E-1/20-16

REPORT FOR THE HEARING

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,

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 EU 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.

I Introduction

1. By letter of 3 March 2020, registered at the Court as Case E-1/20 on the same day, the Supreme Court of Norway (*Norges Høyesterett*) requested an Advisory Opinion in the case pending before it between Mr Kerim and the Norwegian Government, represented by the Immigration Appeals Board.

2. The case before the referring court concerns the validity of the Immigration Appeals Board's decision of 18 September 2018, in which the Immigration Appeals Board upheld the rejection of Mr Kerim's application for a residence card on the grounds that he did not have a right of residence in Norway. Mr Kerim is originally from Afghanistan and is married to a Romanian national.

3. Mr Kerim has based his claim to residence in Norway on Article 7(1)(b) of Directive 2004/38/EC of the European Parliament and of the Council read in conjunction with Article 7(2) thereof.

4. The referring court states that the grounds for the rejection were that Mr Kerim's marriage to a Romanian national was deemed to have been entered into with the main purpose of procuring a right of residence for him in Norway, with the result that issuance of a residence card could be refused under the abuse rule laid down in the sixth paragraph of Section 120 of the Immigration Act.

II Legal background

EEA law

5. 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, ("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, and points 1 and 2 of Annex V.

6. Article 1 of Decision No 158/2007 reads:

> *Annex VIII to the Agreement shall be amended as follows:*
>
> '...
>
> *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".*

...'

7. Recitals 5, 8, 25, 26 and 28 of the Directive read:

(5) 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) With a view to facilitating the free movement of family members who are not nationals of a Member State, those who have already obtained a residence card should be exempted from the requirement to obtain an entry visa within the meaning of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [OJ 2001 L 81, p. 1] or, where appropriate, of the applicable national legislation.

(25) Procedural safeguards should also be specified in detail in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State, as well as to uphold the principle that any action taken by the authorities must be properly justified.

(26) In all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State.

(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.

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

For the purposes of this Directive:

...

2. "family member" means:

(a) the spouse;

...

9. Article 3(1) of the Directive, headed “Beneficiaries”, 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.

10. Article 7 of the Directive, headed “Right of residence for more than three months”, provides, in extract:

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 l(a), (b) or (c).

[...]

11. Article 10 of the Directive, headed “Issue of residence cards”, provides:

1. 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.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

(a) a valid passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

12. 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.

13. 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.

14. Article 35 of the Directive, headed "Abuse of rights", provides:

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

15. The Act of 15 May 2008 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm ("the Immigration Act"),[1]

16. 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.*

17. Section 110, paragraph 2 of the Immigration Act reads:

> *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.*

18. 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.*

19. Section 113 of the Immigration Act provides:

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[1] *Lov. 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her* - Act of 15 May 2008 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm (Immigration Act). All translations of national legal provisions are unofficial.

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.

20. Section 114 of the Immigration Act provides:

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.

21. 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.

22. Section 121, paragraph 1, of the Immigration Act provides:

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.

…

23. 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 of convenience. The Circular requires the relevant administrative body to:

In questionable cases, carry out a 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.

24. 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.

III Facts and procedure

25. Mr Kerim was born in Afghanistan. He left the country in 2005 and resided 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.

26. 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.

27. 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 and, as part of the procedure in dealing with the case, drew up a number of police reports.

28. 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. In 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.

29. 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.

30. 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.

31. In the proceedings before the District Court, the case was limited to the validity of the Immigration Appeals Board's decision of 1 August 2018 and decision of 18 September 2018. The 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.

32. During the Court of Appeal's 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, the 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.

33. The 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.

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

35. In its specific assessment of the facts of the case, the 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.

36. Mr Kerim's appeal to the Supreme Court concerns the Court of Appeal's proceedings and application of the law.

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

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

> **I. 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.

IV Written observations

39. 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 Government of Norway, 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 Republic of Poland, 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.

V Summary of the arguments and observations submitted to the Court

The Norwegian Government

40. As a preliminary remark, the Norwegian Government submits that Article 35 of the Directive covers cases where the predominant purpose for entering into the marriage was to obtain the right of free movement and residence in the EEA. Under this interpretation, the key question should be whether the marriage would have been entered into had there not been the prospect of residence. The Government further maintains that there may be a "marriage of convenience" where the EEA citizen is not aware of the non-EEA national's

real purpose of entering into the marriage. The Norwegian Government considers that, in many cases, this may be necessary to facilitate the abuse.

41. The Norwegian Government submits that it is settled case law that, when interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part.[2]

42. The Norwegian Government notes that Article 35 of the Directive speaks only of "marriages of convenience". The provision does not itself define what constitutes such a marriage. However, the wording of Article 35 still gives valuable guidance for its interpretation. According to the Norwegian Government, the wording gives no indication that the abuse rule only covers cases where the intention to obtain an advantage is the sole purpose pursued. Nor does the provision give any indication that this purpose has to be shared by both parties.

43. The Norwegian Government also notes that Article 35 of the Directive clearly allows the Member States to refuse any right conferred by the Directive "in the case of abuse of rights or fraud, such as marriages of convenience". This shows that "marriages of convenience" is merely an *example* of the broader category of "abuse of rights". Hence, the notion of "marriage of convenience" is thus not separate from the notion of "abuse of rights". It is a label given to a particular situation which fulfils the conditions constituting "abuse of rights".

44. According to the Norwegian Government, the notions of "abuse of rights or fraud" are autonomous concepts of EU and EEA law. It is thus settled case law that, in EU and EEA law, there is a general principle that EU law cannot be relied upon for abusive or fraudulent ends.[3] It follows that Article 35 of the Directive is a specific expression of the general principle prohibiting the abuse of rights as well as fraud. Article 35 must therefore be interpreted in light of this principle. The Government notes that a similar view is expressed in the Commission's 2014 "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 Handbook").[4]

45. The Norwegian Government considers that, in order to assess which subjective requirements are applicable to the notion of a "marriage of convenience", it is necessary to

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[2] Reference is made to the judgments in *Merck*, 292/82, EU:C:1983:335, paragraph 12;, *TNT Express Nederland*, C-533/08, EU:C:2010:243, paragraph 44; and *Liffers*, C-99/15, EU:C:2016:173, paragraph 14.

[3] Reference is made to the judgment *T Danmark* and *Y Denmark Aps*, C-116/16 and C-117/16, EU:C:2019:135, paragraphs 70 to 74.

[4] Reference is made to the 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, SWD(2014) 284 final.

identify the requirements applicable under the general principle that EU and EEA law cannot be relied on for abusive or fraudulent ends.

46. The first case in which the Court of Justice of the European Union ("the ECJ") explicitly addressed the issue of abuse of rights is *van Binsbergen* from 1974.[5] In the *Kofoed* judgment of 2007, the ECJ explicitly referred to the prohibition on abuse of rights as a "general Community law principle".[6] The Norwegian Government maintains that the same is true in EEA law, observing that in *Yara International ASA* the Court described this principle as "an essential feature of EEA law".[7]

47. According to the Norwegian Government, the principle of abuse has been applied across all fields and constitutes a general principle of EU and EEA law. Hence, the requirements do not vary from one field to another, and the whole body of case law is thus relevant.

48. The Norwegian Government submits that, according to case law, establishing abuse involves a two-part test. There must be, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it.[8] This test corresponds to the test that is used by both the ECJ and the Court in cases of abuse in other areas of law. This confirms that Article 35 of the Directive must be regarded as an integral part of the general principle of abuse of rights and should therefore be interpreted in light of this principle.

49. The Norwegian Government notes that the case at hand concerns the second part of this two-part test. The question is whether the exception in Article 35 of the Directive only covers cases where the intention to obtain an advantage is the *sole* purpose pursued, or whether it also covers cases where this is the *predominant* purpose or essential aim.

50. With regard to the subjective element, the Norwegian Government contends that it follows from the well-established formulation of the two-part test that it does not require that the intention to obtain an advantage has to be the "sole purpose" pursued. It is sufficient that there is an "intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it".

51. The Norwegian Government further considers that recent case-law from the ECJ makes it explicit that the general principle of abuse of rights does not require that abuse is

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[5] Reference is made to the judgment in *van Binsbergen*, 33/74, EU:C:1974:131, paragraphs 12 to 13.

[6] Reference is made to the judgment *Kofoed*, C-321/05, EU:C:2007:408.

[7] Reference is made to Case E-15/16 *Yara International ASA* [2017] EFTA Ct. Rep. 434, paragraph 49.

