**JUDGMENT OF THE COURT**
9 February 2021*

*(Freedom of movement – Directive 2004/38/EC – Abuse – Marriages of convenience – Derived rights for third-country nationals)*

In Case E-1/20,

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 the Supreme Court of Norway (*Norges Høyesterett*), in the case between

**Kerim**

and

**The Norwegian Government, represented by the Immigration Appeals Board *(Utlendingsnemnda – UNE),***

concerning the interpretation 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, and in particular Article 7(1)(b), read in conjunction with Article 7(2) and Article 35 thereof,

THE COURT,

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

Registrar: Ólafur Jóhannes Einarsson,

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

having considered the written observations submitted on behalf of:

– the Norwegian Government, represented by Marius Stub, acting as Agent;

– the Danish Government, represented by Jakob Nymann-Lindegren, Maria Søndahl Wolff and Mads Peder Brøchner Jespersen, acting as Agents;

– the Polish Government represented by Bogusław Majczyna, acting as Agent;

– the EFTA Surveillance Authority ("ESA"), represented by James Stewart Watson, Erlend Møinichen Leonhardsen, Ewa Gromnicka and Carsten Zatschler, acting as Agents; and

– the European Commission ("the Commission"), represented by Clemens Ladenburger, Elisabetta Montaguti and Jonathan Tomkin, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Norwegian Government, represented by Marius Stub; ESA, represented by James Stewart Watson, Ewa Gromnicka and Erlend Møinichen Leonhardsen; and the Commission, represented by Clemens Ladenburger, Elisabetta Montaguti and Jonathan Tomkin; at the hearing on 17 September 2020,

gives the following

## Judgment

## I Legal background

*EEA law*

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/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/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, ("Directive 2004/38" or "the Directive") was incorporated in the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") by Decision of the EEA Joint Committee No 158/2007 (OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17) ("Decision No 158/2007"), which added it at point 3 of Annex VIII (Right of establishment), and points 1 and 2 of Annex V (Free movement of workers).

2 Article 1 of Decision No 158/2007 reads:

> *Annex VIII to the Agreement shall be amended as follows:*
>
> *1) ...*
>
> > *The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:*
> >
> > *(a) The Directive shall apply, as appropriate, to the fields covered by this Annex.*
> >
> > *(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".*
> >
> > ...

3 Recitals 5, 6 and 28 of the Directive read:

> *(5) The right of all nationals of EC Member States and EFTA States 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.*
>
> *(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the national of EC Member States and EFTA States or any other circumstances, such as their financial or physical dependence on the national of EC Member States and EFTA States.*
>
> *(28) To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the*

*right of free movement and residence, Member States should have the possibility to adopt the necessary measures.*

4 Article 2 of the Directive, headed "Definitions", provides, in extract:

*For the purposes of this Directive:*

*…*

*2) "Family member" means:*

*(a) the spouse;*

*(b) the partner with whom the national of EC Member States and EFTA States has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;*

*...*

5 Article 3(1) of the Directive, headed "Beneficiaries", 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.*

6 Article 30 of the Directive, headed "Notification of decisions", reads:

*1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.*

*2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.*

*3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.*

7 Article 31 of the Directive, headed “Procedural safeguards”, reads:

> *1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.*
>
> *2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:*
>
> - *where the expulsion decision is based on a previous judicial decision; or*
> - *where the persons concerned have had previous access to judicial review; or*
> - *where the expulsion decision is based on imperative grounds of public security under Article 28(3).*
>
> *3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.*
>
> *4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.*

8 Article 35 of the Directive, headed “Abuse of rights”, reads:

> *Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.*

*National law and practice*

9 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").

