



## JUDGMENT OF THE COURT

13 November 2019\*

*(Free movement of persons – Sectoral adaptations for Liechtenstein – Right of residence – Derived right of residence for family members – Directive 2004/38/EC)*

In Case E-2/19,

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 Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*), in the case of

### **D and E**

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, as adapted to the Agreement on the European Economic Area,

### THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Bernd Hammermann and Ola Mestad (ad hoc), Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- D and E, represented by Mag. Antonius Falkner, Rechtsanwalt;
- the Government of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents;

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

- the Government of Norway, represented by Ketil Bøe Moen, advocate, Attorney General of Civil Affairs, and Carsten Anker, senior adviser, Ministry of Foreign Affairs, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Michael Sánchez Rydelski, Claire Simpson and Carsten Zatschler, members of the Legal & Executive Affairs Department, acting as Agents; and
- the European Commission (“the Commission”), represented by Elisabetta Montaguti and Jonathan Tomkin, legal adviser and member, respectively, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Government of Liechtenstein, represented by Thomas Bischof; the Government of Norway, represented by Torje Sunde, advocate, Attorney General of Civil Affairs, acting as Agent; ESA, represented by Michael Sánchez Rydelski and Claire Simpson; and the Commission, represented by Jonathan Tomkin, at the hearing on 21 June 2019,

gives the following

## **Judgment**

### **I Legal background**

*EEA law*

- 1 Article 4 of the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) reads:

*Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.*

- 2 Article 28(1) and (5) EEA read:

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

...

5. *Annex V contains specific provisions on the free movement of workers.*

3 Article 31 EEA reads, in extract:

*1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. ...*

...

*2. Annexes VIII to XI contain specific provisions on the right of establishment.*

4 Protocol 15 to the EEA Agreement governs transitional periods on the free movement of persons in Liechtenstein.

5 Article 1 of Protocol 15 EEA reads:

*The provisions of the Agreement and its Annexes relating to the free movement of persons between the EC Member States and EFTA States shall apply subject to the transitional provisions laid down in this Protocol.*

6 Article 5 of Protocol 15 EEA reads:

*1. Liechtenstein, on the one hand, and EC Member States and other EFTA States, on the other hand, may maintain in force until 1 January 1998 with regard to nationals from EC Member States and other EFTA States and to nationals of Liechtenstein, respectively, national provisions submitting to prior authorization entry, residence and employment.*

*2. Liechtenstein may maintain in force until 1 January 1998 with regard to nationals of EC Member States and other EFTA States quantitative limitations for new residents, seasonal workers and frontier workers. These quantitative limitations will be gradually reduced.*

7 Article 9(2) of Protocol 15 EEA reads:

*At the end of the transitional period for Liechtenstein the transitional measures shall be jointly reviewed by the Contracting Parties, duly taking into account the specific geographic situation of Liechtenstein.*

8 Decision of the EEA Council No 1/95 of 10 March 1995 (OJ 1995 L 86, p. 58) includes a Declaration on free movement of persons, which includes the following statement:

*The EEA Council recalls that the Contracting Parties for the EEA Agreement undertook to review, at the end of the transitional period provided for in Protocol 15 to this Agreement the transitional measures provided for in the said Protocol, duly taking into account the specific geographic situation of Liechtenstein.*

*The EEA Council recognizes that Liechtenstein has a very small inhabitable area of rural character with an unusually high percentage of non-national residents*

*and employees. Moreover, it acknowledges the vital interest of Liechtenstein to maintain its own national identity.*