[8] Reference is made to the judgment in *McCarthy and Others*, C-202/13, EU:C:2014:2450, paragraph 54, and Case E-4/19 *Campbell*, judgment of 13 May 2020, not yet reported, paragraph 70.

the sole purpose pursued. Instead, it is sufficient that this is the “essential aim”. Examination of case law in different languages supports the view that the subjective requirement of the test can be met even if additional objectives exist alongside the essential aim. Reference is made to a number of cases from the ECJ.[9]

52. Against this background, according to the Norwegian Government, case law concerning the general principle of abuse of rights makes it clear that it is sufficient that the essential aim is abusive, and explicitly rejects that a “sole purpose” is required.

53. The Norwegian Government contends that the case law concerning the general principle of abuse makes it clear that the subjective element of the two-part abuse test refers to the purpose of the benefitting company or person. It does not presuppose that the essential aim has to be shared by others, as it is the one who abuses the law who has to have the abusive intent. This is reflected in the ECJ judgment in *Cussens*, C-251/16, paragraph 56, which suggests that the “objective of the transaction” must be assessed from the perspective of the company or person that benefits from the transaction.

54. In addition, in *McCarthy and Others*, C-202/13, paragraph 57, the ECJ refers to “the intention to obtain an advantage”. The Norwegian Government emphasises that it is not the EEA citizen that tries to obtain an advantage. This shows that it is the purpose of the non-EEA citizen that is the determining factor.

55. As regards the purpose of Article 35 of the Directive, the Norwegian Government notes that recital 28 of the Directive states that the purpose of Article 35 is to “guard against abuse of rights”. This is also the purpose of the general principle of abuse of rights. To enter into a marriage with the *sole* purpose to obtain the right of free movement and residence in the EEA clearly amounts to an abuse of rights.

56. In the Norwegian Government’s view, this is equally clear if the marriage is entered into for the *predominant* purpose to obtain the right of free movement and residence in the EEA. If the predominant purpose of the marriage is to obtain this right, rather than establishing a family, it seems fair to characterise the marriage as a “marriage of convenience”, even in cases where financial or other considerations are present alongside this purpose.

57. The Norwegian Government contends that this interpretation seems necessary if one wishes to ensure the effectiveness of Article 35 of the Directive and “guard against abuse of rights” and asserts that there are two reasons for this. First, according to the Norwegian Government, it seems fair to assume that a marriage fairly seldom is entered into for the *sole* purpose of obtaining the right of free movement and residence in the EEA. When a person considers whether or not to get married, he or she will presumably often consider

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[9] Reference is made to the judgments *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 75; *Part Service*, C-425/06, EU:C:2008:108, paragraph 45; and *Cussens and Others*, C-251/16, EU:C:2017:881, paragraphs 53 and 60.

other factors as well. If this is correct, a strict "sole purpose" requirement will render the scope of Article 35 far more narrow than its underlying purpose calls for. Second, if Article 35 only covers cases where the third country national's sole purpose for entering into the marriage was to obtain the right of free movement and residence, then every claim that the marriage is a "marriage of convenience" could be met simply by maintaining that the marriage serves other purposes as well. For the immigration authorities in the Member States this would be nearly impossible to refute, since the question of which purposes a marriage serves is essentially a psychological matter.

58. The Norwegian Government also argues that it would be difficult to ensure the effectiveness of Article 35 of the Directive and "guard against abuse of rights" if the predominant purpose of securing the right of free movement and residence in the EEA entering has to be shared by both parties. This would make it even more difficult to prove the marriage is indeed a "marriage of convenience". Furthermore, this interpretation would entail that a marriage where the non-EEA national's *sole intention* is to obtain the right of free movement and residence does *not* constitute a "marriage of convenience" if the EEA national is led to believe that this is not the intention. This interpretation would in effect encourage non-EEA nationals to be dishonest about their real intentions in relation to the marriage at the expense of the unknowing EEA national, and would reward those who succeed with a permit.

59. The Norwegian Government submits that in the Handbook a similar view is adopted on page 12. The Handbook states that "a marriage by deception arises when the EU spouse is deceived by the non-EU spouse to genuinely believe that the couple will lead a genuine and lasting marital life. Such a marriage is a marriage of convenience and should be tackled accordingly, with due regard to the innocence of the EU spouse. In such marriages, the EU citizen is not a willing accomplice, but a victim guilty only of good faith."

60. In the Norwegian Government's view, this clearly indicates that it cannot be a requirement that the essential aim of obtaining the right of free movement and residence in the EEA must be shared by both parties. It is sufficient that this is the essential aim of the non-EEA citizen.

61. The Norwegian Government notes that recital 28 of the Directive seems to indicate that Article 35 of the Directive only covers cases where the third country national's sole purpose for entering into the marriage was to obtain the right of free movement and residence in the EEA. The Norwegian Government further notes that the recital seems to draw a distinction between "marriages of convenience", on the one hand, and "any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence", on the other. It contends that the context leaves it unclear whether the words "sole purpose" refer only to "any other form of relationships" or whether they also refer to "marriages of convenience".

62. From the Norwegian Government's perspective, it is not necessary to express a definitive view on this. It is clear from the recital and the wording of Article 35 of the Directive itself that this provision constitutes a specific expression of the general principle of abuse. Hence the recital must be interpreted in this light and could not in any event outweigh what follows from the wording and purpose of Article 35, interpreted in light of the case law referred to. [10]

63. The Norwegian Government contends that the Commission handbook, published in July 2009, "on guidance for better transposition and application 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" (COM(2009) 313 final) is not legally binding. In this communication, the Commission expressed the view that "... abuse may be defined as an artificial conduct entered into solely with the purpose of obtaining the right of free movement and residence under Community law …". In the assessment of the Norwegian Government, the legal basis for this requirement seems to be the ECJ judgments in *Emsland-Stärke* and *Centros*.[11]

64. However, the Norwegian Government considers that the ECJ does not seem to say that Article 35 of the Directive only covers cases where the intention to obtain an advantage is the sole purpose pursued. Instead, it considers the ECJ to say that the subjective element consists of "the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it". This subjective requirement can be met both in cases where the intention to obtain an advantage is the *sole* purpose pursued, and in cases where this is the *predominant* purpose.

65. The Norwegian Government submits that the Commission in its 2014 Handbook reiterates and elaborates its view on what constitutes a "marriage of convenience" and explains what is meant by "sole purpose". On page 9 of the Handbook, the Commission states that "the notion of 'sole purpose' should not be interpreted literally (as being the unique or exclusive purpose) but rather as meaning that the objective to obtain the right of entry and residence must be the predominant purpose of the abusive conduct".

66. The Norwegian Government indicates its support for this interpretation, which is in line with the case law concerning abuse of rights.

67. The Norwegian Government proposes that the questions be answered as follows:

Answer to Question 1:

[10] Reference is made judgement in *Skatteverket*, C-647/17, EU:C:2019:195, paragraph 32.

[11] Reference is made to the judgments in *Emsland-Stärke*, C-110/99, EU:C:2000:695; and *Centros*, C-212/97, EU:C:1999:126.

A "marriage of convenience" within the meaning of Article 35 in the Directive is a marriage where the predominant purpose for entering into the marriage was to obtain the right of free movement and residence in the EEA. The key question is whether the marriage would have been entered into had it not been for the prospect of residence.

Answer to Question 2:

The EEA citizen's intention for entering into the marriage is not decisive when determining whether or not a marriage is a "marriage of convenience".

The Danish Government

68. The Danish Government submits that the legal framework leaves the EEA States with a margin of appreciation when determining whether a marriage is one of convenience within the meaning of Article 35 of the Directive. This assessment must be made by applying the criteria deemed relevant in the individual case, while seeking inspiration in the non-exhaustive and non-binding guideline criteria provided in the Commission's Handbook. Article 35 was inserted in the Directive on request by the EU Member States to make it clear that – as an exemption – they may refuse, terminate or withdraw any rights conferred by the Directive in the case of abuse of rights or fraud. However, the EU legislative bodies did not clarify the concept of abuse of rights in the form of a marriage of convenience nor did they clarify what constitutes abusive conduct in general within the meaning of Article 35.

69. The Danish Government submits further that recital 28 only explains that, for the purpose of this Directive, abuse should be understood as a form of relationship contracted for the sole purpose of enjoying the right of free movement and residence. Logically, in its view, the emphasis here is on the purpose, which in this particular context must be to enjoy (or confer) a right of free movement, which would not exist otherwise, while "sole purpose" forms part of the overarching concept of abuse applying to all areas of EU law.

70. The Danish Government notes that Article 35 of the Directive mentions marriages of convenience as an example of abuse of rights. However, since that provision does not define the concept of abuse of rights or marriages of convenience as such, the concept of abuse of rights must be determined by applying the two-part test set out by the ECJ in *McCarthy*.[12] When it comes to marriages of convenience as a form of abuse, the objective element consists of a marriage formally observing the conditions laid down by the Directive for obtaining a derived right of residence as a spouse, while the subjective

[12] Reference is made to the judgment in *McCarthy and Others*, cited above, paragraph 54.

element is the intention to obtain a (derived) right of residence by artificially fulfilling the conditions laid down for obtaining it, i.e. through a marriage of convenience.

