JUDGMENT OF THE COURT
23 November 2021*

(*Continued right of residence – Stepchild, an EEA national – Derived rights for third-country national parent carer – Abuse of rights –Marriage of convenience – Regulation (EU) No 492/2011 – Directive 2004/38/EC*)

In Case E-16/20,

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 Oslo District Court (*Oslo tingrett*), in the case between

Q and Others

and

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

concerning the interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, and in particular Articles 7(1)(b), 12(3) and 35.

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

THE COURT,

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

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- Q and Others, represented by Félix Olivier Helle, advocate;

- the Norwegian Government, represented by Kristin Hallsjø Aarvik and Pål Wennerås, acting as Agents;

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

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

having regard to the Report for the Hearing,

having heard the oral arguments of Q and Others, represented by Félix Olivier Helle; the Norwegian Government, represented by Kristin Hallsjø Aarvik and Pål Wennerås; ESA, represented by James Stewart Watson; and the Commission, represented by Jonathan Tomkin; at the remote hearing on 29 April 2021,

gives the following

Judgment

I Legal background

EEA law

1 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77) ("Directive 2004/38" or

"the Directive"), as corrected by OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34, was incorporated into 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) ("Joint Committee Decision"), which added it at point 3 of Annex VIII (Right of establishment), and points 1 and 2 of Annex V (Free movement of workers). Constitutional requirements indicated by Iceland, Liechtenstein and Norway were later fulfilled on 9 January 2009, and the decision entered into force on 1 March 2009.

2 Article 1 of the Joint Committee Decision reads, in extract:

> *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".*
> >
> > *(d) In Article 24(1) the word 'Treaty' shall read 'Agreement' and the words 'secondary law' shall read 'secondary law incorporated in the Agreement'.*

3 Article 2 of the Directive, headed "Definitions", reads:

> *For the purposes of this Directive:*
>
> *1. 'Union citizen' means any person having the nationality of a Member State;*
>
> *2. 'family member' means:*
>
> > *(a) the spouse;*
> >
> > *(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as*

equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

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

4 Article 7 of the Directive, headed "Right of residence for more than three months", reads, 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 1(a), (b) or (c).

...

5 Article 12(3) of the Directive, headed "Retention of the right of residence by family members in the event of death or departure of the Union citizen", reads:

> *The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.*

6 Article 35 of the Directive, headed "Abuse of rights", reads:

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

7 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1) ("Regulation 492/2011") was incorporated into the EEA Agreement by EEA Joint Committee Decision No 52/2012 of 30 March 2012 (OJ 2012 L 207, p. 32) which entered into force on 1 February 2013, and is referred to at point 2 of Annex V (Free movement of workers) to the EEA Agreement.

8 Article 10 of Regulation 492/2011 reads:

> *The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.*
>
> *Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.*

National law and practice

9 Section 110 of the Act of 15 May 2008 on Immigration (*lov av 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her*) (*utlendingsloven*) ("the Immigration Act"), headed "Further details concerning to whom the chapter applies", first, second and third paragraphs, reads, in extract:

Nationals of countries covered by the EEA Agreement, hereinafter referred to as EEA nationals, shall be subject to the provisions of this chapter. …

Family members of an EEA national shall be subject to the provisions of this chapter as long as they accompany or are reunited with an EEA national. …

"Family member" means:

(a) a spouse;

(b) a cohabitant, if there is a permanent connection with the EEA national and that connection can be documented;

(c) a relative in direct line of descent of an EEA national or a foreign national mentioned in (a) or (b), who is under the age of 21 or who is dependent upon the EEA national or that national's spouse; and

(d) a relative in direct line of ascent from an EEA national or a foreign national mentioned in (a) or (b) and who is dependent upon the EEA national or that national's spouse.

…

10 Section 112 of the Immigration Act, headed "Right of residence for more than three months for EEA nationals", first paragraph, reads, in extract:

An EEA national shall have 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 provide a declaration to the effect that he or she has sufficient means to provide for himself or herself and any accompanying family members.