- 9 By Decision of the EEA Joint Committee No 191/1999 of 17 December 1999 (OJ 2001 L 74, p. 29) (“Decision No 191/1999”), which entered into force on 1 June 2000, sectoral adaptations were made to Annexes V and VIII to the EEA Agreement in so far as Liechtenstein is concerned.
- 10 Recitals 1 and 2 of Decision No 191/1999 read:
- (1) The EEA Council of 10 March 1995 adopted a Declaration on free movement of persons;*
- (2) The joint review, which was undertaken in accordance with Article 9(2) of Protocol 15 at the end of the transitional period, concluded that the specific geographical situation of Liechtenstein still justifies the maintenance of certain conditions on the right of taking up residence in that country; this Decision is based on the findings of that review;*
- 11 Decision No 191/1999 made the following sectoral adaptations to Annex VIII (Right of establishment) to the EEA Agreement:

*I*

*Nationals of Iceland, Norway and the EU Member States may take up residence in Liechtenstein only after having received a permit from the Liechtenstein authorities. They have the right to obtain this permit, subject only to the restrictions specified below. No such residence permit shall be necessary for a period less than three months per year, provided no employment or other permanent economic activity is taken up, nor for persons providing cross-border services in Liechtenstein.*

*The conditions concerning nationals of Iceland, Norway and the EU Member States cannot be more restrictive than those which apply to third country nationals.*

*II*

- 1. The number of residence permits available annually for nationals of Iceland, Norway or an EU Member State exercising an economic activity in Liechtenstein shall be determined in such a way that the yearly net increase from the previous year in the number of economically active nationals of those countries resident in Liechtenstein is not less than 1,75% of their number on 1 January 1998. Residence permits to persons naturalised in the course of a year shall be deducted from the basis on which the increase for the next year is calculated. Residence permits granted in excess of the minimum number shall not be counted against the increase due the following year.*

2. *The Liechtenstein authorities shall grant residence permits in a way that is not discriminatory and does not distort competition. Half of the net increase in the permits available shall be granted in accordance with a procedure that gives an equal chance to all applicants.*
3. *Residents who have a short-term permit and who exercise an economic activity shall be included in the quota. Such persons may remain in Liechtenstein under the conditions defined in the Agreement after the expiry of the permit, within the quota under which they entered the country. The permit under the quota shall be re-attributed when the person to whom it was attributed changes his residence to another country. The number of short-term permits available for the purposes of exercising an economic activity shall not deviate by more than 10 % from what it was in 1997.*

### III

*Family members of nationals of Iceland, Norway and EU Member States residing lawfully in Liechtenstein shall have the right to obtain a permit of the same validity as that of the person on whom they depend. They shall have the right to take up an economic activity, in which case they will be included in the number of permits granted to economically active persons. However, the conditions in point II may not be invoked to refuse them a permit in the event that the annual number of permits available to economically active persons is filled.*

*Persons giving up their economic activity may remain in Liechtenstein under conditions defined in Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State and in Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity: they will no longer be counted in the number of permits available to economically active persons nor will they be included in the quota defined in point IV.*

### IV

*A supplementary annual quota of 0,5% of the basis referred to in point II shall be available for persons who wish to take up residence on the basis of rights defined in Council Directive 90/364/EEC of 28 June 1990 on the right of residence, Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees, and self-employed persons who have ceased their occupational activity and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students.*

*Point II shall apply mutatis mutandis.*

### V

1. *Liechtenstein may maintain in force for five years national provisions obliging seasonal workers and members of their family to leave the territory of Liechtenstein for at least three months at the expiry of their seasonal permit. Such persons may not be subject to any further restrictions. The seasonal permits shall be automatically renewed for seasonal workers holding a work contract on their return to Liechtenstein. The number of permits available to seasonal workers having the nationality of Iceland, Norway or an EU Member State shall not be less than the number of permits granted in 1997 less the number of permits for persons benefiting from the liberalisation in accordance with the following paragraph.*
2. *The number of persons exempted from the obligation to leave the territory of Liechtenstein annually shall be determined as the number of outstanding permits divided by the number of years remaining until the end of the transitional period for seasonal workers. The order of persons to benefit from the liberalisation shall be determined by the number of consecutive renewals of seasonal permits and by the date of issue of the first such permit within this sequence.*
3. *Persons who have benefited from the liberalisation in accordance with the preceding paragraph shall not occupy a place under the quotas in accordance with points II and IV. Such persons will however be counted in the case of family members taking up economic activity in accordance with point III.*