71. The Danish Government further notes that, in its Handbook, the Commission concludes that, as married couples cannot be obliged or required to present evidence that their marriage is not abusive, the burden of proof for abuse in the form of a marriage of convenience rests on the national authorities. An investigation may only take place where there are reasonable doubts about the genuineness of a marriage contracted between a non-EU national and an EU citizen, despite documentation indicating that they are spouses. However, according to the Danish Government, neither the ECJ nor the Court has had the opportunity as yet to interpret more specifically what is required for national authorities to satisfy the burden of proof for abuse in the form of a "marriage of convenience" within the meaning of the concept of "abuse of rights" in Article 35 of the Directive.

72. Moreover, the Danish Government observes that the Handbook is intended to ensure that the practices of the competent national authorities in detecting and investigating suspected cases of marriages of convenience – to the extent possible and subject to the particulars of the individual case – are based on the same factual and legal criteria within the Union and to contribute to compliance with EU/EEA law. It submits that, as is stated in the Handbook, Section 4 "Operational measures within national remit", the guidance provided therein, such as examples of hints of abuse that could trigger an investigation, is intended as a toolbox of solutions allowing Member States to set up something more tailored.[13]

73. For these reasons, the Danish Government argues that, within the relevant legal framework, a margin of appreciation is left for national authorities and courts to fill with tailored criteria, including – but not limited to – the non-exhaustive and non-binding guideline criteria provided in the Commission's Handbook. When it comes to the assessment of a suspected marriage of convenience, the Danish Government broadly supports the approach taken by the Norwegian Government, namely, that it is the situation at the time when the marriage is concluded which is decisive for the assessment and that for subsequent circumstances to be taken into account a new application must be filed.[14]

74. In the Danish Government's view, this should be the point of departure. However, it stresses that subsequent circumstances, until the point in time at which the assessment is made on the application from the non-EEA citizen for a residence card, should also be taken into account. If subsequent circumstances indicate that the marriage is genuine, for instance a family life initiated after the marriage, the assessment that the conditions for a right of residence are fulfilled should only have legal effect *ex nunc* and vice versa.

[13] Reference is made to the Handbook, pp. 32-33.

[14] Reference is made to the request for an Advisory Opinion, point 39.

75. On the question of whether the intention of both spouses must be taken into account, the Danish Government submits that both intentions must necessarily be considered. However, in its view, it is not a requirement that they were both driven by a motivation to abuse EU/EEA law. It contends that this view finds support in the Handbook. In the section on reasons and motivations behind marriages of convenience, it is clearly indicated that the intention of both parties is to be taken into consideration. It is explained, inter alia, that both the EEA and non-EEA citizen might have individual reasons for entering into the marriage; i.e. an economic gain for the EEA citizen, while the non-EEA citizen's intention of entering into the marriage might be the prospect of obtaining a right of entry and residence under EU law.[15]

76. According to the Danish Government, the Norwegian Government is, however, correct in contending that ultimately the non-EEA citizen's intention is the determinative factor. A key question in this regard, as contended by the Norwegian Government, is whether the marriage would have been entered into at all, had it not been for the prospect of residence.[16] If indeed it is shown that the prospect of residence was the non-EEA citizen's intention and not the forming of a family life with a view to promoting the EEA citizen's right of free movement, which is the purpose protected by the Directive, this could satisfy the burden of proof in relation to the subjective element in the *McCarthy* test, i.e. the artificial conduct.

77. The Danish Government contends that its views are in line with the definition of a "marriage of deception"[17] as a category of a marriage of convenience, which indicates that the individual intention has to be considered for both parties, but also that a marriage may be considered abusive even though only the non-EEA citizen was driven by a motivation to abuse EU/EEA law.

78. The Danish Government agrees with the view taken by the Norwegian Government, namely, that it is not a requirement that the third country national's wish for a right of residence was the sole purpose for entering into the marriage. It is it sufficient that it was the main purpose for entering into the marriage. The wording of Article 35 of the Directive cannot be said to contradict this point of view, since the wording does not clarify abuse in the form of marriages of convenience within the meaning of the Directive.

79. As regards the wording of recital 28, the Danish Government submits that logically the emphasis here is on the fact that the purpose must be to enjoy (or confer) a right of free movement, which would not exist otherwise, while "sole purpose" is part of the concept of abuse in general. This logic is in accordance with the objective of Article 35 of the Directive, which is to prevent the conferral of a right of free movement by way of marriage

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[15] Reference is made to the Handbook, Section 4.1, p. 33.

[16] Reference is made to the request for an Advisory Opinion, point 36.

[17] Reference is made to the Handbook, p. 12.

if the conduct is artificial and motivated by an abusive intent.[18] In such a case, the subjective intention does not correspond with the reason why a spouse is granted a derived right of residence by the Directive. This point of view is in accordance with the Handbook, which is drafted as operational guidelines in close cooperation with the EU Member States and thus to some extent reflects their practices.

80. The Danish Government notes that the Handbook indicates that the notion of "sole purpose" should not be interpreted as the exclusive purpose, but rather as meaning that the objective to obtain the right of entry and residence must be the predominant purpose of the abusive conduct.

81. According to the Danish Government, from an operational point of view, it would not be feasible to have a higher threshold for the burden of proof – which rests on national authorities – for abuse in the form of a marriage of convenience. First, the non-EEA citizen's intention for contracting the marriage might be equivocal.[19] Second, it takes more to prove an abusive conduct than the wish for a right of residence.[20] Third, given that the Handbook is drafted by the Commission in close cooperation with the EU Member States, the "main purpose" is likely to be the commonly applied norm. Moreover, it would seem to strike a fair balance between respecting the legal rights of the person concerned and finding an evidentiary standard that respects the legal interest of the State concerned in determining a marriage of convenience, with a view to ending the unlawfulness, which is a recognised interest from a public policy point of view.

82. An investigation into a marriage can only take place where there are reasonable doubts about its genuineness.[21] Furthermore, as stated in Article 35 of the Directive, the States may only make use of proportionate measures while respecting procedural safeguards. All this should provide for a sufficient level of legal certainty for the individual. For these reasons, the current threshold should not be raised.

83. For the abovementioned reasons, the Danish Government proposes that the questions be answered as follows:

> *Within the relevant legal framework and thus in compliance with EEA law, the EEA States are granted a margin of appreciation to apply tailored criteria for identifying a marriage of convenience.*

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[18] Reference is made to the judgment in *McCarthy and Others*, cited above.

[19] Reference is made to arguments made by Mr Kerim, cited in the request for the Advisory Opinion, point 34. Reference is also made to the Handbook, Section 4.

[20] Reference is made to the Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application 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 (COM(2009) 313 final) (the "2009 Guidelines").

[21] Reference is made to the Handbook, p. 28.

a) *In order to identify a marriage of convenience within the meaning of Directive 2004/38/EC, Article 35, the intention of both the EEA citizen and the non-EEA citizen for entering into a marriage is of significance; however the key factor and a* <u>*necessary precondition*</u> *for applying Article 35 is that the non-EEA citizen's intention with entering into the marriage with an EEA citizen was to obtain a derived right of residence.*
b) *In that regard it is sufficient that the main purpose of the non-EEA citizen for entering into the marriage was to obtain a derived right of residence.*

The Republic of Poland

84. The Republic of Poland submits that, in its judgment in *Emsland-Stärke*,[22] the ECJ devised a test in order to ascertain whether a particular instance of conduct constitutes abuse. The test is composed of the combination of an objective and a subjective element. The objective criterion is that "despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved", while the subjective element consists of "the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it". When both conditions are met, the advantage stemming from EU (EEA) law should not be conferred upon the person applying to obtain it.

85. The Polish Government contends that the concept of abuse of rights should be distinguished from fraud.[23] Abuse of rights involves conduct, the sole purpose of which is to benefit from free movement and residence in the EEA and which formally respects the provisions of EEA law, but does not comply with the purposes of these provisions.[24] Fraud is likely to be limited to forgery of documents or false representation of a material fact concerning the conditions attached to the right of residence.[25] The abusive conduct must take place with the purpose of obtaining the right to free movement and residence under EEA law. In cases of marriages of convenience its abusive character is represented by the mala fides of the spouse (or spouses) prior to and at the moment he/she enters into the marriage.