10 Section 40, paragraph 4, of the Immigration Act reads:

> *A residence permit may be refused if it appears most likely that the main purpose of contracting the marriage has been to establish a basis for residence in the realm for the applicant.*

11 Section 112, first paragraph, of the Immigration Act 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*
> >
> > *(d) is enrolled at an approved educational institution. This is subject to the primary purpose of the stay being education, including vocational education, and to the person in question being covered by a health insurance policy that covers all risks during the stay and making a statement that the person in question is self-supporting and can provide for any accompanying family member.*

12 Section 113 of the Immigration Act reads:

> *An EEA national who is a family member and who accompanies or is reunited with an EEA national who has a right of residence under section 112, first paragraph, (a), (b) or (c), has a right to reside in the realm for as long as the EEA national's right of residence lasts.*
>
> *An EEA national who is a spouse, cohabitant or dependent child under the age of 21, and who accompanies or is reunited with an EEA national with a right of residence under section 112, first paragraph, (d), has a right to stay in the realm for as long as the EEA national's right of residence lasts.*
>
> *In the event of the EEA national's exit from the realm or death, family members who are EEA nationals retain the right of residence for as long as they themselves fulfil the conditions in section 112, first paragraph. Any child of the EEA national and*

*the person who has parental responsibility retain the right of residence in any event, for as long as the child is enrolled at an approved educational institution.*

*In the event of divorce or cessation of cohabitation, a family member of an EEA national retains the right of residence for as long as the person in question fulfils the conditions in section 112, first paragraph.*

*The King may issue regulations containing further provisions on a continued right of residence for persons with parental responsibility as mentioned in the third paragraph.*

13 Section 114 of the Immigration Act reads:

*The provisions of section 113, first and second paragraphs, apply correspondingly to foreign nationals who are not EEA nationals if they are family members of an EEA national with a right of residence under section 112, first paragraph, (a), (b) or (c), or if they are spouses, cohabitants or dependent children under the age of 21 who accompany or are reunited with an EEA national with a right of residence under section 112, first paragraph, (d).*

*A foreign national as mentioned in section 110, fourth paragraph, has a right of residence for more than three months provided that this occurs as part of the provision of a service or is necessary for the establishment of a business in the realm. The King may issue regulations containing further provisions.*

*In the event of the EEA national's death, a family member who is not an EEA national retains the right of residence if the person in question has resided in the realm as a family member for one year prior to the death and fulfils the conditions in section 112, first paragraph, (a), (b) or (c), or resides in the realm as a family member of a person who fulfils the conditions in section 112, first paragraph, (a), (b) or (c). In the event of the exit from the realm or death of an EEA national, any child of the EEA national and the person who has parental responsibility retain the right of residence in any event, for as long as the child is enrolled at an approved educational institution.*

*In the event of divorce or cessation of cohabitation, the EEA national's family members who are not EEA nationals retain the right of residence for as long as they themselves fulfil the conditions in section 112, first paragraph, (a), (b) or (c), or are a family member of a person who fulfils the conditions in section 112, first paragraph, (a), (b) or (c), provided that*

> *(a) at the time of separation, the marriage had lasted three years, including one year in the realm,*

*(b) parental responsibility for children of the EEA national has been transferred to the spouse who is not an EEA national under an agreement or judgment,*

*(c) the spouse who is not an EEA national, or any children, have been exposed to violence or other serious abuse in the marriage, or*

*(d) the spouse who is not an EEA national exercises visitation with children in the realm under an agreement or judgment.*

*The King may issue regulations containing further provisions on a continued right of residence for persons with parental responsibility or visitation rights as mentioned in the third and fourth paragraphs, and in the event of cessation of cohabitation under the fourth paragraph.*

14 Section 120 of the Immigration Act reads:

*A foreign national who otherwise satisfies the conditions for a right of residence under this chapter does not have such a right if there are circumstances that provide grounds for refusing the foreign national admission to or residence in the realm under other provisions of the Act. The same applies if the foreign national has knowingly provided incorrect information or kept secret matters of material importance.*

*Registration certificates, residence cards, permanent residence certificates and permanent residence cards may be revoked on the grounds mentioned in the first paragraph.*

*Registration certificates and residence cards may be revoked when the registration is deemed to be invalid for other reasons. Section 35 of the Public Administration Act applies to revocation decisions under this paragraph insofar as it is relevant.*