## VI

*Applicants for a residence permit shall receive a written reply by the end of the third month from the date of application. Rejected applicants shall have the right to a reasoned refusal in writing. They shall have the same legal remedies as Liechtenstein citizens as regards administrative decisions.*

## VII

*A person employed in but whose residence is not in Liechtenstein (a frontier worker) shall return daily to his country of residence.*

## VIII

*Liechtenstein shall provide the other Contracting Parties and the EFTA Surveillance Authority with all such information as may be necessary to control compliance with this Annex.*

- 12 By way of sectoral adaptation, the following adaptation was made to Annex V (Free movement of workers) to the EEA Agreement:

*The provisions in the SECTORAL ADAPTATIONS in Annex VIII concerning Liechtenstein shall apply, as appropriate, to this Annex.*

- 13 According to the text of the sectoral adaptations introduced by Decision No 191/1999, the adaptations were to apply to Liechtenstein until 31 December 2006. It was provided further that, before that date, “the Joint Committee shall undertake a review on the basis of which it may, duly taking into account the specific geographical situation of Liechtenstein and to the extent strictly necessary, decide to maintain such measures that may be deemed appropriate”. However, in the context of the 2004 EEA Enlargement Agreement (OJ 2004 L 130, p. 3), the temporal limitation was replaced by the following provision:

*Duly taking into account the specific geographic situation of Liechtenstein, this arrangement shall be reviewed every five years, for the first time before May 2009.*

- 14 The reviews carried out in 2009 and 2014 did not give rise to any changes to the arrangement. In the Commission’s Communication to the Council and the European Parliament of 28 August 2015 (Liechtenstein Sectoral Adaptations – Review COM(2015) 411 final; “the 2015 Review”) the Commission stated, inter alia, the following:

*The Liechtenstein authorities can issue a minimum of 56 new residence permits and around 300 new short-term permits (not exceeding 12 months) a year to EEA citizens exercising an economic activity in Liechtenstein. Every year Liechtenstein fulfils its quota obligations for new permits. The number of short-term permits is usually below 300. A supplementary quota is available for people who are not exercising an economic activity and who wish to take up residence in Liechtenstein. This quota is around 20 permits a year. There are no restrictions preventing family members of a holder of a residence permit from joining their spouse/family and taking up residence in Liechtenstein. They also have the right to take up an economic activity.*

[...]

*The latest figures provided by Liechtenstein [...] show a significant decline in the number of applications for residence permits by economically active and inactive people, following a peak in 2008. The number of applications nevertheless remains 16-23 times higher than the allocable minimum quota, in particular for economically active people.*

*In the consultations between the European Commission, the European External Action Service and Liechtenstein on a possible change to the current rules, Liechtenstein argued that its absorption capacity remained rather limited and had not changed during the review period. It also argued that the Joint Declaration on Liechtenstein’s Sectoral Adaptations, attached to the 2014 Agreement on the participation of Croatia in the EEA, basically reconfirmed that Liechtenstein’s absorption capacity was unchanged. Liechtenstein therefore suggested that the specific arrangements for Liechtenstein should not be changed and that the next review should take place before May 2019.*

*In the course of the review, the Commission assessed whether there had been a change in Liechtenstein's specific geographic situation and in the circumstances described in Decision No 1/95 of the EEA Council, namely that (a) Liechtenstein has a very small inhabitable area of rural character; and (b) Liechtenstein has an unusually high percentage of non-national residents and employees and a vital interest in maintaining its national identity.*

*The result of the assessment is as follows:*

*(a) Liechtenstein occupies a territory of 160 square kilometres that has not changed;*