86. The Polish Government further argues that, as EEA law cannot be relied on in the case of abuse,[26] Article 35 of the Directive allows Member States to take effective and necessary measures to fight abuse and fraud in areas falling within the material scope of EEA law on free movement of persons. As the ECJ held, there would be an abuse if the

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[22] Reference is made to the judgment in *Emsland-Stärke*, cited above, paragraphs 52 and 53.
[23] Reference is made to the Handbook.
[24] Reference is made to the judgments in *Emsland-Stärke*, cited above, paragraph 52; and in *Centros*, cited above, paragraph 25.
[25] Reference is made to the judgments in *Kol*, C-285/95, EU:C:1997:280; and *Gloszczuk*, C-63/99, EU:C:2001:488.
[26] Reference is made to the judgment in *Akrich*, C-109/01, EU:C:2003:491, paragraph 57.

facilities afforded by EU (EEA) law in favour of migrant workers and their spouses were invoked in the context of marriages of convenience entered into in order to circumvent the provisions relating to entry and residence of nationals of non-Member States.[27] In such circumstances Member States have the right to take the necessary measures to refuse, terminate or withdraw any right conferred by the Directive. Any such measure must be proportionate and subject to the procedural safeguards provided for in the Directive.[28] The ECJ has also held that any non-EU (non-EEA) national married to an EU (EEA) citizen, claiming to be a beneficiary of Directive 2004/38/EC, benefits from the minimum procedural guarantees provided by that Directive.

87. As regards the concept of sole purpose, the Polish Government submits that from the wording of the Directive it can be inferred that a marriage of convenience is a marriage contracted for the sole purpose of enjoying the right of free movement and residence. It is therefore necessary to define what is the meaning of "sole purpose" in this context. As the Commission pointed out in its Handbook, the notion of "sole purpose" is an autonomous concept of EU (EEA) law and it must be interpreted according to EU (EEA) law, taking into account primarily the purpose of this concept in the wider context of the fundamental freedom to move and the fight against abuse.[29]

88. The Polish Government notes that the Commission has also explained that a marriage cannot be considered to be a marriage of convenience simply because it brings an immigration advantage, such as, for example, the right to a particular surname, location-related allowances, tax advantages or entitlement to social housing for married couples. Therefore, the notion of "sole purpose" should not be interpreted literally (as being the unique or exclusive purpose), but rather as meaning that the objective to obtain the right of entry and residence must be the predominant purpose of the abusive conduct. It seems that such a situation occurred in the present case, as it was demonstrated by Norwegian immigration authorities that the appellant would not have entered into the marriage had there been no prospect of obtaining a residence permit for a spouse of an EEA citizen. Therefore, when determining if the marriage is one of convenience, it is sufficient to demonstrate that the third country national's wish to obtain a residence permit was the main purpose for entering into that marriage, so that mala fides existed on his/her part prior to and at the moment of contracting marriage.

89. The Polish Government understands the first question as seeking to establish whether the EEA citizen's subjective intention for entering into the marriage has any significance for the determination of whether one is faced with a marriage of convenience.

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[27] Ibid.

[28] Reference is made to the judgment in *McCarthy and Others*, cited above; and to the judgment in *Metock and Others*, C-127/08, EU:C:2008:449, paragraph 75.

[29] Reference is made to the Handbook, p. 10.

90. The Polish Government takes view that the EEA citizen's objective intention for entering into the marriage in good faith is not of decisive value for the determination whether the marriage is one of convenience. A genuine marriage is one which both spouses have entered in good faith. Therefore, a marriage cannot be considered genuine if the second spouse, who is not an EEA citizen, is guided by mala fides – that is to say, his/her predominant purpose is to abuse the provisions of the Directive.

91. As the Commission mentioned in its Handbook, in the case of a marriage contracted as a result of deceit, a spouse who is an EEA citizen is deceived by a spouse, who is a third country national, genuinely believing that this relationship will lead to a genuine and lasting marital life. Such marriage is also a marriage of convenience, which should be tackled accordingly, with due regard for the innocence of an EEA spouse. In such marriage, an EEA citizen is not a willing accomplice, but a victim guilty only of good faith.[30]

92. The Republic of Poland proposes that the Court give the following answer to the questions referred:

> *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 is sufficient to establish that the wish to obtain the right of entry and residence was the main purpose for entering into the marriage – but not necessarily the exclusive purpose.*
>
> *The EEA citizen's subjective intention for entering into the marriage does not change the fact that it cannot be regarded as a genuine one if the third country national has entered into this marriage in bad faith.*
>
> *In such a case, it is sufficient that the third country national's wish was the main purpose for entering into the marriage.*

ESA

93. As a preliminary observation, ESA highlights that the general purpose of the Directive is to regulate, facilitate and, indeed, promote the freedom of movement of EEA nationals between EEA States, regardless of whether or not they are economically active, and of their family members, regardless of their nationality. Moreover, having regard to the context and objectives of the Directive, its provisions cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness.[31] The rights granted to family members, particularly those of third country origin, are to be seen in relation to the primary right of the EEA national to whom they are related. More particularly, they are granted on the presumption that, if it were not possible for the EEA

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[30] Ibid., p. 12.

[31] Reference is made to the judgments in *Metock and Others*, cited above, paragraph 84; *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 39; and in *McCarthy and Others*, cited above, paragraph 32.

national to be accompanied or joined by their family members, this could inhibit that person from effectively exercising their right to move.[32] Consequently, the right of a third country national to move freely between and reside in other EEA States is derived from their status as a family member of an EEA national who has exercised rights under the Directive.[33]

94. According to ESA, the rights conferred by the Directive are meant to be used, as is evidenced by these favourable conditions. In that context, the intentions with which the EEA national decides to move to and reside in another EEA State are, in principle, immaterial. Even if, as was pointed out by the Court in *Campbell*, EEA nationals consciously seek situations in order to make use of the rights granted to them by the Directive, this does not in itself constitute abuse.[34] This is because the exercise of these rights facilitates the free movement of persons, which is one of the fundamental freedoms of the EEA and a key objective of the EEA Agreement.[35]

95. ESA notes that the Court, in its observation referred to in the previous paragraph, did not specify for whom the situation conferring a right of residence may be consciously sought by the EEA national concerned. In ESA's view, the implication is that this may include a family member from a non-EEA State. The derived right conferred on such a family member may, therefore, be enjoyed in the same manner by that family member without this constituting abuse. Further, there is nothing in the wording of Article 35 of the Directive, which refers to "any right conferred by" the Directive, to indicate that the derived rights of non-EEA family members are to be treated differently from the direct rights of EEA nationals.

96. ESA submits that the key question is where or how to draw the dividing line between legitimate use of the rights contained in the Directive and the abuse of these rights. In that regard, ESA notes that the Court, again in *Campbell*, observed that the rights of entry and residence may only be restricted in compliance with Articles 27 and 35 of the Directive and that any such measure must be proportionate and subject to the procedural safeguards provided for in the Directive.[36]

97. In line with settled and longstanding case law of both the Court and the ECJ, any exceptions to the basic freedoms granted by the EU Treaties and the EEA Agreement must be interpreted strictly.[37] Whilst this has been explicitly held in respect of the grounds listed

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[32] Reference is made to *Campbell*, cited above, paragraph 61.
[33] Ibid.
[34] Ibid., paragraph 71.
[35] Reference is made to recital 5 of the EEA Agreement.
[36] Reference is made to *Campbell*, cited above, paragraph 69; and the judgments in *Metock and Others*, cited above, paragraphs 74, 75 and 95; and *McCarthy and Others*, cited above, paragraph 45.
[37] Reference is made to the judgments in *Bajratari*, C-93/18, EU:C:2019:809, paragraph 50; and in *Coman and Others*, cited above, paragraph 44.

in Article 27 of the Directive,[38] in ESA's view, this should also be the case with respect to Article 35, which is referred to by both the Court and the ECJ in juxtaposition with Article 27 in the consideration referred to above. This strict interpretation applies to both the scope of the term "abuse" and to the parameters for the application of this provision. From this perspective, abuse of rights pursuant to Article 35 is a narrow exception to be employed only in rare circumstances.

98. A further consideration in this sense is that the EEA States may not adopt rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.[39] Employing too wide a concept of abuse could have precisely such an effect. Likewise, administrative practice on the existing rules must also adhere to this logic.

99. As regards the parameters for the application of Article 35, ESA contends that not only does a strict interpretation imply that the principle of proportionality and procedural safeguards are observed, it also means that the burden of proof lies on the authorities of the EEA States seeking to restrict rights under the Directive. It is for the national authorities and national courts to verify the existence of abuse in individual cases, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of EEA law is not thereby undermined.[40]

100. A further implication of a strict interpretation of this provision is that "any assessment of fraud or abuse by a national court must be conducted on a case-by-case basis".[41] From a substantive point of view, the scope of the concept of "abuse" also needs to be defined in strict terms. In ESA's view, the same applies necessarily to the term "marriage of convenience", which is presented as an illustration of "abuse" in Article 35 of the Directive. In order to establish criteria for determining whether a marriage is indeed a "marriage of convenience" for the purposes of this provision, it is first necessary to consider the scope of the term "abuse".