*Residence documents as mentioned in the second paragraph shall be revoked if the right of residence lapses as mentioned in sections 115, first paragraph, fourth sentence, and 116, first paragraph, fifth sentence.*

*Residence cards shall be revoked if a foreign national who is not an EEA national is granted a residence permit under chapters 3, 4, 6 or 7 of the Act. This does not apply when the foreign national is a family member of an EEA national.*

*The issue of a residence card may be refused under the provisions of sections 118 and 119 if, when asked, the sponsor, see section 39, does not consent to the applicant being granted residence, or if it is likely that the marriage was entered into against*

*the will of one of the parties or with the primary purpose of procuring lawful residence in the EEA for the applicant.*

*The provisions of section 85 apply correspondingly to cases under this chapter*.

*The Directorate of Immigration makes administrative decisions on revocation under the second paragraph.*

*The King may issue regulations containing further provisions.*

15 Section 121, paragraph 1, of the Immigration Act reads:

*EEA nationals and their family members may be rejected when:*

*…*

*(b) they enter into or stay in the realm without a right of entry, right of residence or right of permanent residence under sections 111, 112, 113, 114, 115 or 116 and, moreover, they do not have a right of entry or a residence permit under the general provisions of the Act.*

*…*

16 Circular AI-2/2017, adopted by the Ministry of Labour and Social Affairs (*Instruks i saker om familiegjenforening etter EØS-regelverket*), contains guidelines for the assessment of whether a marriage between an EEA/Norwegian national and a third-country national is an abuse. The Circular requires the relevant administrative body to:

*In questionable cases, carry out an individual assessment of possible abuse of EEA rules, for example whether the marriage was concluded with the sole purpose to obtain the right to residence under EEA rules, which one would not otherwise have been entitled to.*

17 Circular GI-05/2016, adopted by the Ministry of Justice and Public Security (*Instruks om behandling av saker som gjelder opphevelse av innreiseforbud for tredjelandsborgere som er omfattet av utlendingsloven kapittel 13 mv.*), provides in Section 2.1 that, when a third-country national applies for a repeal of an entry ban (based on Section 71(2) of the Immigration Act) from another EEA State and a residence card has been issued to him/her in that EEA State, the assessment of the application must be undertaken on the basis that the third-country national falls within the scope of Directive 2004/38.

## II Facts and procedure

18 Mr Kerim was born in Afghanistan. He left the country in 2005 and stayed in Pakistan, Iran and Turkey before arriving in Greece in 2008. In 2009 he travelled to Romania where he was granted international protection on 24 February 2010.

19 On 18 December 2012, Mr Kerim entered into a religious marriage with a Romanian national. On 21 April 2015, they entered into a civil marriage in Bucharest, at which point his partner took the surname Kerim. The married couple arrived in Norway on 16 December 2015 and registered themselves as living at a residential address in Oslo.

20 On 21 February 2016, Mr Kerim applied for a residence card as a family member of an EEA citizen. The application was examined by the Norwegian Directorate of Immigration (*Utlendingsdirektoratet – UDI*) in cooperation with the police unit dealing with employment and EEA matters (*politiets avsnitt for arbeids- og EØS-saker*). The police conducted interviews with both parties on 23 September 2016, 31 March 2017 and 10 May 2017. As part of the procedure in dealing with the case, the police drew up a number of reports.

21 On 22 January 2018, the Norwegian Directorate of Immigration adopted a decision rejecting the application for a residence card pursuant to the sixth paragraph of Section 120 of the Immigration Act. The Norwegian Directorate of Immigration took the view that Mr Kerim had entered into the marriage with the main purpose of procuring a right of residence in Norway. By the decision, Mr Kerim was also rejected from Norway pursuant to point (b) of the first paragraph of Section 121 of the Immigration Act. An appeal lodged against that decision was rejected by decision of the Immigration Appeals Board of 1 August 2018. The Appeals Board agreed with the Norwegian Directorate of Immigration on the point that Mr Kerim had entered into the marriage with the main purpose of procuring a right of residence in Norway.