*(b) Liechtenstein's population is 36 925. It has grown by more than 4 000 people since 1998 (32 227), the reference year for the Adaptations, and by around 1 300 since 2009 (35 851), the year of the previous review. This might not seem high in real terms but translates into increases of 14 % and around 3 % respectively. The proportion of foreigners has also been rising, up to 33.5 % in 2012 from 33.3 % the previous year, half of whom are EEA citizens. The number of employees is almost equal to the number of residents (over 35 800 persons), 52 % of whom commute from neighbouring countries.*

*These numbers seem to confirm the special geographic nature and the limited absorption capacity of Liechtenstein.*

*The high demand for residence permits, despite the difficulties in obtaining them, is most probably explained by the fact that different tax rules apply to Liechtenstein residents compared with non-residents. As long as these differences remain, it is to be expected that people will want to officially reside in Liechtenstein and will apply in relatively high numbers for residence permits, making it necessary to maintain certain restrictions on the number of annual permits issued.*

*The Council European Free Trade Association (EFTA) working party was briefed about this issue on 5 September 2014 and subsequently on 30 April 2015. No Member State raised concerns about the continuation of the current regime.*

#### **4. CONCLUSIONS**

*In view of the above, the Commission does not see the need to make any change to the current rules and considers that the provisions on the Sectoral Adaptations can remain unchanged. A review of these provisions should take place before May 2019.*

- 15 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) (“the Directive”) was incorporated into the EEA Agreement at point 1 of Annex V (Free movement of workers) and point 3 of Annex VIII (Right of establishment) by Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 (OJ 2008 L 124, p. 20) (“Decision No 158/2007”). The decision entered into force on 1 March 2009.

16 Recitals 11 and 12 of Decision No 158/2007 read:

(11) *Decision of the EEA Joint Committee No 191/1999 of 17 December 1999 introduced new sectoral adaptations to Annex V and Annex VIII to the Agreement with regard to Liechtenstein, which were amended by the Agreement on the Participation of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic in the European Economic Area, signed in Luxembourg on 14 October 2003.*

(12) *The incorporation of Directive 2004/38/EC into the Agreement shall be without prejudice to these sectoral adaptations with regard to Liechtenstein[.]*

17 Article 1 of Decision No 158/2007 replaced the text in point 3 of Annex VIII to the EEA Agreement to read as follows:

...

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

...

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

18 The first sentence of recital 5 of the Directive reads:

*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.*

19 Article 2(2) of the Directive reads:

*“Family member” means:*

...

*(c) the direct descendants who are under the age of 21 or are dependants ...*

20 Article 3(1) of the Directive reads, as adapted:

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

21 Article 7(1) of the Directive reads, as adapted:

*All nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of longer than three months if they:*

*(a) are workers or self-employed persons in the host Member State; or*

*(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or*

*(c) ...*

*(d) are family members accompanying or joining a national of EC Member States and EFTA States who satisfies the conditions referred to in points (a), (b) or (c).*

#### *National law*

22 Pursuant to Article 2(1) thereof, the Act of 17 September 2008 on foreigners (*Ausländergesetz*, LGBI. 2008 No 311, as amended) (“Foreigners Act”) applies to persons who are not nationals of an EEA State or Switzerland, and their family members. The Foreigners Act has provisions on family reunification. Pursuant to Article 32, the purpose of family reunification is to bring family members together at the same time in the household of the applicant. Persons to be regarded as family members are the spouse or registered partner, and unmarried children of both spouses under the age of 18.

23 The Act of 20 November 2009 on free movement for EEA and Swiss nationals (*Personenfreizügigkeitsgesetz*, LGBI. 2009 No 348, as amended) (“Free Movement of Persons Act”) applies to EEA and Swiss nationals. Pursuant to Article 1(2) thereof, the purpose of the Free Movement of Persons Act is, inter alia, to implement the Directive and the special arrangements for Liechtenstein set out in Annexes V and VIII to the EEA Agreement. Pursuant to Article 41 of the Free Movement of Persons Act, EEA and Swiss

nationals holding a permit to take up residence in Liechtenstein may be joined at any time by their family members.