101. ESA submits that the European Courts have, to date, not provided detailed criteria for how to assess whether a certain activity, situation or conduct constitutes "abuse" within the meaning of Article 35 of the Directive. Nonetheless, it follows from the case law on the concept of "abuse" in general, that a dual test is to be followed. First, the State must demonstrate the presence of a combination of objective circumstances in which, "despite formal observance of the conditions laid down by EEA rules, the purpose of those rules

[38] Reference is made to Case E-15/12 *Wahl* [2013] EFTA Ct. Rep. 534, paragraph 83; and *K.* v *Staatssecretaris van Veiligheid en Justitie*, C-331/16, EU:C:2018:296 and *H.F.* v *Belgische Staat*, C-366/16, EU:C:2018:296, paragraph 40.

[39] Reference is made to *Wahl*, cited above, paragraph 54.

[40] Reference is made to the judgments in *Emsland-Stärke*, cited above, paragraph 54; and *Oulane*, C-215/03, EU:C:2005:95, paragraph 56.

[41] Reference is made to *Campbell*, cited above, paragraph 72.

has not been achieved". Second, the State must demonstrate the existence of "a subjective element consisting in the intention to obtain an advantage from the EEA rules by artificially creating the conditions laid down for obtaining it".[42]

102. ESA stresses that it is not open to national courts, when assessing the exercise of a right arising from EEA law, "to alter the scope of that provision or to compromise the objectives pursued by it".[43] This requirement must guide the national courts when applying the test.

103. ESA submits that this dual test provides a way in which to structure the examination of the relevant factors in each case. It is also important to underline that the test is cumulative, meaning that the State must demonstrate fulfilment of both the objective and the subjective aspects of the test. Thus, the dual test may allow, for instance, for reliance on sufficiently robust statistical evidence as the starting point for an investigation aimed at determining whether a marriage is genuine. However, such contextual information must be supplemented with the evidence of subjective factors which show that not only was there an abuse of rights in many comparable situations,[44] but, more importantly, particular subjective elements also existed in the case at hand which, following a specific assessment of all the relevant individual factors, made it sufficiently clear that there was an intention to circumvent the rules. These circumventions would take the form of obtaining an advantage from the EEA rules by artificially creating the conditions laid down for obtaining it.

104. ESA stresses that the presence of the subjective element is thus necessary to avoid disregarding the very substance of the primary and individual right of EEA nationals "to move and reside freely within the territory of the Member States and of the derived rights enjoyed by those citizens' family members who are not nationals of a Member State".[45] Conversely, the fact that it is not sufficient to demonstrate the existence of subjective elements, objective circumstances also being required, underlines that the rights in question can only be denied in exceptional situations.

105. ESA emphasises that this is a strict test, also highlighting that the concept of abuse under Article 35 of the Directive is a narrow one. In this connection, although States may examine whether the conditions for obtaining a right are really fulfilled, such as whether a residence is in fact "genuine", as was recently made clear in *Campbell*, in ESA's submission, this should not be examined under Article 35 and must be distinguished from abuse. ESA stresses that, under the first limb of this test, it must be demonstrated that it

[42] Reference is made to *Campbell*, cited above, paragraph 70; and to the judgments *O.* v *Minister voor Immigratie, Integratie en Asiel* and *Minister voor Immigratie, Integratie en Asiel* v *B. ("O and B")*, C-456/12, EU:C:2014:135, paragraph 58; and in *McCarthy and Others*, cited above, paragraph 54.

[43] Reference is made to the judgment in *McCarthy and Others*, cited above, paragraph 114.

[44] Ibid., paragraphs 56 and 57.

[45] Ibid., paragraph 57.

follows from a combination of objective circumstances that, despite the formal observance of the conditions for the rules conferring of a right, the purpose of these rules has not been achieved. In the present case the right at issue is that of an EEA national to move to another EEA State and to reside there together with his/her spouse, as defined in Article 2(2) of the Directive, irrespective of the nationality of the spouse. In this context, the realisation of the purpose of the rules on free movement and residence laid down in the Directive is predicated on the bona fide exercise of these rights. In the case of an EEA national exercising these rights together with a spouse, in particular if the spouse is of non-EEA State origin, the latter derives his/her rights from the marital relationship with the EEA national. As the marriage to the principal holder of the right is the basis for the derived rights of the spouse of third country origin this necessarily presupposes that the marriage must be genuine.

106. ESA argues that in order to assess whether a marriage is genuine or artificial it needs to be determined which moment in time constitutes the relevant reference point for this assessment. Assuming that the most relevant moments are the time of conclusion of the marriage, the time of entry into the EEA State concerned and the time of applying for a residence permit, ESA submits that the latter is the most appropriate, as it is from that moment in time that the competent authority will be able to gauge the overall situation regarding the marriage. In this connection, ESA stresses that, irrespective of the original reason for concluding the marriage, circumstances and intentions may evolve over time, as can the nature of the marital relationship. The determination of the nature of such a relationship must therefore take all relevant factors and personal circumstances into account.

107. In that regard, ESA submits that there are many obvious indicators of the existence of a genuine or sincere relationship, which include matters such as sharing a common household, having children together, participating in each other’s broader family life, amongst many others. At the same time, ESA emphasises that the absence of such obvious factors is not necessarily indicative of an artificial construct.[46] One factor which may also be of relevance, particularly in the present case could be the length of time between the conclusion of the marriage and the application for a residence permit. Though not conclusive, the shorter the gap between the two, the greater the likelihood that the marriage might be an artificial construct.

108. ESA notes that it appears from the statement of facts provided in the Supreme Court’s request that the applicant and his EEA national partner entered into a religious marriage in 2012 and sealed this in a civil marriage in 2015, before moving to Norway later that year. In the absence of indications to the contrary, it would seem that the couple had been together for about three years before they formalised their relationship and subsequently moved to Norway. This in itself could, subject to verification, be indicative

[46] Reference is made to the Handbook, p. 34.

of the genuine character of the marriage. By contrast, the fact that the couple moved to Norway relatively quickly after the civil marriage could conceivably be regarded as a pointer in the opposite direction. At any rate, the facts of this case make clear that the moment of application for the residence permit is most suited for assessing the possibility of abuse and the intentions of the marriage partners, as situating that moment either in 2012 (religious marriage) or 2015 (civil marriage) would appear gratuitous.

109. In addition, ESA submits that, alongside the personal circumstances of the partners to the marriage, other more contextual information may be used in the assessment. An example of such objective circumstances, which may be relied on in order to demonstrate that the purpose of the rights conferred by the Directive have not been achieved, could be the documented existence of sufficiently widespread patterns of behaviour from persons in similar situations who engage in or seek to engage in abuse of rights. Thus, if, for instance, it can be objectively established that many third country nationals from the same region often enter into marriages of convenience, within the meaning of Article 35 of the Directive, with EEA nationals from a particular country or region, this may be one such factor. Another example may be the demonstration of behaviour which from the perspective of the genuine exercise of right in question is significantly atypical from a statistical perspective.

110. All of these factors must operate in combination. Moreover, ESA submits that the notion of "objective circumstances" entails a qualitative standard, which, for example, rumours, impressions or anecdotal evidence would likely not meet. Finally, a sufficient number of such relevant circumstances must be present. Only then can the first limb of the test be considered fulfilled, allowing the second limb of the test, which must also be fulfilled in order for an abuse to exist, to be examined.

111. The second limb of the test is aimed at ascertaining the subjective intention to obtain an advantage under EEA rules by artificially creating the conditions to obtain it. ESA notes that here the challenge is to determine how such a subjective intention can be established.

112. As a starting point, ESA observes that the referring court has asked for clarification about different aspects of the subjective intent of the EEA national (point (a)) and of the third country national (point (b)). ESA stresses that there is nothing in the wording of recital 28 or Article 35 of the Directive, or the relevant test established in case law, which indicates that the subjective intent should be treated any differently on the basis of the status of the holder of the alleged rights in question.

113. In the context of the question raised by the Supreme Court in point (a), ESA emphasises that the EEA national is the primary rights holder. This means that the EEA national is not merely a conduit for the derived rights of the third country national. Indeed, it is the fact that the third country national may enjoy derived rights which makes the

enjoyment of the rights of the EEA national effective.[47] Consequently, the competent national authorities must examine and establish the potential subjective intent of the EEA national to obtain advantages from the EEA rules, in the form of the right of free movement and residence, by artificially creating the conditions laid down for obtaining them in cases concerning an alleged marriage of convenience.

114. With respect to the question raised by the Supreme Court in point (b), ESA contends that there should be no distinction between the intent of the EEA national and the intent of the third country national when it comes to the question whether it is a requirement that the wish for a right of residence was the sole purpose for entering into the marriage, or whether it is sufficient that it was the main purpose for entering into the marriage.