…

11 Section 113 of the Immigration Act, headed "Right of residence for more than three months for family members who are EEA nationals", reads, in extract:

> *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 stay 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. In any event, the children of the EEA national and the person who has parental responsibility retain the right of residence for as long as the children is enrolled at an approved educational institution.*
>
> *In the event of divorce or cessation of cohabitation, the 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.*
>
> *...*

12 Section 114 of the Immigration Act, headed "Right of residence for more than three months for family members and other foreign nationals who are not EEA nationals", first, third and fourth paragraphs, reads, in extract:

> *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).*
>
> *...*
>
> *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 stayed 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 stays 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, the*

children of the EEA national and the person who has parental responsibility in any event retain the right of residence 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 a court judgment;

(c) there is a particularly difficult situation in which, for example, the spouse who is not an EEA national or, as the case may be, children, has or have been exposed to violence or other serious abuse in the marriage; or

(d) the spouse who is not an EEA national is exercising a right of access to the children in the realm under an agreement or a court judgment.

II Facts and procedure

13 According to the request, Ms Q is a Peruvian national. She has two children, who are half-brothers. Child A was born in 2007, and child B was born in 2001. Child B was a Peruvian national at the time of his arrival in Norway, and acquired Greek nationality in April 2019. Child A is a Greek national.

14 Ms Q and her children began living together with Mr C, a Greek national, in Athens, Greece, in 2013. According to the request, Ms Q and Mr C became engaged in the same year.

15 Mr C applied for a divorce from his previous spouse in August 2013. The marriage was dissolved by decision of Athens District Court in February 2014.

16 In March 2015, Mr C, Ms Q and her children, A and B, moved to Norway. The two children began attending school that same month.

17 On 10 March 2015, Ms Q applied for a residence permit in Norway under national rules governing work permits for skilled workers. According to the request, the application was

based on an offer of employment dated 8 January 2015 from the General Manager of Domino's Pizza Norway, and an offer of employment signed by Ms Q's sister. Also attached to the application was a written statement dated 9 March 2015 from Ms Q's sister, to the effect that Ms Q could live at her home. It was apparent from the application that Ms Q was applying for a residence permit for the period from 18 February 2015 to 18 February 2025.

18 On 7 April 2015, the Norwegian Directorate of Immigration (*Utlendingsdirektoratet – UDI*) adopted a decision rejecting Ms Q's application. The reason given for the rejection was that her qualifications as a skilled worker were not relevant for the position with Domino's Pizza. On 29 April 2015, Q appealed against that decision. In the appeal proceedings, Ms Q provided a rental contract, showing she and Mr C had rented a flat together in Norway from 9 March 2015. However, by decision of 24 November 2015, the Immigration Appeals Board upheld the rejection.

19 On 1 December 2015, Ms Q and Mr C married in Greece. On 15 December 2015, Ms Q and her children applied for residence permits in Norway as family members of Mr C. Attached to the application were Mr C's salary statements from August 2015 and the months thereafter, and also his employment contract dated 11 December 2015, with Domino's Pizza. On 22 December 2015, A's application was granted. On 16 January 2016, Ms Q's and B's applications were also granted.

20 On 7 December 2016, the police undertook a residence inspection. According to the police report, Mr C, Ms Q and her two children were living together.

21 On 18 May 2017, Mr C contacted the police in Norway stating that he had applied for legal separation in Greece. He stated that after the Directorate of Immigration had rejected the first application for a residence permit, Ms Q had asked him if they could get married, so that she and the children could live in Norway on the basis of family reunification. Mr C stated that he had been in love with Ms Q at the time they entered into the marriage. He submitted a written statement, dated 16 May 2017, to the effect that he no longer wished to be the reference person for Ms Q, and a copy of an application for divorce filed in Greece, dated 28 February 2017.

22 On 19 June 2017, Ms Q filed an application for separation with the County Governor (*Fylkesmannen*) in Norway.

23 On 2 August 2017, Mr C reported that he had moved back to Greece. He is registered as having left Norway on 17 August 2017.

24 At the time of the request, Mr C and Ms Q were still married. The divorce hearing scheduled in Greece was postponed due to the COVID-19 pandemic.

25 On 15 December 2017, Ms Q applied for a residence permit as a family member of her son A, an EEA national. On 10 April 2019, the application was rejected by the Directorate of Immigration on the grounds that Ms Q and her child, A, were deemed not to fulfil the conditions for residence in Norway in accordance with Chapter 13 of the Immigration Act. Following an appeal, that decision was upheld by the Immigration Appeals Board by decision of 13 November 2019.

26 On 25 November 2019, Ms Q sent a notice of legal action to the Immigration Appeals Board. The Immigration Appeals Board upheld the rejection by decision of 10 December 2019.