## **II Facts and procedure**

- 24 According to the referring court, D was born in 1980 and is a German national. Her daughter E was born in 2012 and is also a German national. D divorced from E's father in 2016. The parents have joint rights of custody over E. It follows from an agreement between them that E is being cared and provided for and raised by D. D and E resided in Germany until early 2018.
- 25 In May 2017, D married F, a Turkish national resident in Liechtenstein since 1999. Following an application by D, the Migration and Passport Office of the Principality of Liechtenstein issued a residence permit to D in the framework of family reunification, in her capacity as the spouse of F. Since February 2018, D has been resident with F in Liechtenstein, and has been working full-time as an employed person in Liechtenstein.
- 26 In March 2018, D applied for permission for her daughter E to join her in Liechtenstein in the framework of family reunification. The application was rejected by the Migration and Passport Office by a decision of 5 July 2018. An appeal challenging that decision was rejected by the Government by a decision of 21 August 2018.
- 27 The Migration and Passport Office and the Government set out as the reason for their decisions, in essence, that D received her residence permit in Liechtenstein only in the framework of the right of her husband, a third country national resident in Liechtenstein, to family reunification. Since her right of residence in Liechtenstein was derived from a third country national, she was also considered a third country national and was unable to transfer greater rights than those she personally held. Pursuant to Liechtenstein law applicable in the case of nationals of a third country, such as Turkey, a minor child such as E could not be granted a residence permit for the purposes of family reunification.
- 28 On 23 August 2018, D and E challenged the Government's decision before the Administrative Court.
- 29 By a letter of 24 January 2019, registered at the Court on 29 January 2019, the Administrative Court decided to stay the proceedings and refer the following question to the Court:

*Must Directive 2004/38, in particular Article 3(1) in conjunction with Article 7(1)(d) thereof, and the first sentence of Point III of Decision No 191/1999 be interpreted as meaning that a family member of a national of an EU Member State has the right to obtain a permit of the same validity as that of the person on whom he depends even if the person on whom he depends obtained the right of residence in Liechtenstein only on the basis of national law and not on the basis of EEA law?*

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

### **III Answer of the Court**

#### *Observations submitted to the Court*

- 31 D and E submit that, where an EEA national receives a residence permit in Liechtenstein in accordance with the sectoral adaptations, Point III of those adaptations provides that family members shall have the right to obtain a permit of the same validity. D was granted a residence permit in the framework of family reunification, in application of the rules set out in the sectoral adaptations. Her daughter E thus has a right to obtain a residence permit in Liechtenstein of the same validity as hers.
- 32 D and E argue that an unconditional right to family reunification also follows from Article 7 of the Directive, as D and E are both EEA nationals. By that provision, the Directive establishes not only a right to family reunification for the EEA national already resident in another EEA State but also a direct right for those EEA nationals who wish to join that person.
- 33 In the view of D and E, the Court should answer the question referred in line with the approach set out above and thus ensure family reunification of D and E in accordance with EEA law, which they have been refused for more than a year.
- 34 The Government of Liechtenstein submits that D has never received an independent residence permit in Liechtenstein on the basis of the Free Movement of Persons Act and the sectoral adaptations applicable to Liechtenstein. D cannot therefore be considered an EEA national for the purposes of Point I of the sectoral adaptations. Nor did D come to Liechtenstein as a family member of a direct beneficiary under the Directive. Therefore, D has not exercised a right to free movement pursuant to the EEA Agreement. In these circumstances, it appears that the Directive is not at all applicable.
- 35 Since D did not obtain a residence permit pursuant to Point I of the sectoral adaptations, it is the view of the Liechtenstein Government that Point III extending the residence right to family members does not apply. For the same reason, the right to be joined by a family member under the Directive does not apply.
- 36 Upon a question from the bench, the Government of Liechtenstein submitted at the hearing that, according to national law and practice, an EEA national who has a derived right of residence under the Foreigners Act can be included under the regime of the Free Movement of Persons Act as soon as the EEA national acquires an independent right of residence, which is, the case, for example, after five years' uninterrupted residence in Liechtenstein, or if the person successfully participated in the procedure established under the sectoral adaptations. Upon another question from the bench, the Government of Liechtenstein submitted at the hearing that the residence permit granted to D was not