115. Moreover, ESA cannot see that any other approach than "sole purpose" is feasible when interpreting Article 35 of the Directive, which as an exception should be interpreted strictly, in the light of recital 28 of the Directive. In this context, it must be determined both which kind of "advantage" is referred to and also what is meant by "sole purpose". With respect to the advantage, ESA submits that, unlike what the wording of the general test may indicate, this will not be just any advantage (or advantages) that will be obtained under EEA rules by artificially creating the conditions laid down for obtaining that advantage. Instead, ESA understands recital 28 of the Directive, in the specific context of a marriage of convenience, to refer to the right of free movement and residence only.

116. With respect to the "sole purpose", the question is whether it is to be understood literally, as meaning the only purpose to the exclusion of any other purpose. Or is it to be understood as meaning that the objective to obtain the right of entry and residence should "be the predominant purpose of the abusive conduct"? ESA shares the Commission's view in the Handbook that the notion of "sole purpose" does not have to be interpreted literally, as being the unique or exclusive purpose. Instead, the concept of "sole purpose" can be understood as meaning that the objective to obtain the right of free movement and residence must be the predominant purpose of the abusive conduct.

117. However, apart from the Commission's interpretation in the Handbook, ESA is not aware of any other relevant authority which should lead to any understanding which deviates from a literal one. Indeed, an interpretation deviating from a literal one would not seem to be easily reconcilable with the requirement that this exception must be interpreted strictly. Moreover, legal certainty as a general principle of EEA law would seem to lead to the same conclusion.[48] This principle entails a general requirement of specificity, precision

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[47] Reference is made to *Campbell*, cited above, paragraph 61.

[48] Reference is made to Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 37; and to Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord and Others* v *ESA* [2005] EFTA Ct. Rep. 117, paragraph 163; and to the judgment in *Halifax*, cited above, paragraph 72.

and clarity,[49] and that persons concerned should know unambiguously their rights and duties so that they may take measures accordingly.

118. Second, while there may not be any relevant authorities from the European Courts on this issue, ESA has examined the notion of abuse in other areas of EEA and EU law, where it has been held applicable in numerous varied fields.[50] For these reasons, ESA offers the Court an alternative route, should it wish to explore a literal interpretation of the concept of "sole purpose".

119. In ESA's analysis, it seems that the notion of abuse and the issue of "sole purpose" has been examined most often in particular cases concerning VAT and tax. For instance, in *Halifax*, the ECJ held that EU law cannot be applied to "abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by" EU law.[51] According to the ECJ in that case, it "must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in point 89 of his Opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages."[52] Here, the narrow phrase "sole purpose" seems to be equated with the broader term "essential aim". In itself, this might imply a broader approach to the abuse exception than that advanced by ESA. On the other hand, the test advanced by the Advocate General and explicitly endorsed by ECJ, i.e. whether the activity in question may have some explanation other than abuse, seems clearly to indicate that ECJ did in fact have a more narrow test in mind and is clearly compatible with ESA's approach. In addition, the question whether the objective of acquiring a right of residence in another EEA State was a precondition for the conclusion of the marriage would appear to be apposite in this context.

120. Third, ESA continues, if this test is advanced with a view to legal certainty in the field of tax law, it seems all the more appropriate to apply it with respect to one of the most personal and profound areas of human life, even more so in light of fundamental rights, including the right to family life.[53]

121. Fourth, in *Halifax* the "sole purpose" test was derived from the prohibition of abuse as a general principle of EU law and on the basis of the ECJ's judgment in *Emsland-Stärke*. In contrast, in the present case it is directly based on the text of Article 35 of the Directive,

[49] Reference is made to *Wahl,* cited above, paragraph 56.

[50] Reference is made to the judgment in *T Danmark* and *Y Denmark Aps*, cited above, paragraph 74.

[51] Reference is made to the judgments in *Halifax*, cited above, paragraph 69; and in *Emsland-Stärke*, cited above, paragraph 51.

[52] Reference is made to the judgments in *Halifax*, cited above, paragraph 75; in *Part Service*, cited above, paragraph 42; and *Kratzer*, C-423/15, EU:C:2016:604, paragraph 40.

[53] Reference is made to *Halifax*, cited above, paragraph 89.

to be interpreted strictly and in light of recital 28 of the Directive. Deviating from this clear wording, such as by equating "sole purpose" with "essential aim", would therefore be very different to the situation in *Halifax* where the ECJ took this approach on another legal basis, particularly because it would introduce uncertainty in a legal text where there ought not to be any.

122. Finally, ESA submits that its suggested literal approach, should the predominant purpose test not be considered relevant, would be best compatible with fundamental rights. As the Court held in *Jabbi*, "all the EEA States are parties to the European Convention on Human Rights ("ECHR"), 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."[54] ESA submits that the same is the case with respect to Article 12 of the ECHR, which enshrines the right to marry. For instance, in the case of *O'Donoghue and Others* v *United Kingdom*, the European Court of Human Rights ("ECtHR") held: "Article 12 secures the fundamental right of a man and woman to marry and found a family. The exercise of the right to marry gives rise to social, personal and legal consequences. … In the context of immigration laws and for justified reasons, the States may be entitled to prevent marriages of convenience, entered solely for the purpose of securing an immigration advantage."[55]

123. Thus, in ESA's submission, the ECtHR would appear to have interpreted the limitations on the right to marry under Article 12 of the ECHR with respect to marriages of convenience in a manner which is similar to the approach advanced by ESA in relation to the notion of "sole purpose" as interpreted literally.

124. ESA summarises its position, emphasising that "sole purpose" can be interpreted literally. This means that the relevant question, in order to determine the subjective intent in light of the second limb of the test, is whether the purpose of the EEA national and the third country national to enter into the marriage was exclusively to obtain the right of free movement and residence by artificially creating the conditions laid down, in the form of a marriage, for obtaining them.

125. In order to determine whether it was the case that a marriage was entered into for this sole purpose, ESA proposes that the relevant question is whether there was any other explanation for why the marriage was entered into. If there was, the marriage may be considered genuine and effective. If there was not, there may be an abuse.

126. In order to answer this question, subjective factors should be relied on. In ESA's view, subject to the principle of effectiveness, and the principle of proportionality set out in Article 35 of the Directive itself, EEA law does not necessarily preclude reliance on any

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[54] Reference is made to Case E-28/15 *Jabbi* [2016] EFTA Ct. Rep. 575, paragraph 81.

[55] Reference is made to the judgment of the ECtHR of 14 December 2010 in *O'Donoghue and Others* v *United Kingdom*, CE:ECHR:2010:1214JUD003484807, paragraphs 82 and 83.

relevant subjective factors. However, all relevant factors must be examined in their context. Any other approach would risk compromising the objectives pursued by the rights conferred by the Directive and the fundamental rights of free movement under EEA law.

127. Lastly, ESA submits that the provisions of the EEA Agreement are to be interpreted in the light of fundamental rights.[56] These fundamental principles of EEA law must guide the referring court in its assessment of the rights in question and potential abuse of those rights in the case before it. In particular, the right to family life as enshrined in Article 8 of the ECHR may be relevant. In particular, these principles may guide the interpretation of the requirement of Article 35 of the Directive that the "necessary measures" EEA States may adopt "to refuse, terminate or withdraw rights conferred" by the Directive in case of abuse of rights "shall be proportionate". As far as ESA is aware, there is no relevant authority on the application of the proportionality test in this context.

128. In a related context, however, the ECJ examined in *F* whether EU law, in light of, inter alia, the right to privacy under Article 7 of the EU Charter of Fundamental Rights, precludes reliance on psychologists' expert opinions in order to verify the credibility of the statements made by an asylum seeker who invoked, as a ground for granting asylum, fear of being persecuted in his country of origin for reasons relating to his sexual orientation.[57] In light of fundamental rights and the principle of proportionality, it held that this was the case.[58]

129. ESA submits that similar considerations, by analogy, may be relevant in the present case as well, both with respect to the methods used to assess the first and the second limb of the test. Although the ECJ's considerations relate to the use of a specific psychological report for assessing the sexual orientation of an asylum seeker in a vulnerable position, and applied in a context which is not EEA relevant, ESA submits that these principles, based on the right to privacy and the principle of proportionality, may also be relevant in order to determine the availability of any method which national authorities may seek to use in order to determine whether an EEA national and a third country national have entered into a marriage of convenience and thereby engaged in abuse within the meaning of Article 35 of the Directive.

130. In ESA's submission, this means that any such method, and by extension any measure adopted on the basis of Article 35 of the Directive, must, in principle, be justified in light of the right to privacy and family life, and must not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued by measures under Article 35. It is for the national courts to determine whether this requirement is fulfilled on a case-by-case basis.

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[56] Reference is made to *Jabbi*, cited above, paragraph 81.

[57] Reference is made to the judgment of 25 January 2018, *F*, C-473/16, EU:C:2018:36.

[58] Reference is made to the judgment in *F*, cited above, paragraphs 35 and 56 to 58.

