E-16/20-11

REPORT FOR THE HEARING

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 Article 7(1)(b), Article 12(3) and Article 35 thereof.

I Introduction

1. By letter of 18 November 2020, registered at the Court on the same day, Oslo District Court requested an Advisory Opinion in the case pending before it between Q and Others 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 4 February 2020 to reject the application for a residence card submitted by Q, who is a Peruvian national. Q has based her claim to residence in Norway on Directive 2004/38/EC of the European Parliament and of the Council ("the Directive").

3. According to the referring court, the question in the case before it is whether the Directive, alone or in light of the EEA Agreement, confers a derived right of residence in Norway on Q, a third-country national parent of a minor child who resides in Norway but is a national of another EEA State. The EFTA Court is also requested to rule on whether the right of continued residence of a child of an EEA national and that child's primary carer, under Article 12(3) of the Directive, also applies to stepchildren of an EEA national, after the departure of the EEA national. And if so, whether this also applies where the EEA national has applied for divorce from the third-country parent before their departure. Finally, the referring court asks the EFTA Court to answer whether that would be the case even if the marriage of the child's mother or father was an abuse of rights within the meaning of Article 35 of the Directive, but was perceived as being genuine by the EEA national and the child.

II Legal background

EEA law

4. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/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, 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 9 January 2009, and the decision entered into force on 1 March 2009.

5. 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'.

6. 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.

7. 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).

...

8. Article 12 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, in extract:

...

3. 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.

9. 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.

10. 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 Decision of the EEA Joint Committee 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.

11. 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

12. The first, second and third paragraphs of 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", read, in extract:[1]

> *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*

[1] All translations of national law are unofficial.

(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.

13. The first paragraph of Section 112 of the Immigration Act, headed "Right of residence for more than three months for EEA nationals", reads:

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.

14. 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.

…

15. The first, third and fourth paragraphs of 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", read, 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.

III Facts and procedure

16. Q is a Peruvian national. Q is divorced and has two children, A and B. B was born in 2001 and A was born in 2007. The children are half-brothers. B was a Peruvian national at the time of his arrival in Norway, but became a Greek national on 19 April 2019. A is a Greek national.

17. C is a Greek national. Q and C became cohabitants in Athens in 2013, and B and A lived together with them. Q, A and B ("the plaintiffs") state that Q and C became engaged in 2013.

18. C applied for a divorce from his previous spouse on 26 August 2013. The marriage was dissolved by decision of the district court in Athens on 24 February 2014.

19. Q has a sister and a brother in Norway, who have lived in Norway since 2005 and 2009, respectively. They are her half-siblings. The sister became a Norwegian citizen in 2014. The brother is still a Peruvian national.

20. In March 2015, C, Q and the children travelled to Norway. The children began attending school that same month.

21. On 10 March 2015, Q applied for a residence permit in Norway under national rules governing work permits for skilled workers. The application was based on an offer of employment dated 8 January 2015 from D, General Manager of Domino's Pizza Norway, and an offer of employment signed by the plaintiff's sister, E. Also attached to the application was a written statement dated 9 March 2015 from her sister, E, to the effect that Q could live at her home. It was apparent from the application that Q was applying for residence for the period from 18 February 2015 to 18 February 2025.

22. On 7 April 2015, the Norwegian Directorate of Immigration (*Utlendingsdirektoratet – UDI*) adopted a decision rejecting the application. The reason given for the rejection was that her skills training was not relevant for the position with Domino's Pizza. On 29 April 2015, Q appealed against that decision. As part of the appeal process, Q provided a rental contract showing she and C had rented a flat together in Norway from 9 March 2015. This point is not in dispute. By decision of 24 November 2015, the Immigration Appeals Board upheld the rejection.

23. Q and C were married on 1 December 2015 in Greece. On 15 December 2015, Q and the children applied for residence cards in Norway as family members of C. Attached to the application were salary statements for C from August 2015 and the months thereafter, and an employment contract for C with Domino's Pizza, dated 11 December 2015 and signed by E. The applications were granted on 22 December 2015 for A and on 16 January 2016 for Q and B.

24. The police undertook a residence inspection on 7 December 2016. According to the police report, C, Q and the children were living together.

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

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

27. On 2 August 2017, C reported that he had moved back to Greece and he is registered as having moved out of Norway on 17 August 2017.

28. C and Q are still formally married, as the divorce hearing scheduled in Greece was postponed due to the Covid-19 pandemic.

29. On 15 December 2017, Q applied for a residence card as a family member of an EEA national through her son, A. On 10 April 2019, the application was rejected by the Directorate of Immigration on the ground that Q and 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.

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

31. On 11 December 2019, Q applied for an interim injunction against the rejection of her application for a residence card. On 16 December 2019, she also initiated legal proceedings challenging the validity of the Immigration Appeals Board's decision and subsequent decision.

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

33. According to the referring court, the plaintiffs have further submitted that A retains his right of residence under Article 12(3) of the Directive, irrespective of his mother's purpose of entering into the marriage, that is to say, even if there is found to be an abuse of rights under Article 35.

34. Further, the Government understands that the summons relates to Q and both sons, although no application for a residence card has been made for B, who is over the age of 18. The Immigration Appeals Board's decision accordingly does not apply to him.