counted towards the residence permits annually available under the sectoral adaptations to Annexes V and VIII to the EEA Agreement.

- 37 The Government of Norway has not taken a final position on the interpretation of the sectoral adaptations, but indicates that it may concur with the Liechtenstein Government's interpretation to the effect that rights of residence for family members of EEA nationals only apply where the EEA national resides in Liechtenstein on the basis of EEA law. The rights of residence for family members under Article 7 of the Directive are derived rights acquired through their status as family members of the beneficiary (reference is made to Case E-4/11 *Clauder* [2011] EFTA Ct. Rep. 216, paragraph 39 and case law cited). Where the person residing in Liechtenstein has no rights under the Directive, there is no EEA beneficiary from whom the rights of the family member may be derived. A different interpretation would make the rights of the family member autonomous rather than derived, which would alter the character of such rights. It would also limit the scope of the sectoral adaptations beyond what appears to be a natural understanding of those adaptations.
- 38 The Government of Norway submits that the sectoral adaptations for Liechtenstein cannot be interpreted homogeneously with the Directive as understood in EU law. Such an interpretation would contravene the wording, objectives and context of the adaptations and simply set aside what has been determined by the Contracting Parties to the EEA Agreement. It stresses that provisions of EEA law setting out the borders of the EEA Agreement – borders that are different to those under EU law – are not to be interpreted dynamically or homogeneously (reference is made to Case E-4/04 *Pedical* [2005] EFTA Ct. Rep. 1, paragraph 28).
- 39 The Government of Norway submits further that Article 4 EEA, as referred to by the referring court, does not apply where EEA law lays down more specific rules prohibiting discrimination (reference is made, inter alia, to Case E-1/01 *Einarsson* [2002] EFTA Ct. Rep. 1, paragraph 38 and case law cited). Such rules are laid down in Article 28 EEA and the Directive. However, by virtue of the sectoral adaptations to these provisions, Liechtenstein can indeed treat nationals of other EEA States differently to Liechtenstein nationals. Such adaptations cannot be circumvented by applying the general prohibition in Article 4 EEA.
- 40 ESA notes that D is an EEA national who moved to Liechtenstein and who has been lawfully residing there since February 2018. She is therefore covered by the wording of Article 3(1) of the Directive, which applies to all EEA nationals. There are no grounds for excluding EEA nationals who derive their residence rights from third country nationals. Moreover, D resides and works in Liechtenstein and thus falls within the scope of Article 7(1)(a) of the Directive. Her daughter E therefore enjoys a derived right of residence under Article 7(1)(d).
- 41 ESA submits that this conclusion is not affected by the sectoral adaptations in Annexes V and VIII to the EEA Agreement. While ESA recognises Liechtenstein's right to apply these restrictions, they provide no legal basis for denying family reunification in this case. In particular, Decision No 158/2007, which incorporated the Directive into the

EEA Agreement, did not include an adaptation whereby the Directive would only apply to EEA nationals who move to or reside in Liechtenstein by virtue of the sectoral adaptations.

