JUDGMENT OF THE COURT

11 March 2025[*]

(*Admissibility – Article 34 SCA – The notion of court or tribunal – The concept of independence – Article 1(2)(b) EEA – Free movement of persons – Directive 2004/38/EC – Article 7 – The concept of a worker – The condition of sufficient resources*)

In Case E-23/24,

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 Immigration Appeals Board (*Utlendingsnemnda*), in the case of

AO and IM,

THE COURT,

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

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- the Norwegian Government, represented by Helge Røstum and Oscar Nordén, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Sigurbjörn Bernharð Edvardsson, Johanne Førde, Kyrre Isaksen and Melpo-Menie Joséphidès, acting as Agents; and

- the European Commission ("the Commission"), represented by Elisabetta

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

Montaguti and Jonathan Tomkin, acting as Agents,

gives the following

JUDGMENT

I INTRODUCTION

1 This request for an advisory opinion concerns the interpretation of Article 7(1)(b) of Directive 2004/38/EC. The main question is whether an EEA national and her family member may be considered to have sufficient resources within the meaning of that provision even if all the resources stem from income of a third-country national.

2 The request has been made in proceedings before the Immigration Appeals Board (*Utlendingsnemnda*) ("UNE") concerning the applications of AO and IM for permanent residence in Norway.

II LEGAL BACKGROUND

EEA law

3 Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads, in extract:

> *The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.*
>
> *Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.*
>
> …

4 The fifth recital of the Agreement on the European Economic Area ("EEA Agreement" or "EEA") reads:

> *DETERMINED to provide for the fullest possible realization of the free movement of goods, persons, services and capital within the whole European Economic Area, as well as for strengthened and broadened cooperation in flanking and horizontal policies;*

5 Article 1 EEA reads, in extract:

1. The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.

2. In order to attain the objectives set out in paragraph 1, the association shall entail, in accordance with the provisions of this Agreement:

...

(b) the free movement of persons;

...

6 Article 28(1) EEA reads:

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

7 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; and EEA Supplement 2012 No 5, p. 243) ("Directive 2004/38" or "the Directive") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 (OJ 2008 L 124, p. 20; and EEA Supplement 2008 No 26, p. 17) ("JCD 158/2007"), and is referred to at point 1 of Annex V (Free movement of workers) and point 3 of Annex VIII (Right of establishment) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway. The requirements were fulfilled by 9 January 2009, and the decision entered into force on 1 March 2009.

8 The third subparagraph of Article 1(1) of JCD 158/2007 reads:

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'.

9 Article 7 of the Directive, entitled "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

...

(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).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

…

10 Article 16 of the Directive, entitled "General rule for Union citizens and their family members", reads, in extract:

1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

…

National law

11 It appears from the request that the Directive was transposed into Norwegian law through the Act of 15 May 2008 relating to the admission of foreign nationals into the realm and their stay here (Immigration Act) (*Lov om utlendingers adgang til riket og deres opphold her (utlendingsloven)*).

12 Chapter 13 of the Immigration Act regulates the right of access and residence for foreign nationals encompassed by the EEA Agreement.

13 Section 112 of the Immigration Act, entitled "Right of residence for more than three months for EEA nationals", which, according to UNE, implements Article 7(1) of the Directive, reads:

EEA nationals shall have the right of residence for a period of longer than three months provided they:

a. are workers or self-employed persons;

b. are to provide services;

c. have sufficient resources at their disposal for themselves and any accompanying family members and have sickness insurance covering all risks during the residence period; or

d. are enrolled at an approved educational establishment. It is a requirement that that the primary purpose of the stay must be education, including vocational education, that they are covered by sickness insurance covering all risks during the residence period, and that they provide a declaration confirming that they have sufficient funds to provide for themselves and any family members.