131. ESA submits that the Court should answer the questions as follows:

> *The determination of whether one is faced with a marriage of convenience covered by the abuse rule in Article 35 of Directive 2004/38/EC should be based on the dual test where the State must demonstrate two elements: first the presence of a combination of objective circumstances in which, despite formal observance of the conditions laid down by EEA rules, the purpose of those rules has not been achieved, and secondly the existence of a subjective element consisting in the intention to obtain an advantage from the EEA rules by artificially creating the conditions laid down for obtaining it.*
>
> *In the context of the first criterion, the assessment of the nature of the marriage should take place as it existed at the moment of the application for a residence permit and should take all personal circumstances of the partners to the marital relationship into account, including sharing a common household, having children together, sharing finances, participating in each other's broader family life, although the absence of such factors is not necessarily indicative of an artificial construct.*
>
> *The EEA national's subjective intention for entering into the marriage has significance for the determination of whether one is faced with a marriage of convenience.*
>
> *It is a prerequisite for a marriage to be found to be a marriage of convenience that the third country national's and the EEA national's wish for a right of residence for the third country national was the sole purpose for entering into the marriage. The notion of "sole purpose" can be interpreted as referring to "predominant purpose", or, should an literal interpretation be applied, as being the unique or exclusive purpose.*
>
> *The examination must also comply with the principle of proportionality, in light of fundamental rights.*

The Commission

132. At the outset, the Commission observes that the request for an Advisory Opinion is made in a context where the Court of Appeal has already determined that, on the basis of an assessment of the specific facts, the marriage of the appellant is a marriage of convenience under Article 120(6) of the Immigration Act and Article 35 of the Directive. The Court of Appeal is stated to have determined that the appellant in the main proceedings would not have entered into the marriage had there been no prospect of him obtaining a right of residence. It has further been found that securing the right of residence was the main purpose of entering into the marriage. In a context where the Court of Appeal assessed the facts, and the appeal is limited to questions of law, the Supreme Court has not specified

the grounds upon which the Court of Appeal reached its conclusion, nor the legal framework (such as the burden and standard of proof, the relative weight accorded to particular factors considered) which was applied in reaching that finding.

133. The Commission notes further that the Court is requested to provide guidance, in general terms, on the legal criteria that must be applied in order to establish whether or not a marriage is a marriage of convenience by reference to certain submissions made by the appellant as part of his appeal – which includes, in particular, questions concerning the subjective intentions of each of the spouses and whether the abusive intention constitutes the "sole", or the "main", grounds for contracting the marriage.

134. In the Commission's view, the legal and factual analysis of the case are inextricably linked. The legal criteria, both procedural and substantive, necessarily inform and define the manner in which the facts are collected and assessed. Consequently, the Commission submits that, in order to be useful, the reply by the Court must be capable of informing both the collection and assessment of the facts and thereby, ultimately, the legal qualification of the marriage in question.

135. In the Commission's view, a first key issue is whether, in order to establish that a marriage is one of convenience, it is necessary to determine that the "sole purpose" of the marriage was to procure a right of residence in Norway, or whether it is sufficient to establish that the "main purpose" of the marriage was to secure such an advantage, notwithstanding other considerations, advantages or benefits that may also have constituted grounds for entering into the marriage. A second issue concerns whether, for the purposes of determining if there is an abuse under Article 35 of the Directive, it is sufficient to have regard to the subjective intention of the third country national spouse alone, or whether such a finding must depend on both spouses' intention to engage in abuse.

136. As regards the concept of "abuse of law" in the EEA legal order, the Commission observes that the question of "abuse of rights" under Union law has arisen in a number of different contexts, such as taxation,[59] company law,[60] agriculture and export refunds,[61] and the free movement of persons.[62] Despite such diversity in contexts, the ECJ has adopted a consistent approach in its case law, underlining that "abuse" must be clearly distinguished from the "use" of Union law.[63] The fact that an EEA national wishes to exercise his or her rights as conferred upon by them by the Treaties does not in itself constitute an abuse of

[59] Reference is made to the judgments in *Cussens*, cited above, paragraphs 25 to41; in *Halifax*, cited above; and *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544.

[60] Reference is made to the judgment in *Centros*, cited above.

[61] Reference is made to the judgments *SICES and Others*, C-155/13, EU:C:2014:145; and in *Emsland-Stärke*, cited above.

[62] Reference is made to the judgments *Zhu and Chen*, C-200/02, EU:C:2004:639; *Angelo Alberto Torresi*, C-58/13 and C-59/13, EU:C:2014:2088; and in *O and B*, *McCarthy and Others*, and *Campbell*, all cited above.

[63] Reference is made to the judgments in *Zhu and Chen*, cited above, paragraphs 34 to 41; in *Centros*, cited above, paragraphs 23 to 30; and in *Angelo Alberto Torresi*, cited above, paragraphs 34 to 52.

such a right.[64] At the same time, the ECJ has consistently held that abusive practices that are conducted solely for the purposes of deceitfully obtaining advantages which are provided for by Union law do not come within the scope of Union legislation.[65]

137. In the Commission's assessment, the ECJ has further clarified that a finding of abuse requires a combination of both objective and subjective elements.[66] The objective element requires that it be evident from the specific set of circumstances in question that despite the fact that the formal conditions laid down in law appear to have been adhered to, the underlying purpose of those rules has not been achieved. The subjective element requires there to be an obvious intention by the party in question to attain an improper benefit resulting from the application of Union law through artificially establishing the conditions which are necessary to obtain it.[67]

138. These overarching principles have underpinned the Commission's articulation, in various interpretative communications and guidelines, of the legal criteria applicable to determining the existence of a "marriage of convenience" within the meaning of Article 35 of the Directive, which constitutes a particular form of abuse.[68]

139. The Commission refers in particular to:

(a) its 2009 Guidelines on the Application of Directive 2004/38/EC;[69]

(b) the Communication entitled "Free movement of EU citizens and their families: Five actions to make a difference";[70] and

(c) its Communication entitled "Helping national authorities fight abuses of the right to free movement" accompanied by the Handbook (a Staff Working Document entitled "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").[71]

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[64] Reference is made to the judgment in *Centros*, cited above.
[65] Reference is made to the judgment in *Halifax*, cited above.
[66] Reference is made to the judgment in *Emsland-Stärke*, cited above, paragraphs 52 to 53; and in *Angelo Alberto Torresi*, cited above, paragraph 44.
[67] Reference is made to the judgment in *Angelo Alberto Torresi*, cited above, paragraph 46.
[68] Reference is made to *Campbell*, cited above, paragraph 70.
[69] Reference is made to the 2009 Guidelines.
[70] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Free movement of EU citizens and their families: Five actions to make a difference (COM(2013) 837 final).
[71] Communication from the Commission to the European Parliament and the Council — Helping national authorities fight abuses of the right to free movement: 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 (COM(2014) 604 final.

140. The Commission notes that, while these interpretative communications and guidelines are neither authoritative nor legally binding, they contain the Commission's understanding of how the abuse provisions are to be applied in practice. Consequently, in its argument, the Commission draws on the most relevant elements developed in these documents as a basis for replying to the questions referred.

141. As regards the criteria for the assessment of marriages of convenience and the question of "sole purpose" or "main purpose", the Commission observes that, in assessing "marriages of convenience", the Handbook adopts an approach that is holistic in nature seeking to establish, on the basis of a number of different elements, whether the marriage is the expression of a genuine relationship or rather the product of artificial conduct.

142. The Commission emphasises the observation in the Handbook that, in general, genuine marriages are characterised by the intention of the married couple to create together a durable family unit as a married couple and to lead an authentic marital life. In contrast, marriages of convenience are characterised by the lack of such an intention. Their objective is to attain an improper benefit resulting from the application of Union law through artificially establishing the conditions which are necessary to obtain it. The Handbook underlines that the abusive character of marriages of convenience is represented by the bad faith of the spouses prior to and at the moment they enter into the marriage.

143. On this basis, the Commission considers that the point of departure of any analysis as to the existence of a marriage of convenience is whether there exists a genuine relationship between the parties and whether the act of marriage reflects a true intention to create a durable family unit together. It is in this legal context that recital 28 of the Directive refers to marriages of conveniences as those which have been contracted for the "sole purpose" of enjoying the right of free movement or residence. The Commission maintains that the use of the word "sole" in this context serves to underline a situation in which marriage was contracted in the absence of any genuine relationship between the parties and where the construct was purely artificial and was entered into only for the purpose of obtaining improperly a right under EEA law. The Handbook underlines, however, that the concept of "sole purpose" falls to be interpreted autonomously and should not be interpreted literally. It suggests that a marriage may be regarded as the product of abusive conduct where obtaining a right of entry and residence constitutes the predominant purpose of the abusive conduct, as opposed to the exclusive purpose.