27 On 11 December 2019, Ms Q applied for an interim injunction against the rejection of her application for a residence permit. On 16 December 2019, she also initiated legal proceedings before Oslo District Court challenging the validity of the Immigration Appeals Board's decisions.

28 The Immigration Appeals Board reconsidered, of its own initiative, whether the decision of 13 November 2019 should be reversed. By decision of 4 February 2020, the Immigration Appeals Board upheld its conclusions. It also considered that Ms Q's family life with Mr C was not genuine in nature. In written pleadings of 28 February 2020, the plaintiffs disputed this and produced documentation showing that Mr C and Ms Q shared a residential address in Greece from 2013 and a letter of 15 May 2015 from Mr C to the Norwegian Tax Administration (*Skatteetaten*), in which he stated that he was not single, but was engaged to be married to Ms Q. She was not informed that the immigration authorities viewed the marriage as one of convenience until the Immigration Appeals Board's decision.

29 According to Oslo District Court, the plaintiffs have further submitted that A retains the right of residence under Article 12(3) of the Directive, irrespective of his mother's motives for entering into the marriage, that is to say, even if there were an abuse of rights under Article 35.

30 It follows from the request that although, on the understanding of the Norwegian Government, the claim relates to Ms Q and both of her children, no application for a residence permit has been made for child B, who is over the age of 18. Therefore, the Immigration Appeals Board's decision cannot apply to child B.

31 Against this background, Oslo District Court decided to stay the proceedings and make a reference to the Court. The request, dated 18 November 2020, was registered at the Court on the same day. Oslo District Court has referred the following questions to the Court:

1. *The EU Court of Justice has held that Article 21 TFEU and Directive 2004/38/EC grant a right to reside in a host State to a minor child who is a national of another EU State and who satisfies the conditions laid down in Article 7(1)(b), and that "the*

same provisions" allow a parent who is that child's primary carer to reside with the child in the host Member State, see, for example Case C-86/12 Alokpa paragraph 29. At the same time, the EU Court of Justice has also held that such a parent does not come within the personal scope of the Directive as provided for in Article 3(1), see Alokpa paragraphs 24–26.

In a situation as described above, may the parent's right of residence be based on the Directive alone or in the light of the EEA Agreement, or does such a right presuppose that the Directive is to be applied together with Article 21 TFEU, or possibly that the Directive is to be given a broad interpretation in the light of Article 21 TFEU?

2. *Article 12(3) of Directive 2004/38/EC confers a right to continued residence on a child of an EEA national who is enrolled at an approved educational establishment and the person who has parental responsibility (custody) of the child should the EEA national depart from the country. May a child who is the descendant of the EEA national's spouse only, who was granted a right of residence using the EEA national as a reference person, also derive such a right under the Directive alone or in the light of the EEA Agreement? Does this also hold true if the EEA national has applied for divorce from the parent of that child before departing from the country?*

3. *If Question 2 is answered in the affirmative, does this also hold true if the marriage of the child's mother or father was an abuse of rights under Article 35 of Directive 2004/38/EC, but was perceived as being genuine by the EEA national and the child?*

32 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answer of the Court

Preliminary remarks

33 According to the Court's settled case law, Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") establishes a special means of judicial cooperation between the Court, on the one hand, and national courts, on the other. The aim is to provide national courts with the necessary interpretation of elements of EEA law to decide the cases before them (see Case E-4/19 *Campbell*, judgment of 13 May 2020, paragraph 43).

34 In order to give assistance to national courts in cases in which they have to apply provisions of EEA law, the Court may extract from all the factors provided by the national court the elements of EEA law requiring an interpretation having regard to the subject-matter of the dispute. The Court may restrict its analysis to the provisions of EEA law that will be of use to the national court, which has the task of interpreting the provisions of national law and determining their compatibility with EEA law (see Case E-4/19 *Campbell*, cited above, paragraph 44).

35 Thus, although the referring court has raised questions concerning the interpretation of Article 21 of the Treaty on the Functioning of the European Union ("TFEU") and Directive 2004/38, it is incumbent on the Court to give as complete and as useful a reply as possible and it does not preclude the Court from providing the referring court with all the elements of interpretation of EEA law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its questions (see Case E-4/19 *Campbell*, cited above, paragraph 45).

36 Under the circumstances of the present case, and in order to realise the purpose of cooperation under Article 34 SCA, the Court finds it appropriate to examine the questions in light of Regulation 492/2011 on the freedom of movement for workers. The reason is that it appears from the request that A, is the stepchild of an EEA national, Mr C. As described further below, Mr C appears to have been economically active in Norway as a worker, which is not disputed.