22 Mr Kerim applied to have the decision reversed, whilst also initiating legal proceedings against the Norwegian State, represented by the Immigration Appeals Board, claiming that the decision is invalid.

23 By decision of the Immigration Appeals Board of 18 September 2018, the request for reversal was dismissed. On 7 November 2018 Mr Kerim was deported to Romania.

24 In the proceedings before Oslo District Court (*Oslo tingrett*), the case was limited to the validity of the Immigration Appeals Board's decision of 1 August 2018 and decision of 18 September 2018. Oslo District Court proceeded on the basis that the subject-matter of the assessment under the abuse rule is whether the main purpose of the act of abuse was to enjoy the lawful right of residence under the Directive, and that the Immigration Appeals Board's understanding of the exception laid down in the sixth paragraph of Section 120 of the Immigration Act was in accordance with Article 35 of the Directive.

25 During Borgarting Court of Appeal's (*Borgarting lagmannsrett*) hearing of Mr Kerim's appeal, Mr Kerim was held only to have a legal interest in having the validity of the Immigration Appeals Board's decision of 18 September 2018 examined. In its decision, Borgarting Court of Appeal also proceeded on the basis that there was no substantive difference between the assessment under the sixth paragraph of Section 120 of the Immigration Act and that of Article 35 of the Directive.

26 Borgarting Court of Appeal found that the abuse rule does not require that the marriage is entered into solely for the purpose of obtaining residence, but that the national and EEA provisions are intended to catch marriages in which the right of residence is the necessary precondition for entering into the marriage on the part of the applicant, so that the right of residence was the main purpose of entering into the marriage.

27 Borgarting Court of Appeal thus held that, under both sets of rules, it is the applicant's intention as regards entering into a marriage that represents the determining factor in whether a marriage of convenience exists.

28 In its specific assessment of the facts of the case, Borgarting Court of Appeal concluded that it had been clearly demonstrated that Mr Kerim would not have entered into the marriage had there been no prospect of a right of residence.

29 Mr Kerim's appeal to the Supreme Court of Norway concerns the proceedings before Borgarting Court of Appeal and its application of the law.

30 By decision of 9 December 2019, the Appeals Selection Committee of the Supreme Court of Norway granted leave to appeal as regards the application of the law relating to the sixth paragraph of Section 120 of the Immigration Act.

31 Against this background, the Supreme Court of Norway has referred the following questions to the Court:

> *Which criteria should be the basis for determining whether one is faced with a marriage of convenience covered by the abuse rule in Article 35 of Directive 2004/38/EC? It would be useful if the EFTA Court could especially comment on the following:*
>
> a. *Does the EEA citizen's subjective intention for entering into the marriage have any significance for the determination of whether one is faced with a marriage of convenience?*
> b. *If the third country national's intention is the key factor for determining whether one is faced with a marriage of convenience within the meaning of the Directive, is it a requirement that the third country national's wish for a right of residence was the sole purpose for entering into the*

*marriage, or is it sufficient that it was the main purpose for entering into the marriage.*

32 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

33 The case before the referring court concerns an application for a right of residence under the national legal framework adopted on the basis of the Directive. Borgarting Court of Appeal examined the evidence and concluded that the appellant in the main proceedings entered into a marriage with the main purpose of securing a right of residence and that the marriage therefore constituted a marriage of convenience.

34 The questions referred relate to the concept of abuse under Article 35 of the Directive. In essence, the referring court has asked for guidance on what constitutes a marriage of convenience within the meaning of the Directive. In particular, it asks whether the concept must be interpreted as meaning that the sole purpose of such a marriage was a third-country national's wish for a right of residence, or whether it is sufficient that it was the main purpose for entering into the marriage.