- 42 ESA submits further that the first sentence of Point III of the sectoral adaptations confers the right to family reunification, irrespective of the provisions of the Directive. An EEA national is simply required to be “residing lawfully” in Liechtenstein in order to benefit from family reunification. While Point I grants EEA nationals a specific route to obtaining a residence permit, there is nothing to suggest that EEA nationals cannot freely benefit from other lawful routes to obtaining a permit. Similarly, the right for the family member to obtain a “permit of the same validity” does not refer to a specific type or kind of permit, nor does it specify the “route” by which the permit must have been obtained. Reserving the right to family reunification to those EEA nationals whose residence permit is based on EEA law, would possibly also entail that EEA nationals are subject to stricter conditions than third country nationals as regards family reunification, in violation of the fourth sentence of Point I of the sectoral adaptations.
- 43 The Commission submits that, even if D was admitted to Liechtenstein on the basis of her status as a spouse of a third country national, the fact remains that she is an EEA national who resides in Liechtenstein and therefore has exercised free movement rights falling within the scope of EEA law. She already complies with the sectoral adaptations by possessing a residence permit. Point I of the sectoral adaptations does not prescribe any requirement as regards the form or type of residence permit. In these circumstances, national rules may not introduce additional conditions which restrict or nullify the rights conferred under EEA law (reference is made to the judgment in *Commission v Spain*, C-157/03, EU:C:2005:225, paragraphs 28 to 30 and case law cited).
- 44 Thus, the Commission submits that once an EEA national exercising free movement in Liechtenstein has been issued with a residence permit her situation must be considered to fall within the scope of the Directive, as implemented by the Free Movement of Persons Act, regardless of the fact that the residence permit was issued under national law provisions governing family reunification.

#### *Findings of the Court*

- 45 By its question, the referring court asks, in essence, whether it is possible for an EEA national to rely on the Directive in order to derive a right of residence in Liechtenstein, in a situation where that person is a dependant family member of an EEA national with a valid residence permit in Liechtenstein, even though that residence permit was not granted on basis of the sectoral adaptations, but by virtue of national law.
- 46 Article 3(1) of the Directive provides that it applies to all EEA nationals who move or reside in an EEA State other than that of which they are nationals and their family

members, as defined in Article 2(2) of the Directive, who accompany or join them (see also *Clauder*, cited above, paragraphs 36 and 37).

- 47 Pursuant to Article 2(2)(c) of the Directive, family members include direct descendants under the age of 21 or those who are dependent on an EEA national. Family members have the right to reside with an EEA national in another EEA State for a period of longer than three months, provided that the EEA national fulfils the conditions laid out in Article 7(1) of the Directive.
- 48 In the present case, it is not disputed that D is an EEA national who satisfies the conditions in Article 7(1)(a) of the Directive as a worker, and that she is residing in Liechtenstein on the basis of a valid residence permit. Therefore, based on the wording of the Directive alone, E would have a right of residence in Liechtenstein pursuant to Article 7(1)(d) in her capacity as D's family member.
- 49 The question is whether the sectoral adaptations result in a different conclusion.
- 50 In this regard the Court recalls, first, that, due to its specific geographical situation, under the sectoral adaptations to Annexes V and VIII to the EEA Agreement, Liechtenstein is entitled to maintain a system of prior authorisation for the taking up of residence in Liechtenstein, as well as annual quantitative limits. This exemption was originally laid down in Protocol 15 to the EEA Agreement, which lapsed on 1 January 1998. The current exemption follows from sectoral adaptations to Annexes V and VIII to the EEA Agreement, which were provisionally introduced by Decision No 191/1999 and made indefinite by the 2004 EEA Enlargement Agreement, subject only to a review every five years.
- 51 Recital 12 of Decision No 158/2007 states that the incorporation of the Directive into the EEA Agreement shall be without prejudice to the sectoral adaptations to Annexes V and VIII with regard to Liechtenstein. Consequently, since the sectoral adaptations set out specific conditions for the taking up of residence in Liechtenstein, the question of whether an EEA national may take up residence in Liechtenstein depends, in principle, on the conditions set out in those adaptations, regardless of whether a right of residence would otherwise flow from the Directive.
- 52 Point I of the sectoral adaptations provides that EEA nationals may take up residence in Liechtenstein only after having received a permit from the Liechtenstein authorities. They have a right to obtain this permit, subject only to the restrictions specified in the sectoral adaptations. Point II further stipulates that the number of permits available annually for economically active EEA nationals shall be determined in such a way that the yearly net increase from the previous year in the number of economically active EEA nationals resident in Liechtenstein is no less than 1,75% of their number on 1 January 1998. Point III gives family members of EEA nationals residing lawfully in Liechtenstein the right to obtain a permit of the same validity as that of the person on whom they depend.