Question 1

37 By its first question, the referring court asks, in essence, whether a child with the nationality of an EEA State enjoys an independent right of residence in another EEA State and, if so, whether his/her primary carer, who possesses the nationality of a third country, is entitled to reside with the child in the host EEA State. The Commission has submitted that the case in the main proceedings should be examined under the provisions of Regulation 492/2011 and not Directive 2004/38.

38 According to the first paragraph of Article 10 of Regulation 492/2011, children of a national of an EEA State who is or has been employed in the territory of another EEA State shall be admitted to that State's general education system, including apprenticeship and vocational training courses, under the same conditions as nationals of that State, provided that those children are residing in its territory.

39 In determining the scope of that article, it must be noted that the concept of a worker, insofar as it defines the scope of a fundamental freedom within the EEA, must be interpreted broadly. The essential feature of the concept is that, for a certain period of time, a worker performs services for and under the direction of an employer in return for remuneration. Moreover, a person is a worker even if only engaged in part-time work, or where the remuneration received is below the minimum guaranteed wage in the State

concerned, provided that the activity in question is not purely marginal and ancillary (see Case E-4/19 *Campbell*, cited above, paragraph 49 and case law cited).

40 It is apparent from the request that following his move to Norway in March 2015, Mr C took up an economic activity as a worker in a pizza restaurant. It follows that he exercised his free movement rights and had the status of worker within the meaning of Article 28 of the EEA Agreement. Whether A is to be considered as his child for the purposes of Regulation 492/2011 is examined below.

41 In those circumstances, the question is whether a third-country national, such as Ms Q, can claim a right of residence on the basis of Article 10 of Regulation 492/2011 in her capacity as a parent-carer of an EEA national's child.

42 As the wording of Article 10 of Regulation 492/2011 is identical to that of Article 12 of Regulation No 1612/68, the case law on the interpretation of Article 12 of Regulation No 1612/68 applies to the interpretation of Article 10 of Regulation 492/2011 (compare the judgment in *Jobcenter Krefeld*, C-181/19, EU:C:2020:794, paragraph 34).

43 It is settled case law, first, that the child of an EEA national worker or former worker who has exercised the freedom of movement to work in another EEA State enjoys an independent right of residence in the host EEA State, on the basis of the right to equal treatment as regards access to education, where that child wishes to attend general education courses in that EEA State. Second, recognition that that child has an independent right of residence entails that the parent who is the primary carer for that child should be recognised as having a corresponding right of residence (compare the judgment in *Jobcenter Krefeld*, cited above, paragraph 35).

44 The Norwegian Government has argued that since Ms Q's son, the child A, is not the biological or adopted child of an EEA national, but is Mr C's stepchild, he does not fall within the scope of Article 10 of Regulation 492/2011, which remains limited to "the children of a national of a Member State".

45 The objective pursued by Regulation 492/2011, namely to ensure freedom of movement for workers, requires the best possible conditions for the integration of the worker's family in the host EEA State. A refusal to allow the parents caring for the children to remain in the host EEA State while those children are attending school might deprive the children of a right granted to them by the legislature (compare the judgment in *Jobcenter Krefeld*, cited above, paragraph 36).

46 To that end, the beneficiaries of the right of access to education enshrined in Article 10 of Regulation 492/2011 are defined broadly, since the children themselves may not, in certain circumstances, be EEA nationals and may not be children common to the migrant worker and his spouse (compare the judgment in *Baumbast and R*, C-413/99, EU:C:2002:493, paragraphs 56 and 57).

47 The Court observes that the European Court of Justice has interpreted the right, previously enshrined in Article 12 of Regulation No 1612/68, and reproduced in identical terms in Regulation 492/2011, as entailing that both the descendants of that worker and those of the spouse have the right to install themselves with that worker. To have given a restrictive interpretation to that provision, to the effect that only the children common to the migrant worker and the spouse enjoyed that right, would have failed to have regard to the aim of integration of members of the families of migrant workers pursued by Regulation No 1612/68 (compare the judgment in *Baumbast and R*, cited above, paragraph 57 and judgment in *Hadj Ahmed*, C-45/12, EU:C:2013:390, paragraph 50). Consequently, the term "children" must be understood to include also the worker's adopted children and stepchildren.