Foreign nationals resident in the realm pursuant to letter (a) of the first paragraph who cease to be workers or self-employed persons shall nevertheless retain their status as workers or self-employed persons if they:

a. are temporarily unable to work as the result of an illness or accident;

b. provide documentary evidence of involuntary unemployment after having had paid work for more than one year, and have registered as a job-seeker with the Norwegian Labour and Welfare Administration;

c. provide documentary evidence of involuntary unemployment following expiry of a fixed-term employment contract of less than one year's duration or of having become involuntarily unemployed during the first twelve months and having registered as a job-seeker with the Norwegian Labour and Welfare Administration; or

d. commence a course of vocational education. Unless they are involuntarily unemployed, the status as workers or self-employed persons under letter (a) of the first paragraph shall be retained only for as long as the course of vocational education is related to their previous work.

In cases such as referred to in letter (c) of the second paragraph, the status under letter (a) of the first paragraph shall lapse after six months.

The King may issue regulations containing further provisions, including on what is to be deemed to be sufficient resources under letter (c) of the first paragraph, approved educational establishments and requirements pertaining to the declaration referred to in letter (d) of the first paragraph.

14 Section 114 of the Immigration Act, entitled "Right of residence for more than three months for family members and other foreign nationals who are not EEA nationals", which, according to UNE, implements Article 7(2) of the Directive, reads:

The provisions of the first and second paragraphs of section 113 shall apply mutatis mutandis to foreign nationals who are not EEA nationals if they are family members of an EEA national having a right of residence under letter (a), (b) or (c) of the first paragraph of section 112 or if they are spouses, cohabitants or dependent children under the age of 21 who accompany or are reunited with an EEA national having a right of residence under letter (d) of the first paragraph of section 112.

A foreign national as referred to in the fourth paragraph of section 110 shall have a right of residence for more than three months, provided that this occurs as part of the provision of a service or is necessary for the establishment of a business in the realm. The King may issue regulations containing further provisions.

In the event of the EEA national's death, a family member who is not an EEA national shall retain the right of residence if he or she has resided in the realm as a family member for one year prior to the death and fulfils the conditions laid down in letter (a), (b) or (c) of the first paragraph of section 112, or resides in the realm as a family member of a person who fulfils the conditions laid down in letter (a), (b) or (c) of the first paragraph of section 112. In the event of an EEA national's exit from the realm or death, any child of the EEA national and the person having parental responsibility shall in any event retain the right of residence for as long as the child is enrolled at an approved educational establishment.

In the event of divorce or cessation of cohabitation, the family members of an EEA national who are not EEA nationals shall retain the right of residence for as long as they themselves fulfil the conditions laid down in letter (a), (b) or (c) of the first paragraph of section 112, or are family members of a person who fulfils the conditions laid down in letter (a), (b) or (c) of the first paragraph of section 112, 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 by agreement or judgment to the spouse who is not an EEA national;

c. a particularly serious situation presents, such as when the spouse who is not an EEA national, or any children, have been exposed to violence or other serious abuse in the marriage; or

d. the spouse who is not an EEA national exercises visitation rights with children in the realm pursuant to an agreement or judgment.

The King may issue regulations containing further provisions on a continued right of residence for persons with parental responsibility or visitation rights as referred to in

the third and fourth paragraphs, and in the event of cessation of cohabitation under the fourth paragraph.

15 Section 115 of the Immigration Act, entitled "Right of permanent residence for EEA nationals", which, according to UNE, implements Article 16(1) of the Directive, reads:

An EEA national who has had continuous lawful residence in the realm for five years under sections 112 and 113 shall have a right of permanent residence. Temporary residence outside the realm in certain circumstances shall be permitted without the requirement for continuous residence being affected. The right of permanent residence shall remain irrespective of whether the conditions for residence laid down in sections 112 and 113 are fulfilled. The right of permanent residence shall lapse if the holder resides outside the realm for more than two consecutive years.