144. The Commission considers that, where a marriage is entered into without any genuine intention to create together a durable family unit as a married couple and to lead an authentic marital life, it would be excessively formalistic if, in order to establish abuse, a national authority were required to demonstrate that the only purpose of the marriage was to obtain an improper right of residence in Norway. Indeed, it is not inconceivable that an individual may seek to enter into marriage to improperly obtain a number of advantages, none of which are linked to a desire to create an authentic durable family unit. In such a

case, the impossibility to qualify such a marriage as abusive would compromise the effectiveness of Article 35 of the Directive.

145. At the same time, the Commission underlines that the fact that a couple enters into a marriage for the main purpose of establishing a right of residence ought not necessarily and inevitably lead to the conclusion that the marriage constitutes an abuse of rights. In this context, the Commission recalls that the Handbook underlines that when an EEA national marries a non-EEA national on the basis of a genuine relationship, it should not be surprising that they want to live together somewhere, often in a country in which the other spouse had no legal rights of residence before the marriage. A marriage cannot be considered as a marriage of convenience simply because it brings an immigration advantage (or indeed other advantages). Similarly, the 2009 Guidelines underline that the fact that EU citizens and their family members obtain a right of residence under Union law in a Member State other than that of the EU citizen's state of origin does not constitute abuse as they are benefiting from an advantage inherent in the exercise of the right of free movement protected by the Treaty, regardless of the purpose of their move to that State.

146. The Commission contends that, in this context, it is conceivable that genuine and durable partners may decide to marry solely, or primarily, to obtain certain advantages, without such a marriage being contrived. Individuals may, for example, marry to obtain taxation advantages, or to ensure clarity regarding fiscal rights, guardianship rights, or to ensure material protection (such as protection in the event of separation or death of a partner). Equally, there may be situations where genuine and durable partners decide to contract a marriage in the anticipation of the exercise of free movement rights, in order to ensure there is clarity about their legal situation to avoid the risk of separation. As the Court has recently observed, the fact that an EEA national consciously seeks a situation conferring a right of residence in another Member State does not in itself constitute abuse.[72]

147. The Commission submits that, in line with the case law on abuse, the legal test requires an assessment as to whether the parties seek to contrive an "artificial" or "fictitious" construction in order to attain an improper benefit. However, to be sufficiently complete and adequate, such an assessment cannot be limited to whether the objective of a marriage is to obtain an advantage but must also take into account the qualitative nature of the relationship as a whole. The risk of an approach confined to examining a party's desire to obtain residence (whether it be the sole or main purpose of a marriage) without at the same time looking at the genuine nature of the relationship is that it may result in genuine marriages erroneously being qualified as abusive.

148. As regards the intention of the parties entering into marriage, the Commission observes that the Handbook specifies that marriages of convenience can be subdivided into different categories which include marriages where both spouses freely consent to enter into a relationship designed to obtain an improper advantage under EU law, and also

[72] Reference is made to *Campbell*, cited above, paragraph 71.

"marriages of deception", where an EU spouse is deceived by the non-EU spouse to genuinely believe that the couple will lead a genuine and lasting marital life. The Handbook underlines that the latter situation also qualifies as a marriage of convenience and should be treated accordingly, with due regard to the innocence of the EU spouse.

149. Thus, in the Commission's view, for the purposes of finding a "marriage of convenience", it is sufficient for national authorities to establish the abusive intention of the third country national spouse without it also being necessary to establish that the EEA national spouse also engaged in abusive conduct.

150. The Commission underlines, however, that this conclusion does not negate the obligation on the part of national authorities to base their findings regarding the abusive intention of one or both spouses on an assessment of all the relevant facts.

151. In this regard, the Commission notes that, according to the appellant's submission, to date, it was only the intention of the third country national and not the spouse that was assessed and held relevant under Norwegian law. However, the Commission considers that, to be complete, an assessment of a marriage of convenience will as a rule, and save in exceptional circumstances, require an examination of both parties to the marriage, which is also a necessary precondition for national authorities to determine whether only one or both parties have sought to engage in abusive conduct. Thus the mere fact that the determination of a marriage of convenience may be based exclusively on the subjective intention of one of the parties to the marriage, namely, the third country national spouse, does not mean that the assessment of the facts may be limited to that spouse.

152. The Commission considers the appellant to raise certain additional issues, as reproduced in the request for an Advisory Opinion, as part of his appeal. In particular, the appellant's submissions imply that the national authorities misapplied the burden of proof rules and that the appellant was improperly required to demonstrate the authenticity of the marriage. He also raises concerns that relevant evidence as regards the duration of the marriage was excluded.

153. On these issues, the Commission observes that Section 3.2 of the Handbook provides guidance on the evidential burden and the burden of proof for establishing the existence of a marriage of convenience. It is stated in the Handbook that while there is no single Union wide common approach to the gathering of evidence, there are certain procedural requirements that must nevertheless be respected. In particular, the following principles may be distilled:

(a) EEA State authorities must take a case-by-case approach and review all various elements that might constitute evidence to support or oppose the conclusion that a marriage of convenience has been contracted.

(b) Collected evidence must be considered in its entirety and its assessment must be

based on a combination of all information collected during the course of investigation. The investigated marriage must be reviewed in a neutral, unbiased way so that evidence both in favour of and against the original suspicion is sought, collected and duly taken into account.

(c) As regards the burden of proof, the Handbook underlines that it is for the national authorities who suspect that a non-EU national has entered into a marriage of convenience with an EU citizen for the sole purpose of being granted an EU right to free movement to prove that the marriage is one of convenience. Of course, in the event of well-founded suspicions as to the genuineness of a particular marriage, national authorities may invite the couple to produce further relevant documents or evidence to refute such suspicions.

154. In light of the above, the Commission contends that the burden of establishing that a marriage constitutes an abuse within the meaning of Article 35 of the Directive rests with the national authorities of the EEA State, in this case the Norwegian authorities. Nevertheless, such authorities may legitimately request members of a couple to submit evidence, where there are objective grounds to doubt the genuineness of a marriage.

155. At the same time, the Commission reiterates its view that the examination of the evidence must include all relevant factors – incorporating evidence that is both in favour of and against the genuineness of the marriage under examination.

156. In this context, the Commission notes that, as part of his appeal, the appellant expresses concern that the duration of his relationship was not taken into account, insofar as this duration post-dates the marriage, on the basis that it is the intention of the parties at the time of marriage that is relevant for the determination of an abuse within the meaning of Article 35 of the Directive. On this point, the Commission observes that it is not apparent from the case history, as recorded in the decisions of the national judicial authorities, whether the appellant's religious marriage of 18 December 2012 – some three years before the couple's move to Norway – was considered relevant or whether only the civil marriage was taken into account and, if the latter, on what grounds the religious ceremony was not taken into consideration.

157. The Commission considers it to be accepted that the question as to whether a marriage was contracted in good faith requires consideration of the subjective intention of the party or parties at the time of entering into the marriage. At the same time, where, as in the present case, a relationship has seemingly subsisted for a considerable duration, and commenced three years prior to the exercise of free movement rights, that factor in itself may point in favour of the genuine character of the marriage and must also be factored into the assessment.

158. According to the Commission, it is ultimately for the national judicial authorities, in the present case, the Supreme Court of Norway, to establish that the examination of the marriage in question complies with the requirements of EEA law. However, the

Commission considers that such a review should incorporate an assessment as to whether the appropriate burden of proof was applied and whether all relevant information has been collected and considered in a holistic manner, including all elements that point in favour of the genuineness of the marriage as well as elements that point against the genuineness of the marriage, with no one set of factors being given precedence over another.

159. The Commission proposes that the questions be answered as follows:

In order to determine that a marriage is a "marriage of convenience" for the purposes of Article 35 of Directive 2004/38/EC, it is necessary for national authorities to establish, on the basis of a case-by-case examination of all relevant objective factors, that the married couple, or the third country national spouse, had no genuine intention to create a durable family unit as a married couple and to lead an authentic marital life and that the intention was rather to improperly attain a right of residence resulting from the of EEA law through artificially establishing the conditions which are necessary to obtain such a right.

While the concept of "marriage of convenience" may cover situations where either both spouses, or exclusively the third country national spouse, has contracted the marriage with the intention of improperly obtaining a right derived from the application of EEA law, national authorities must base their conclusion on as full an assessment of the facts as possible, taking into account all evidence obtained, as a rule, from both spouses including both elements that may plead in favour and as well as elements that plead against the conclusion that a marriage is abusive.

Where on the basis of such an assessment, it is concluded that there is no genuine intention to create a durable family unit as a married couple and to lead an authentic marital life and that the intention was rather to attain a right of residence, it is sufficient to establish that the intention was the predominant intention, without the need to establish that it was the sole intention for concluding the marriage in question.

Páll Hreinsson
Judge-Rapporteur