



E-2/19-20

**REPORT FOR THE HEARING**  
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.

**I Introduction**

1. By a letter of 24 January 2019, registered at the Court on 29 January 2019, the Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*) made a request for an advisory opinion in a case pending before it concerning D and E.

2. D and E are mother and daughter and both German nationals. D holds a residence permit in Liechtenstein in her capacity as the spouse of a Turkish national resident there. However, E's application for a residence permit in Liechtenstein has been rejected. An issue in the case before the referring court is whether this rejection is contrary to EEA law.

## II Legal background

### *EEA law*

3. 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.*

4. Article 28(1) and (5) EEA reads:

*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.*

5. 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.*

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

7. 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.*

8. 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.*

9. 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.*

10. 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.*

11. 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.

12. 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;*

13. 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.*

14. By Decision No 191/1999, the following sectoral 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.*

15. As a result of Decision No 191/1999, it was provided that the sectoral adaptations were to apply to Liechtenstein until 31 December 2006 and 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.*

16. The reviews in 2009 and 2014 did not give rise to any changes to the arrangement. A new review is scheduled for 2019.

17. 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/ECC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/36/EEC (“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.

18. 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[.]*

19. 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’.*

20. 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.*

21. Article 2(2) of the Directive reads:

*“Family member” means:*

...

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

22. 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.*

23. 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*

24. Pursuant to its Article 2(1), 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.

25. 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 its Article 1(2), 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.

### **III Facts and procedure**

26. 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, provided for and raised by D. D and E resided in Germany until early 2018.

27. 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.

28. 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 6 July 2018. An appeal challenging that decision was rejected by the Government by a decision of 21 August 2018.

29. 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.

30. On 23 August 2018, D and E challenged the Government's decision before the Administrative Court. On 18 January 2019, the Administrative Court decided to seek an advisory opinion from the Court.

31. The Administrative Court observes that D's residence permit in Liechtenstein is based on national rules on family reunification, not on EEA rules on free movement of persons and freedom of establishment, including the Directive. The question nevertheless arises whether E may take up residence in Liechtenstein on the basis of the Directive.

32. The Administrative Court notes that, on a literal reading of Article 3(1) of the Directive, it applies to D, with the effect that E may claim a right of residence in Liechtenstein pursuant to Article 7(1)(d) of the Directive as D's family member. However, the Migration and Passport Office and the Government appear to take the view that, in light of the special arrangements for Liechtenstein in Annexes V and VIII to the EEA Agreement, the Directive must be interpreted restrictively so that it applies only to such EEA nationals who have obtained a residence permit on the basis of EEA rules. D did not obtain a permit of that kind.

33. As possible further aids to the interpretation of the relevant provisions, the Administrative Court refers to case law interpreting the Directive in the EEA,<sup>1</sup> recital 5 of the Directive on the need to extend a residence right to family members, Article 4 EEA on the prohibition of discrimination on grounds of nationality, and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") guaranteeing respect for family life.

34. Against this background, the Administrative Court has referred 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?**

#### **IV Written observations**

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

---

<sup>1</sup> Reference is made to Cases E-4/11 *Clauder* [2011] EFTA Ct. Rep. 216, and E-28/15 *Jabbi* [2016] EFTA Ct. Rep. 575.

- 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;
- 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.

## **V Summary of the arguments and observations submitted to the Court**

### *D and E*

36. 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.

37. 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.

38. The approach of the Government of Liechtenstein appears to be that D cannot be treated as an EEA national and that D and E cannot therefore be granted family reunification. D and E submit that this position violates human rights and is not in conformity with EEA law.

39. 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.

*The Government of Liechtenstein*

40. 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. The fact that D is legally residing in Liechtenstein and that she is an EEA national does not alter this conclusion.

41. 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. Granting E the right to obtain a residence permit on the basis of the Directive would mean that all EEA nationals, regardless of the legal basis on which their residence permit in Liechtenstein is based, would have an EEA right of family reunification. This would result in a circumvention of the sectoral adaptations.

42. Consequently, family reunification in the present case is governed exclusively by the Foreigners Act. Since E is neither a common child of D and F, nor did she join the family at the same time, as is required by the Foreigners Act, D's request for the grant of a residence permit for E had to be rejected.

43. Insofar as fundamental rights are concerned, the Government of Liechtenstein submits that the right to respect for family life cannot be construed as a general obligation on a State to accept the choice of the common residence of a married couple or to permit family reunification on its territory. As noted by the referring court, the applicants can carry out their family life in Germany, also together with D's spouse.

44. The Government of Liechtenstein proposes the following answer to the question referred:

*The question of the Administrative Court of whether 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 must 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 must be answered in the negative.*

*The Government of Norway*

45. 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.<sup>2</sup> 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.

46. 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.<sup>3</sup>

47. 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.<sup>4</sup> 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.

48. The Government of Norway acknowledges that the provisions of the EEA Agreement are to be interpreted in the light of fundamental rights, including the right to respect for family life, and that restrictive national provisions falling within the scope of the EEA Agreement therefore must be compatible with such rights.<sup>5</sup> On the other hand, it is not for the Court to assess fundamental rights in a legal situation falling outside the scope

---

<sup>2</sup> Reference is made to *Clauder*, cited above, paragraph 39 and case law cited.

<sup>3</sup> Reference is made to Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, paragraph 28.

