wife’s stay in Spain and her subsequent return to Norway, based on Article 7(1)(b), cf. Article 7(2), of the Directive.
- 27 According to the plaintiff, Article 7(1)(b) of the Directive regulates the right of residence in another EEA State for EEA nationals who are not economically active. That person’s family members, who are not EEA nationals, derive their right of residence from Article 7(2).
- 28 The plaintiff states that the main legal issue at stake is the extent to which Article 7(1)(b), cf. Article 7(2), of the Directive applies to non-economically active EEA nationals and their family members upon their return to the EEA State of which the EEA national is a citizen. Articles 28 and 31 EEA regulate the freedom of movement of economically active persons, while the Directive equates the movement of economically active and non-economically active persons.

- 29 The main objective of the EEA Agreement, according to the plaintiff, was to expand the European Union’s internal market to the EEA/ EFTA States. In this regard, the plaintiff recalls that the preamble to the EEA Agreement states that its objective is to establish a dynamic and homogeneous European Economic Area, based on common rules.
- 30 The plaintiff concludes that the objective of homogeneity must be decisive when it comes to the interpretation of Article 7(1)(b) of the Directive.
- 31 The plaintiff acknowledges that the concept of “Union citizenship” is without parallel in EEA law. He claims, notwithstanding that fact, that the right of free movement must be uniform throughout the EEA.
- 32 The plaintiff emphasises the importance of the judgment of the Court of Justice of the European Union (“ECJ”) in the case of *O. and B.*⁵ There, the plaintiff maintains, the ECJ based its result upon Article 21(1) of the Treaty on the Functioning of the European Union (“TFEU”). Nonetheless, the plaintiff states that, the ECJ’s judgment provides reasons for interpreting and applying the Directive in the manner claimed by the plaintiff, and thereby in accordance with the principle of homogeneity. Without such an interpretation, the right to free movement by EEA nationals would be hindered. In further support of this, the plaintiff refers to the case law of the Court.⁶
- 33 For all of those reasons, the plaintiff proposes that the Court should answer the question referred in the affirmative.

5 Reference is made to the judgment in *O. v Minister voor Immigratie, Integratie en Asiel* and *Minister voor Immigratie, Integratie en Asiel v B.*, C-456/12, EU:C:2014:135, paragraphs 51, 54 and 56.

6 Reference is made to Case E-26/13 *Atli Gunnarsson* [2014] EFTA Ct. Rep. 254.

THE DEFENDANT

- 34 The defendant argues that the question referred has already been answered in the case of *O. and B.* There, the ECJ held that the Directive does not confer derived rights of residence for third-country nationals in the Member State of which their sponsors, i.e. the EU citizens, are nationals, and that such a derived right could only be established on the basis of Article 21(1) TFEU.⁷
- 35 In this regard, the defendant points out that the EEA Agreement does not contain a provision corresponding to Article 21 TFEU. Furthermore, the defendant stresses that the Court has already had occasion to point out that the Directive cannot introduce rights into the EEA Agreement based on the concept of Union citizenship in Article 21(1) TFEU.⁸
- 36 The defendant states that, since it is common ground that Ms Amoh did not pursue any economic activity in Spain, the provisions on the free movement of persons in the main part of the EEA Agreement, Articles 28, 31 and 36, are not applicable in the present proceedings. Ms Amoh's residence in Spain could therefore only have been based on Article 7(1)(b) of the Directive, subject to the conditions of that provision. It is disputed whether Ms Amoh fulfilled all of those conditions.
- 37 Turning to the plaintiff's arguments concerning homogeneity, the defendant acknowledges that the homogeneous interpretation and application of common rules is essential for the effective functioning of the internal market within the EEA. The principle of homogeneity therefore leads to a presumption that provisions framed in the same way in the EEA Agreement and in EU law are to be construed in the

7 Reference is made to *O. and B.*, cited above, in particular paragraphs 37 to 56.

8 Reference is made to *Atli Gunnarsson*, cited above, paragraph 80.

same way. Thus, Article 6 EEA provides that EEA rules, in so far as they are identical in substance to corresponding EU rules, shall be interpreted in conformity with the rulings of the ECJ given prior to the signing of the EEA Agreement. Conversely, the Court has repeatedly dismissed invitations to rely upon, by way of analogy or interpretation, provisions of EU law which have not been made part of EEA law.⁹ The defendant maintains that, accordingly, the principle of homogeneity dictates that the provisions of the Directive, which are rules common to the EEA and the EU, are interpreted uniformly and in conformity with the judgment in *O. and B.* In contrast, the rights established in that judgment on the basis of Article 21(1) TFEU may not be transposed by analogy when interpreting the Directive.

- 38 The defendant proposes that the Court should answer the question referred as follows:

Directive 2004/38/EC does not establish a derived right of residence for third-country nationals who are family members of an EEA national in the EEA state of which that citizen is a national.