EEA nationals who reside in the realm under letter (a) of the first paragraph of section 112 shall have a right of permanent residence even where they have not had continuous residence for five years, if they:

a. at the time they stop working, take early retirement or have reached the age laid down in legislation for entitlement to an old age pension, and have resided continuously in the realm for more than three years and have been working in the realm for at least the preceding twelve months;

b. have resided continuously in the realm for more than two years and have acquired a permanent incapacity to work;

c. after three years of continuous employment and residence in the realm, work in another EAA State while retaining their place of residence in the realm, to which they return each day or at least once a week.

If the incapacity under letter (b) of the second paragraph is the result of an accident at work or an occupational disease entitling the person concerned in whole or in part to State benefits, no condition shall be imposed as to length of residence.

EEA nationals who are family members of and residing with a person as referred to in the second paragraph shall have a right of permanent residence as from the time the right of permanent residence under the second paragraph takes effect.

EEA nationals who are family members of and residing with an EEA national having a right of residence under letter (a) of the first paragraph of section 112 shall have a right of permanent residence in the event of the EEA national's death, even though the deceased did not have a right of permanent residence under the first or second paragraph, if:

a. the deceased had been resident in the realm for two consecutive years prior to the death; or

b. the death was caused by an accident at work or an occupational disease.

The King may issue regulations containing further provisions, including on what is to be deemed continuous lawful residence, what comes within the notion of temporary residence outside the realm, including valid reasons for absence, on the content of the requirement of living together and on lapse of the right of permanent residence.

16 Section 116 of the Immigration Act, entitled "Right of permanent residence for family members who are not EEA nationals", which, according to UNE, implements Article 16(2) of the Directive, reads:

A family member who is not an EEA national and who has lived with an EEA national and had continuous lawful residence in the realm for five years under the first paragraph of section 114 shall have a right of permanent residence. The same shall apply in respect of a family member who is not an EEA national and who, under the first sentence of the third paragraph or the fourth paragraph of section 114, has had continuous lawful residence in the realm for five years. Temporary residence outside the realm in certain circumstances shall be permitted without the requirement for continuous residence being affected. The right of permanent residence shall remain irrespective of whether the conditions for residence laid down in section 114 are fulfilled. The right of permanent residence shall lapse if the holder resides outside the realm for more than two consecutive years.

A right of permanent residence under the fourth and fifth paragraphs of section 115 shall apply mutatis mutandis in respect of family members who are not EEA nationals.

The King may issue regulations containing further provisions, including on what is to be deemed continuous lawful residence, what comes within the notion of temporary residence outside the realm, including valid reasons for absence, on the content of the requirement of living together and on lapse of the right of permanent residence.

17 Moreover, Section 19-19 of Regulation of 15 October 2009 No 1286 on the admission of foreign nationals into the realm and their stay here (*forskrift 15. oktober 2009 nr. 1286 om utlendingers adgang til riket og deres opphold her (utlendingsforskriften)* ("the Immigration Regulation"), entitled "Right of permanent residence – involuntary interruption of employment", reads:

For foreign nationals as referred to in letters (a), (b) and (c) of the second paragraph of section 115 of the Act, periods of documented involuntary unemployment, involuntary interruption of employment and absence from, or termination of,

employment due to illness or accident, shall be deemed to be accrued working time or period(s) of employment.

Involuntary unemployment shall be documented by the Labour and Welfare Administration or by an employment office in another EEA or EFTA country. The Directorate of Immigration may issue further guidelines in cooperation with the Labour and Welfare Directorate.

18 The organisation of the immigration authorities is regulated in Chapter 10 of the Immigration Act. The Directorate of Immigration (*Utlendingsdirektoratet – UDI*) makes decisions on the right of residence pursuant to Chapter 13 of the Immigration Act, which can be appealed to UNE.

19 Section 76 of the Immigration Act, entitled "Power of instruction and review of decisions", reads:

Administrative decisions under the Act made by the police, foreign service missions or other public administrative agencies may be appealed to the Directorate of Immigration. Administrative decisions under the Act made by the Directorate of Immigration at first instance may be appealed to the Immigration Appeals Board.