35 Under Article 35 of the Directive, EEA States may refuse, terminate or withdraw any right conferred by the Directive in the case of abuse or fraud, such as a marriage of convenience, subject to procedural safeguards. A marriage for the purposes of the Directive is between spouses or its equivalent between partners who have contracted a registered partnership within the meaning of Article 2(2) of the Directive. The Directive does not provide a definition of a marriage of convenience but the phrase is mentioned in Article 35 as an example of abuse of rights or fraud (see also recital 28 of the Directive).

36 Article 35 of the Directive is an expression of the general principle of the prohibition of abuse of rights. The notion of marriage of convenience must therefore be interpreted in accordance with that principle. Where the third-country national family member of an EEA national derives rights of entry and residence from the Directive, the EEA State in question may restrict that right only in compliance with Articles 27 and 35 of the Directive. Any such measure must be proportionate and subject to the procedural safeguards provided for in the Directive (see Case E-4/19 *Campbell*, judgment of 13 May 2020, paragraph 69 and case law cited).

37 A determination of abuse of rights under EEA law is based on a cumulative test combining objective and subjective elements. The objective element requires that it be evident from

the specific set of circumstances in question that, despite formal observance of the conditions laid down by the EEA rules, the purpose of those rules has not been achieved. The subjective element requires an abusive intention to obtain an advantage from the EEA rules by artificially creating the conditions laid down for obtaining it (see *Campbell*, cited above, paragraph 70 and case law cited).

38 However, the fact that an EEA national consciously seeks a situation conferring a right of residence in another EEA State does not in itself constitute abuse. Nor can such conduct constitute an abuse even if the spouse did not, at the time when the couple installed itself in another EEA State, have a right to remain in the EEA State of origin (see *Campbell*, cited above, paragraph 71 and case law cited).

39 The subjective element implies bad faith, that is, an intent to abuse or circumvent provisions of EEA law or wrongfully obtain advantages that would ordinarily have resulted from a lawful use of rights under EEA law, in other words a legitimate and justified use of rights (compare the judgments in *Akrich*, C-109/01, EU:C:2003:491, paragraph 57, and in *Halifax*, C-255/02, EU:C:2006:121, paragraph 69).

40 The Directive's autonomous concept of a marriage of convenience as an example of an abuse of rights must therefore involve bad faith by the party concerned and at the same time artificially create the conditions required for obtaining such a benefit that result in failing to achieve the purpose of the Directive.

41 It is settled case law that the derived right of residence for a third-country national who is a family member of an EEA national exists in order to ensure that the EEA national can exercise effectively freedom of movement. The purpose and justification of the derived right is based on the fact that a rejection thereof would interfere with the exercise of the rights provided for EEA nationals. Therefore, the Directive grants rights to EEA nationals and their family members who during a genuine residence in an EEA State seek to create or strengthen family life (see *Campbell*, cited above, paragraphs 61 to 63). As also expressed in recital 6, maintaining the unity of the family is one of the objectives of the Directive.

42 It must be recalled that any interpretation of the Directive must be exercised in the light of and in line with fundamental rights and freedoms (compare the judgment in *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraphs 79 and 80 and case law cited). It should be added that recital 5 of the Directive links the derived family rights to the EEA national's freedom and dignity while recital 6 confirms that "maintaining the unity of the family in a broader sense" is one of the objectives of the Directive.

43 Fundamental rights form part of the general principles of EEA law. The Court has held that the provisions of the European Convention on Human Rights ("ECHR"), which enshrines in Article 8(1) the right to respect for private and family life, and the judgments of the European Court of Human Rights ("ECtHR") are important sources for determining the

scope of these fundamental rights (see Joined Cases E-11/19 and E-12/19 *Adpublisher AG* v *J and K*, judgment of 10 December 2020, paragraph 50, and Case E-14/15 *Holship* [2016] EFTA Ct. Rep. 240, paragraph 123). In that regard, it must be noted that the EEA States, in particular their courts, must not only interpret their national law in a manner consistent with EEA law but are also under an obligation to ensure that the interpretation and application of acts incorporated into the EEA Agreement does not result in a conflict with fundamental rights protected by EEA law (compare the judgments in *B. M. M. and Others*, C-133/19, C-136/19 and C-137/19, EU:C:2020:577, paragraph 33, and *O and Others*, cited above, paragraph 78).