48 It is settled case law that the independent right of residence granted to a child by Regulation 492/2011 does not depend on the fact that the parents or parent who care for the child should continue to have the status of migrant worker in the host EEA State (compare the judgments in *Ibrahim and Secretary of State for the Home Department*, C-310/08, EU:C:2010:80, paragraph 29; and *Teixeira*, C-480/08, EU:C:2010:83, paragraphs 37, 46 and 50). Thus, children of EEA nationals who are within the general education systems of a host EEA State may continue to derive a right of residence in a host State under Article 10 of Regulation 492/2011 even after the parent worker has ceased working in that State.

49 Likewise, the fact that the parent concerned loses the status of a worker has no effect on the primary carer's right of residence, under Article 10 of Regulation 492/2011, corresponding to that of the child of whom he or she is the primary carer (compare the judgment in *Jobcenter Krefeld*, cited above, paragraph 37 and case law cited). In addition, Article 10 of Regulation 492/2011 is to be applied independently of other provisions of EEA law, such as those of Directive 2004/38, that govern the conditions for the exercise of a right of residence in another EEA State (compare the judgment in *Jobcenter Krefeld*, cited above, paragraph 38 and case law cited).

50 Furthermore, the right conferred by Article 10 of Regulation 492/2011, read in the light of the requirement of respect for family life, a general principle of EEA law, necessarily implies that the child has the right to be accompanied by the person who is his primary carer, irrespective of the primary carer's nationality, and who is entitled to reside with the child in that EEA State during his studies. This applies notwithstanding that the carer might not have an independent right under EEA law. To refuse to grant permission to remain in an EEA State to a parent who is the primary carer of the child exercising his right to pursue his studies in the host EEA State infringes that right (compare the judgment in *Baumbast and R*, cited above, paragraphs 72, 73 and 75 and *Ibrahim and Secretary of State for the Home Department*, cited above, paragraph 31). Thus, a primary carer's right of residence under Regulation 492/2011 corresponding to that of the child of whom he or she is a primary carer applies irrespective of nationality.

51 Accordingly, it follows that the first question must be answered to the effect that the child of an EEA national who previously worked in another EEA State and the child's third-country national parent caring for that child derive a right of residence on the basis of Article 10 of Regulation 492/2011. This applies regardless of whether the child is common to the EEA national and the spouse, or is the child of the spouse only. In light of the Court's findings with respect to Regulation 492/2011, there is no need to make an assessment under the provisions of Directive 2004/38.

Question 2

52 In light of the answer to the first question, the second question referred must be understood to concern the possible implications of a situation where the EEA national has applied for divorce from the parent of the stepchild.

53 From the request it appears that, while Mr C has filed for a divorce, the divorce was not finalised at the time of the request.

54 As the Court held in the answer to Question 1, the term "children" must be understood to include stepchildren. The fact that the parents of the child concerned have divorced or applied for divorce, and the fact that only one parent is an EEA national who has ceased to be a migrant worker in the host State are not relevant for the child's right of residence pursuant to Article 10 of Regulation 492/2011 (compare *Ibrahim and Secretary of State for the Home Department*, cited above, paragraph 29 and case law cited).

55 The answer to Question 2 must therefore be that a child who is the descendant of the EEA national's third-country national spouse only, who was granted a right of residence on the basis of Article 10 of Regulation 492/2011 using the EEA national as a reference person, retains such right of residence even if the EEA national has applied for divorce from the parent of that child.

Question 3

56 By its third question, the referring court asks in essence whether the finding that a marriage between an EEA national who has exercised his freedom of movement to work in another EEA State and a third-country national constitutes an abuse of rights will impact on the right of residence of a child in education in the host EEA State in circumstances in which the marriage was perceived as genuine by the EEA national and the child.

57 In light of the Court's answer to Question 1, the Court will examine Question 3 based on the general principle of the prohibition of abuse of rights.

58 According to that principle, EEA States may refuse, terminate or withdraw any right conferred by EEA law in the case of abuse or fraud, such as a marriage of convenience, (see Case E-1/20 *Kerim*, judgment of 9 February 2021, paragraph 35). Consequently, in

circumstances where the child's and the third-country national's derived rights of residence result from an abuse of rights, the EEA States may take any measures necessary to counter the abuse.

59 It is for the referring court to assess whether there is a marriage of convenience based on the specific facts in each case. The facts provided in the request make it appropriate for the Court to recall its findings in *Kerim* (cited above) with regard to marriages of convenience.