- 53 Based on the rules in points II and IV of the sectoral adaptations, Liechtenstein has, according to its submissions, annual quotas of 56 residence permits for economically active EEA nationals and 16 residence permits for economically inactive EEA nationals. It appears that a special procedure laid down in the Free Movement of Persons Act must be followed to be granted a residence permit within these quotas.
- 54 Liechtenstein also issues residence permits under, inter alia, the Foreigners Act, which applies to third-country nationals and their family members. D has been granted a residence permit under the rules of the Foreigners Act, within the framework of family reunification, in her capacity as the spouse of F, a Turkish national resident in Liechtenstein.
- 55 While Point III is silent as to the nature of the permit from which a family member derives her right to reside in Liechtenstein, it is apparent from Point III read in light of the context and scope of Decision No 191/1999 that it refers to permits of EEA nationals residing in Liechtenstein on the basis of the sectoral adaptations and its system of quantitative limits. Thus, the right to family reunification granted to EEA nationals in Point III of the sectoral adaptations applies to EEA nationals that have been granted a permit within the meaning of the sectoral adaptations, and does not extend to residence permits granted on a legal basis other than the sectoral adaptations.
- 56 As is undisputed between the parties to the present proceedings, D was not subject to the system established under the sectoral adaptations, nor was the residence permit which was granted to her counted towards the number of permits available under that system.
- 57 However, while Liechtenstein is not under any obligation to grant a residence permit to an EEA national outside the system provided for in the sectoral adaptations, the sectoral adaptations cannot be interpreted to preclude the EEA rights of EEA nationals to whom Liechtenstein has granted residence permits on other grounds and who reside there. Importantly, the sectoral adaptations cannot serve as a basis for undermining rights, which are granted to EEA nationals by virtue of EEA law and concern the exercise of their residence in Liechtenstein. Accepting the use of the quantitative limit system to create two separate classes of EEA nationals residing in Liechtenstein based on the nature of their residence permits would require a clear legal basis in the sectoral adaptations, which is not present.
- 58 Thus, in light of the foregoing, the answer to the question referred must be that the sectoral adaptations to Annexes V and VIII to the EEA Agreement, in particular Point III thereof, do not deprive the family member of an EEA national, who has a valid residence permit and is residing in Liechtenstein, of the right to accompany or join the EEA national in Liechtenstein on the basis of Article 7(1)(d) of the Directive, even though the residence permit that the EEA national in Liechtenstein holds was not granted on the basis of the system provided for in the sectoral adaptations.

#### IV Costs

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

On those grounds,

#### THE COURT

in answer to the question referred to it by the Administrative Court of the Principality of Liechtenstein hereby gives the following Advisory Opinion:

**The sectoral adaptations to Annexes V and VIII to the EEA Agreement, in particular Point III thereof, do not deprive the family member of an EEA national, who has a valid residence permit and is residing in Liechtenstein, of the right to accompany or join the EEA national in Liechtenstein on the basis of Article 7(1)(d) of Directive 2004/38/EC, even though the residence permit that the EEA national in Liechtenstein holds was not granted on the basis of the system provided for in the sectoral adaptations.**

Páll Hreinsson

Bernd Hammermann

Ola Mestad

Delivered in open court in Luxembourg on 13 November 2019.

Ólafur Jóhannes Einarsson  
Registrar

Páll Hreinsson  
President