<sup>4</sup> Reference is made, inter alia, to Case E-1/01 *Einarsson* [2002] EFTA Ct. Rep. 1, paragraph 38 and case law cited.

<sup>5</sup> Reference is made, inter alia, to *Clauder*, cited above, paragraph 49 and case law cited, and Joined Cases E-3/13 and E-20/13 *Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraph 226.

of EEA law.<sup>6</sup> In the event EEA law were to apply, the Government of Norway submits that Article 8 ECHR does not require family life to be performed in one particular State.<sup>7</sup>

ESA

49. 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).

50. 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.

51. 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.

52. ESA submits that, in the event that further interpretation of the sectoral adaptation should be required, there are a number of reasons why they should be construed so as to facilitate family reunification. First, the sectoral adaptations are exceptions to the free movement of persons and should be interpreted strictly,<sup>8</sup> or at least no broader reading than is necessary should be given to achieve their particular goal. In the present case, the sectoral adaptations did apply, namely the requirement to obtain a permit, and have therefore served

---

<sup>6</sup> For comparison, reference is made to the judgment in *Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 and 22.

<sup>7</sup> Reference is made to the judgment of the European Court of Human Rights of 3 October 2014 in *Jeunesse v the Netherlands*, Application no. 12738/10, paragraphs 107 and 109.

<sup>8</sup> Reference is made to Case E-15/12 *Wahl* [2013] EFTA Ct. Rep. 537, paragraph 83, and the judgment in *Orfanopoulos and Oliveri*, C-482/01 and C-493/01, EU:C:2004:262, paragraph 64.

their purpose. Interpreting the adaptations as ruling out the application of EEA law where a permit has been obtained via a different legal route would be disproportionate to securing their aim.

53. Second, where a provision of EEA law is open to several interpretations, preference must be given to the interpretation which ensures the effectiveness of the provision.<sup>9</sup> To interpret the sectoral adaptations in such a way as to treat an EEA national lawfully residing and working in Liechtenstein as a third country national and/or to require that person to obtain another residence permit, with essentially the same effect, via a different legal route, would be to undermine the effective application of the Directive and Article 28 EEA.

54. Third, ESA submits further that provisions of the EEA Agreement are to be interpreted in the light of fundamental rights.<sup>10</sup> Where possible, the relevant provisions should therefore be construed so as to preserve the family bond between D and E.

55. Finally, ESA contends that Liechtenstein's approach leads to undesirable outcomes. In the first place, by categorising EEA nationals in D's situation as third country nationals or a sub-category of EEA nationals, Liechtenstein is depriving such EEA nationals of their rights under EEA law, in particular the right to family reunification under Article 28 EEA and the Directive. There is no indication in the text of the sectoral adaptations that this was the intention of their drafters.

56. In the second place, Liechtenstein's approach leads to discrimination between EEA nationals, depending on the basis on which they have obtained their residence permit in Liechtenstein. Such discrimination cannot be allowed.<sup>11</sup> That said, it appears that Liechtenstein in some cases has recognised that flexibility is required where EEA nationals hold residence permits not based on EEA law, to ensure that the appropriate consequences can be drawn from their status as EEA nationals. In ESA's view, that approach is the correct one and should also apply in the present case.

57. ESA proposes the following answer to the question referred:

*Directive 2004/38, in particular Article 3(1) read in conjunction with Article 7(1)(d) thereof, and the first sentence of Point III of the sectoral adaptations to Annex V and Annex VIII to the EEA Agreement with regard to Liechtenstein, must be interpreted as meaning that a family member of an EEA national has the right to reside with that EEA national, irrespective of whether the EEA national obtained her/his residence permit on the basis of national immigration rules or on the basis of implemented EEA law.*

---

<sup>9</sup> Reference is made to *Clauder*, cited above, paragraph 48.

<sup>10</sup> Reference is made to *Jabbi*, cited above, paragraph 81 and case law cited.

<sup>11</sup> Reference is made to the judgment in *Matteucci*, 235/87, EU:C:1988:460, paragraph 16.

*The Commission*

58. 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.<sup>12</sup>

59. Thus, 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.

60. The Commission submits further that D's residence status in Liechtenstein must, as a matter of EEA law, be considered to carry with it the right to be accompanied or joined by her daughter E pursuant to Article 7(1)(d) of the Directive. Moreover, the right to be accompanied by family members has been recognised to be of particular importance in facilitating the exercise of free movement rights<sup>13</sup> and ensures respect for family rights as enshrined in Article 8 ECHR.<sup>14</sup>

61. The Commission proposes the following answer to the question referred:

*Article 7(1)(d) of Directive 2004/38 read in conjunction with the first sentence of Point III of the sectoral adaptations to Annex V and Annex VIII to the EEA Agreement with regard to Liechtenstein must be interpreted as conferring a right on a family member of an EEA national to reside with that EEA national in the Principality of Liechtenstein regardless of whether the residence permit issued to the EEA national was granted under domestic immigration rules or in implementation of EEA law.*

Páll Hreinsson  
Judge-Rapporteur

---

<sup>12</sup> 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.

<sup>13</sup> Reference is made, inter alia, to the judgment in *Metock and Others*, C-127/08, EU:C:2008:449, paragraph 56 and case law cited.

<sup>14</sup> Reference is made, inter alia, to the judgment in *Commission v Germany*, C-441/02, EU:C:2006:253, paragraphs 108 and 109.