44 The Court also notes that, according to the ECtHR, "the right to respect for "family life" does not safeguard the mere desire to found a family; it presupposes the existence of a family …, or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father…, or the relationship that arises from a genuine marriage, even if family life has not yet been fully established … or the relationship that arises from a lawful and genuine adoption…" (judgment of the ECtHR, *E.B. v. France*, Application No 43546/02, paragraph 41 and case law cited).

45 The Court notes that in order to distinguish a "genuine marriage", that is, a marriage that does not constitute an abuse of rights under Article 35 of the Directive, from a marriage of convenience, regard must be had to the right to respect for private and family life under Article 8 ECHR (compare the judgment in *Akrich*, cited above, paragraph 58).

46 According to settled case law, where a provision of EEA law does not make reference to the laws of the EEA States for the purpose of ascertaining its meaning and scope, the provision in question must be given an autonomous and uniform interpretation throughout the EEA. Thus, as noted above, marriage of convenience must be interpreted autonomously and uniformly in accordance with EEA law and may not be subject to divergent interpretations by the EEA States (see Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraph 89, and compare the judgment in *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 32 and case law cited). In view of the foregoing, it is necessary to determine what constitutes a "genuine marriage" in order to ascertain the meaning and scope of Article 35 of the Directive, insofar as it relates to abuse in the context of marriages of convenience.

47 As argued by the Commission, marriage entered into in order to create or strengthen family life is often characterised by the intention of the married couple to create together a durable family unit as a married couple. On the contrary, marriages of convenience are characterised by the lack of such an intention (compare also Section 2.2 of the Commission's Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens ("the Commission's Handbook")). As further argued by the Commission, a marriage of convenience is often one in which the marriage was contracted in the absence

of a genuine relationship between the parties and where the construct was purely artificial and entered into for the purposes of improperly obtaining a right under EEA law. The Court observes that marriages may take many forms, and that certain marriages are entered into spontaneously by the parties without a period of reflection. However, such marriages are not abusive unless the essential purpose, without which one or both parties would not have entered into the marriage, is the improper obtaining of a right under EEA law.

48 As argued by the Commission, it may be that a couple has entered into a marriage for a number of reasons, including but not limited to establishing a right of residence. That does not necessarily and inevitably mean that the marriage constitutes an abuse of rights, because the benefit is inherent in the exercise of the right.

49 On the basis of the foregoing, a marriage of convenience means a marriage that fails to satisfy the genuine marriage test, as it represents an artificially established condition on the basis of which a third-country national is to obtain an improper benefit. Thus, where there are reasonable doubts regarding whether a marriage is genuine, national authorities should determine whether at least one spouse involved entered into the marriage essentially to obtain an improper advantage contrary to the objectives of the Directive. This entails the existence of a *conditio sine qua non*, that is, the existence of an essential purpose, which is the improper obtaining of a right under EEA law, without which one or both parties would not have entered into the marriage, that is, had it not been for the essential purpose of improperly obtaining derived rights of free movement and residence for the third-country national, the marriage would not have been entered into by at least one of the spouses. The concept of essential purpose also covers instances in which such a purpose represents the sole purpose for entering into marriage because, where a purpose is exclusive, it is – necessarily – also essential (compare, to this effect, the judgment in *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 53 and case law cited).

50 Against this background, the answer to the second part of the question must be that, in order to determine whether a marriage of convenience for the purposes of Article 35 of the Directive exists, in circumstances in which reasonable doubts exist as to whether the marriage in question is in fact genuine, it is necessary for the national authorities to establish, on the basis of a case-by-case examination, that at least one spouse in the marriage has essentially entered into it for the purpose of improperly obtaining the right of free movement and residence by the third-country national spouse rather than for the establishment of a genuine marriage.