GOVERNMENT OF THE PRINCIPALITY OF LIECHTENSTEIN

- 39 Liechtenstein concurs with the defendant that the question referred has already been answered in the case of *O. and B.*¹⁰ For that reason, Article 7(1)(b), cf. Article 7(2), of the Directive cannot confer rights of residence on a third-country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is citizen.

9 Reference is made to Case E-1/01 *Hörður Einarsson* [2002] EFTA Ct. Rep. 2, paragraph 45, and Case E-1/02 *ESA v Norway* [2003] EFTA Ct. Rep. 1, paragraph 55.

10 Reference is made to *O. and B.*, cited above, in particular paragraphs 36, 37, 39, 49 to 51 and 56.

- 40 Liechtenstein submits that this finding is also supported by the Joint Declaration by the Contracting Parties to Decision No 158/2007. With regard to the ECJ’s interpretation of Article 21(1) TFEU in the case of *O. and B.*, Liechtenstein adds that it must be borne in mind that the EEA Agreement does not contain a provision corresponding to Article 21(1) TFEU. The concept of “Union citizenship” therefore has no equivalence in the EEA Agreement.¹¹
- 41 According to Liechtenstein, it is for each of the EEA/EFTA States to decide for itself on the derived rights of residence for third-country nationals in situations such as that of the present case.
- 42 Liechtenstein proposes that the Court should answer the question referred as follows:

Article 7(1)(b) cf. Article 7(2) of Directive 2004/38/EC do not confer derived rights of residence to a third-country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen.

ESA

- 43 ESA submits that the purpose of establishing a derived right of residence for family members of EEA nationals is to ensure that the right to free movement within the EEA is real and effective.¹²
- 44 ESA acknowledges that the purely hypothetical prospect of exercising the right to freedom of movement does not establish a sufficient connection with EEA law to justify the application of that law’s provisions.¹³ Consequently, derived rights of residence of third-

11 Reference is made to *Atli Gunnarsson*, cited above, paragraph 80.

12 Reference is made to the judgment in *Metock*, C-127/08, EU:C:2008:449, paragraphs 56, 62 and 84, and Case E4/11 *Arnulf Clauder* [2011] EFTA Ct. Rep. 216, paragraph 49.

13 Reference is made to the judgment in *Friedrich Kremzow v Republik Österreich*, C-299/95, EU:C:1997:254, paragraph 16.

country national family members in principle only exist where these are necessary to ensure that the EEA national can exercise his or her free movement and residence rights effectively.

- 45 ESA points out that the parties seem to differ on the documentation concerning Ms Amoh's stay in Spain and her connection to Norway during the stay. ESA acknowledges that, on the basis of the information provided in the request for an Advisory Opinion, it appears that Ms Amoh did not exercise her right to free movement as a worker. However, ESA states that, if she was a worker, which the referring court must assess, then the plaintiff would have a derived right of residence in the host State pursuant to Article 7 of the Directive, as well as in the home State on the basis of Article 28 EEA.
- 46 Proceeding on the basis that Ms Amoh was not economically active during her stay in Spain, ESA states that Article 7(1)(b) only requires that she must have sufficient resources not to become a burden on the Spanish social assistance system during her period of residence, and that she must have comprehensive sickness insurance cover in Spain during that time. According to ESA, this establishes that the rights guaranteed by Article 7 of the Directive are also applicable in circumstances where the EEA national is non-economically active.
- 47 Turning to the applicability of Article 7 of the Directive to the home State of an EEA national, ESA submits that the Court has already found that Article 7(1)(b) can be invoked by non-economically active EEA nationals, who have exercised their free movement rights, against their EEA State of nationality.¹⁴ ESA maintains that the same principle is at stake in this case. For any residence right to be truly effective, the home State must also be prohibited from hindering the exercise of the right. Similarly, the opportunities offered by the

14 Reference is made to *Atli Gunnarsson*, cited above, paragraphs 75, 77, 78 and 80.

Directive could not be fully effective if a national of an EEA State could be deterred from availing himself of them by obstacles raised on his return to his country of origin by legislation penalising the fact that he has used them.¹⁵

48 In other words, despite the fact that Union citizenship does not exist under the EEA Agreement, ESA argues for a result that ensures homogeneity. The scope of free movement rights granted to EEA/EFTA nationals should be the same as for EU nationals. ESA adds that the lack of a citizenship concept in the EEA Agreement entails that the Directive should be accorded a more important role in the EEA context. Its scope must therefore be broadened on the basis of the principle of effectiveness.¹⁶

49 ESA submits that the derived rights of third-country family members of returning Norwegian nationals must be examined under EEA law on the premise that non-economically active nationals can invoke Article 7(1)(b) of the Directive against their own EEA State and that economically active EEA nationals derive their corresponding rights from Articles 28, 31 and 36 EEA. In both instances, the substance of the rights should be the same. ESA concludes that the plaintiff should thus be able to invoke Article 7(2) of the Directive.