60 The determination of abuse of rights under EEA law is based on a cumulative test combining objective and subjective elements. The objective element requires that it be evident from the specific set of circumstances in question that, despite formal observance of the conditions laid down by the EEA rules, the purpose of those rules has not been achieved. The subjective element requires an abusive intention to obtain an advantage from the EEA rules by artificially creating the conditions laid down for obtaining it (see *Kerim*, cited above, paragraph 37 and case law cited).

61 The subjective element implies bad faith, that is, an intention to circumvent provisions of EEA law or wrongfully obtain advantages that would ordinarily have resulted from a lawful use of rights under EEA law, in other words a legitimate and justified use of rights (see *Kerim*, cited above, paragraph 39). A marriage of convenience is one in which the marriage was contracted in the absence of a genuine relationship between the parties and where the construct was purely artificial and entered into for the purposes of improperly obtaining a right under EEA law (see *Kerim*, cited above, paragraph 47).

62 The Court observes that a couple may have entered into a marriage for a number of reasons, including, but not limited to, establishing a right of residence. That does not necessarily and inevitably mean that the marriage constitutes an abuse of rights, because the benefit is inherent in the exercise of the right (see *Kerim*, cited above, paragraph 48).

63 In order to determine whether a marriage of convenience exists, in circumstances in which reasonable doubts exist as to whether the marriage in question is in fact genuine, it is necessary for the national authorities to establish, on the basis of a case-by-case examination, that at least one spouse in the marriage has essentially entered into it for the purpose of improperly obtaining the right of free movement and residence by the third-country national spouse rather than for the establishment of a genuine marriage (see *Kerim*, cited above, paragraph 50).

64 In circumstances in which a marriage of convenience is found to exist, rights that would otherwise accrue in the host EEA State by virtue of a genuine marriage cannot be relied upon by a third-country national.

65 The Court notes that the purpose of the rule granting a derived right of residence for an EEA national's third-country national spouse and their common children or children of one spouse only, is to allow the worker to be able to continue the family life created or

strengthened without restricting the worker's right to free movement (see Case E-28/15 *Jabbi* [2016] EFTA Ct. Rep. 575, paragraphs 65 and 67 and case law cited). A denial of these residence rights would interfere with the exercise of the freedom of movement provided for EEA nationals (compare *Baumbast and R*, cited above, paragraph 52).

66 Thus, where the marriage between a national of an EEA State and a third-country national spouse is the continuation of a genuine relationship, the fact that at least one spouse involved entered into it essentially to obtain the benefit of rights conferred by EEA law, such as residence rights in a particular EEA State, is not relevant to an assessment of their legal situation by the national authorities (compare the judgment in *Akrich*, C-109/01, EU:C:2003:491, paragraph 61). For example, it may be that a couple who have created or strengthened family life in one EEA State without being married intend to move to another EEA State to take up work in that State and enter into marriage in order to obtain a right of residence for the third-country national in that State, so that they can continue their family life. In such circumstances the purpose of the rules has in fact been achieved, and the fact that the third-country national obtains the right of residence cannot itself result in the marriage being considered artificial and a marriage of convenience.

67 The Court thus finds that the answer to Question 3 must be that, in the event that the authorities of an EEA State have established that a marriage between an EEA national and a third-country national amounts to a marriage of convenience, the EEA State may take any measures necessary to refuse, terminate or withdraw rights derived from such an abuse. Such measures must be proportionate and subject to procedural safeguards.

IV Costs

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

On those grounds,

THE COURT

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

1. **The child of an EEA national who previously worked in another EEA State and the child's third-country national parent caring for that child, derive a right of residence on the basis of Article 10 of Regulation (EU)**

No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union. This applies regardless of whether the child is common to the EEA national and the spouse, or the child is of the spouse only.

2. **A child who is the descendant of the EEA national's third-country national spouse only, who was granted a right of residence on the basis of Article 10 of Regulation (EU) No 492/2011 using the EEA national as a reference person, retains such right of residence even if the EEA national has applied for divorce from the parent of that child.**

3. **In the event that the authorities of an EEA State have established that a marriage between an EEA national and a third-country national amounts to a marriage of convenience, the EEA State may take any measures necessary to refuse, terminate or withdraw rights derived from such an abuse. Nevertheless, any such measures must be proportionate and subject to procedural safeguards.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 23 November 2021.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President