35. Against this background, Oslo District Court decided to stay the proceedings and refer 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?**

IV Written observations

36. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- 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 Leonhardsen and Stewart Watson, acting as Agents; and

- the European Commission ("the Commission"), represented by Elisabetta Montaguti and Jonathan Tomkin, members of its legal service, acting as Agents.

V Proposed answers submitted

Q and Others

37. Q and Others propose that the Court answer the questions as follows:

Question 1:

[…] [A] parent's right of residence in a situation as described above may be based on the Directive alone, or possibly in the light of the EEA Agreement, and that such a right does not presuppose that the Directive is to be applied together with Article 21 TFEU.

Question 2:

[…] [T]he question whether the descendants of the EEA national's spouse only (særkullsbarn) are entitled to continued residence under Article 12(3), or possibly in the light of the EEA Agreement, are also entitled to continued residence in the host State where the EEA national has applied for divorce before departure must be answered in the affirmative.

Question 3:

[T]he question should be answered in the affirmative.

The Norwegian Government,

38. The Norwegian Government proposes that the Court answer the questions as follows:

1. *A third-country national who is the parent of a minor of EEA nationality does not fall within the definition of "family members" in Article 2(2) and, therefore, is not a beneficiary of Directive 2004/38/EC within the meaning of Article 3(1) thereof. Consequently, a person such as the plaintiff in the main proceedings cannot claim derived rights of residence based on Article 7(2) of the Directive nor, in the absence of a provision equivalent to Article 21 TFEU, are there any provisions in the main part of the EEA Agreement giving rise to such rights in conjunction with Directive 2004/38/EC.*

2. *While both the children of the EEA national and those of the spouse are family members of the EEA national within the meaning of Article 2(2) of Directive 2004/38/EC, and thus beneficiaries according to Article 3 of the Directive, the scope of the family members conferred rights upon by Article 12(3) is limited to "his/her children and of the parent who has actual custody of the children". Therefore, a child who is not a direct descendant of the EEA national, but only of his/her spouse, is not entitled to retain rights pursuant to Article 12(3) after the departure of the EEA national.*

   In the alternative, in so far as rights conferred by Article 12(3) also include the children of the EEA national's spouse, such persons can in any event not retain derived rights from the EEA national pursuant to that provision where divorce proceedings between the EEA national and his/her spouse are initiated prior to the EEA national's departure from the host EEA state.

3. *In light of the foregoing answer, there is no need to answer the third question referred.*

In the alternative, since maintenance of residence rights for stepchildren and the spouse of the EEA national under Article 12(3) is derived from being family members of the EEA national, such status being conferred upon them as a consequence of the marriage between the EEA national and the third-country national, those rights may be refused, terminated or withdrawn if that marriage constitutes an abuse of rights under Article 35 of Directive 2004/38/EC.

Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EEA 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 EEA rules by artificially creating the conditions laid down for obtaining it.

In the context of a marriage entered into by an EEA national and a third country national, the subjective element consists in the intention – the essential or predominant aim – of the third-country national to obtain derived rights of residence under Directive 2004/38/EC by entering into a marriage and thus artificially creating the conditions laid down for obtaining derived residence rights.

ESA

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

1. *In a situation such as that at issue in the main proceedings an EEA national child enjoys an independent a right of residence in the host State pursuant to Article 7(1)(b) of Directive 2004/38, provided the conditions laid down in that provision are fulfilled. As a corollary to that right, a third country national parent and primary carer of that child is entitled under that same provision to reside with the child in another EEA State.*

2. *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, can derive a right to continued residence in the host State on the basis of Article 12(3) of Directive 2004/38, provided the child is enrolled at an approved educational establishment. This also applies if the EEA national has applied for divorce from the parent of that child before departing from the country. As a corollary to that right, a third country national parent and primary carer of that child is entitled under that same provision to reside with the child in that State.*

The Commission

40. The Commission proposes that the Court answer the questions as follows:

The child of an EEA national worker who is or has been employed in the territory of another EEA State, and who has been admitted to that State's general educational system enjoys an autonomous right of residence in that State pursuant to Article 10 of Regulation (EU) 492/2011. Such a right of residence entails that the parent who has primary care of that child should be recognised as having a corresponding right of residence.

The rights conferred by Article 10 of Regulation (EU) 492/2011 on the children of an EEA national who is or has been employed in the territory of another EEA State is not limited to children that are common to the EEA national and his or her spouse but includes the children of the spouse alone. Those rights are not affected by the fact that the EEA national concerned has initiated divorce proceedings prior to his or her departure from the host Member State.

In the event that the authorities of an EEA State have established that a marriage between an EEA national and a third country amounts to an abuse prohibited by the general principle of abuse of law, the EEA State may take the measures necessary to refuse, terminate or withdraw rights derived from such an abuse. Nevertheless, any such measure must be proportionate, subject to procedural safeguards, and ensure full respect for the rights of the child. A restrictive measure can not in any event limit the right of residence of children who are themselves EEA nationals and derive an independent right of residence under EEA law.

Páll Hreinsson
Judge-Rapporteur