50 ESA proposes that the Court should answer the question referred as follows:

15 Reference is made to the judgments in *Pusa*, C-224/02, EU:C:2004:273, paragraph 18, and in *D'Hoop*, C224/98, EU:C:2002:432, paragraphs 30 and 31.

16 Regarding the principle of effectiveness, reference is made to Case E-17/15 *Ferskjar kjötvörur*, judgment of 1 February 2016, not yet reported, paragraph 66, *Clauder*, cited above, paragraphs 34 and 46, and Case E-15/12 *Jan Anfinn Wahl* [2013] EFTA Ct. Rep. 534, paragraph 54.

Article 7(1)(b) in combination with Article 7(2) of Directive 2004/38/EC confer derived rights of residence to a third country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen.

THE COMMISSION

- 51 The Commission submits that, although the question referred only mentions an interpretation of the Directive, it should be expanded to encompass the issue of whether, where the third-country national spouse of an EEA national has acquired a derived right of residence in another EEA State on the basis of Article 7(1)(b) in conjunction with Article 7(2) of the Directive, the EEA Agreement equally confers such a derived right of residence on that family member when he accompanies the EEA national to reside in the EEA State of which she is a national.
- 52 The Commission acknowledges that in *O. and B.* the ECJ held, first, that the Directive was not intended to govern the rights of entry and residence of a Union citizen in a Member State of which he is national, and, second, that any rights that such a Union citizen, or a member of his family as derived rights, might be able to assert against that Member State must be derived, if at all, from Article 21(1) TFEU.¹⁷
- 53 The Commission provides three reasons why the result in the case of *O. and B.* does not apply to the present case. Firstly, the conclusion in that case, which purports to be based on *McCarthy I*, fails to take

¹⁷ Reference is made to *O. and B.*, cited above, paragraphs 42 to 44.

account of the fact that the latter case concerned a wholly internal situation.¹⁸ Second, the ECJ's holding in *O. and B.* concerning the applicability of the Directive must be read in conjunction with the ECJ's conclusion on the possibility of applying the Directive by analogy.¹⁹ Third, despite being a recent judgment, *O. and B.* cannot be regarded as the last word on this issue. More precisely, in a recent case, *McCarthy II*, the ECJ indicated, albeit with somewhat perfunctory reasoning, that the Directive may indeed be applicable to situations such as that of the present case.²⁰ The Commission contends that the Court should apply the same methodology to the present case and adds that such a result would be consistent with the Court's reasoning in *Atli Gunnarsson*.²¹

54 Should the Court not agree with the preceding arguments, the Commission claims that the reference to a right under Article 21(1) TFEU in *O. and B.* has to be seen in the context of the case law on which that statement was based, in particular the cases of *Singh* and *Eind*.²² Hence, the reference in *O. and B.* to Article 21 TFEU does not mean that the principles laid down in *Singh* and *Eind*, which are based on free movement rather than citizenship, no longer apply. According to the Commission, this case law, which concerned circumstances before the Directive entered into force, still applies to the interpretation of EEA law where an EEA national has previously exercised the right of free movement as a worker. However, in the present case, the question is based upon the premise that the EEA

18 Reference is made to the judgment in *McCarthy I*, C-434/09, EU:C:2011:277, paragraphs 27 to 29.

19 Reference is made to *O. and B.*, cited above, paragraph 61.

20 Reference is made to the judgment in *McCarthy II*, C-202/13, EU:C:2014:2450, paragraphs 31 to 38, and to the Opinion of Advocate General Szpunar in the same case, EU:C:2014:345, point 88.

21 Reference is made to *Atli Gunnarsson*, cited above.

22 Reference is made to the judgments in *Singh*, C-370/90, EU:C:1992:296, and in *Eind*, C-291/05, EU:C:2007:771.

national had acquired a right of residence in Spain as a non-economically active person. Such situations have, according to the Commission, been dealt with by the Court in *Atli Gunnarsson*, and the logic of the Court in that case can, therefore, be adopted in the present case.²³

- 55 The Commission proposes that the Court should answer the question referred as follows:

Where an EEA national has acquired a right of residence in another EEA State on the basis of Article 7(1)(b) of Directive 2004/38/EC (and family members have acquired such a right there on the basis of Article 7(2) thereof) the EEA Agreement requires the same rights of residence to be conferred on those family members when they accompany or join the EEA national to the EEA State of which that person is a citizen.

Páll Hreinsson
Judge-Rapporteur

23 Reference is made to *Atli Gunnarsson*, cited above, paragraphs 71 to 83.