51 As regards the first part of the question referred, the referring court essentially asks whether, in order to determine whether one is faced with a marriage of convenience, the relevant authorities must examine the EEA national’s subjective intention for entering into marriage or whether the third-country national’s subjective intention suffices for this determination.

52 It is for the national court to verify, in accordance with the rules of evidence of national law, provided the effectiveness of EEA law is not undermined, whether the examination of the marriage in question complies with the requirements of EEA law, while ensuring the procedural safeguards prescribed by Article 31 of the Directive. However, the Court may, where appropriate, provide clarification designed to give the national court guidance in its interpretation (compare, for instance, the judgments in *Halifax*, cited above, paragraph 77, and in *Cussens and Others*, cited above, paragraph 59).

53 The Court recalls that Article 10(2) of the Directive sets out an exhaustive list of documents which national authorities shall request a non-EEA national to present in order to demonstrate a family link to the EEA national for the purpose of obtaining a residence card, including documentation evidencing spousal status. It is to be noted that measures adopted by the national authorities, on the basis of Article 35 of the Directive, in order to refuse, terminate or withdraw a right conferred by the Directive must be based on an individual examination of the particular case in the light of the applicant's individual position (compare the judgment in *McCarthy and Others*, C-202/13, EU:C:2014:2450, paragraph 48).

54 When undertaking that examination of the applicant's personal circumstances, it is incumbent upon the competent authority to take account of the various factors that may be relevant in the particular case (compare the judgment in *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 23).

55 The determination of the existence of a marriage of convenience, as described above, requires an assessment of a complex set of facts and circumstances relating to the applicant's situation. It will be necessary for the national authorities of the EEA State in question to establish, using appropriate evidence, whether the nature of the marriage in question is not genuine, and whether the intention of the parties involved has been to enter into the marriage essentially for the purpose of improperly securing the right of free movement and residence of the third-country national, or whether the intention involved other purposes shared by both spouses relating to a genuine marriage.

56 For example, it may be relevant to take account of the duration of the relationship measured at the time when the person applies for residence, as highlighted by the Commission and ESA. A relationship of considerable duration may provide *prima facie* evidence of a genuine relationship. Other elements that may be taken into account include, inter alia, whether the parties reside together, have children together or share parental responsibilities, and have serious long-term commitments together which may be financial (compare also Sections 4.3 and 4.4 of the Commission's Handbook).

57 Since, as stated above, a genuine marriage is predicated upon the good faith of both spouses, a statement from the EEA national relating to the nature of the marriage and the purpose of entering into the marriage must be considered and taken into account in the

overall assessment. The relevant procedural safeguards provided for in Article 31(3) of the Directive must be satisfied in relation to any measure adopted by an EEA State to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of rights.

58 Against this background, the answer to the first part of the question must be that, for the determination of whether a marriage of convenience for the purposes of Article 35 of the Directive exists, in circumstances in which reasonable doubts exist as to whether the marriage in question is in fact genuine, facts must be established and assessed in their entirety, which includes taking into account the subjective intention of an EEA national for entering into a marriage with a third-country national.

## IV Costs

59 The costs incurred by the Danish Government, the Polish 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 questions referred to it by the Supreme Court of Norway hereby gives the following Advisory Opinion:

1. **In order to determine whether a marriage of convenience for the purposes of Article 35 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 exists, in circumstances in which reasonable doubts exist as to whether the marriage in question is in fact genuine, it is necessary for the national authorities to establish, on the basis of a case-by-case examination, that at least one spouse in the marriage has essentially entered into it for the purpose of improperly obtaining the right of free movement and residence by a third-country national spouse rather than for the establishment of a genuine marriage.**

2. **For the determination of whether a marriage of convenience for the purposes of Article 35 of Directive 2004/38 exists, in circumstances in which reasonable doubts exist as to whether the marriage in question is in fact genuine, facts must be established and assessed in their entirety, which includes taking into account the subjective intention of an EEA national for entering into a marriage with a third-country national.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 9 February 2021.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President