The Ministry's general right of instruction does not confer authority to instruct in relation to decisions in individual cases. Nor may the Ministry instruct the Immigration Appeals Board on the interpretation of legislation or the exercise of discretion in cases other than cases involving return grants under section 90a. The Ministry may instruct in relation to prioritisation of cases.

The Ministry may decide that an administrative decision made by the Directorate of Immigration in favour of a foreign national shall be reviewed by the Immigration Appeals Board. That decision shall be made no later than four months after the administrative decision was made, shall be in writing and shall be reasoned. Chapters IV to VI of the Public Administration Act (forvaltningsloven) on case preparation, administrative decisions and appeals shall not apply to such decisions.

If, in a case under the third paragraph, the Immigration Appeals Board concludes that the Directorate of Immigration's administrative decision is invalid, it shall annul that administrative decision and refer the case back to the Directorate of Immigration to be reeaxmined in whole or in part. Valid administrative decisions may not be annulled or amended, but the Board may issue a statement about the issues of principle involved in the case.

The King may issue regulations containing further provisions on case preparation and the Immigration Appeals Board's authority in cases under the third paragraph.

20 The independence and composition of UNE is further outlined in Section 77 of the Immigration Act, entitled "The Immigration Appeals Board", which reads, in extract:

The Immigration Appeals Board shall decide, as an independent body, those cases which are assigned to it pursuant to the first and third paragraphs of section 76.

The Immigration Appeals Board shall be led by a Director, who must satisfy the requirements applicable to judges. The Director shall be appointed by the King-in-Council for a term of six years. The Director may be reappointed for one term.

The Immigration Appeals Board shall also have Board Chairs, who must satisfy the requirements applicable to judges. They shall be appointed by the King-in-Council.

The Immigration Appeals Board shall have Board members appointed by the Ministry following proposals from the County Governors (statsforvalterne), the Norwegian Association of Lawyers (Norges Juristforbund), the Association of Social Scientists (Samfunnsviterne) and humanitarian organisations. Members shall be appointed for a four-year term. The position is voluntary, and the person appointed must, in consequence, express a willingness to accept the position. Board Members must act independently and at arm's length from the party who proposed them. Reappointments may be made once. Replacements during the course of a term shall be made by the Ministry following proposals from those same bodies.

Only persons who:

a. are Norwegian citizens resident in Norway;

b. are between 18 and 70 years old at the time of appointment;

c. are not under public debt negotiations or bankruptcy proceedings or subject to bankruptcy-related disqualification;

d. satisfy the conduct-related requirements of section 72 of the Courts of Justice Act;

e. are sufficiently proficient in Norwegian; and

f. are personally suitable for the task may be appointed.

Employees of ministries, practising lawyers and lawyer trainees may not be Board Members.

The Ministry may release a Board Member from the position if that member:

a. does not satisfy the conditions for appointment under the fifth paragraph;

b. has failed to comply with his or her duty of confidentiality;

c. has seriously breached other duties relating to the position; or

d. himself or herself so requests.

The Board's meetings shall be held in camera. Any person(s) participating in the Board's examination of cases shall have a duty of confidentiality under sections 13 to 13e and 13g of the Public Administration Act. Breach shall be punishable under section 209 of the Criminal Code (straffeloven).

The King may issue regulations containing further provisions on the appointment of Board Members and on the requirements for being released from the position.

21 Moreover, Section 16-2 of the Immigration Regulation, entitled "Regarding the Immigration Appeals Board's Director and Board Chairs. The Director's competence", reads:

The Director's sphere of work shall also include the function of Board Chair. The Director and the Board Chairs must meet the criteria for judges set out in the first paragraph of section 53 and the second paragraph of section 54 of the Courts of Justice Act (domstolloven).

The Director may issue general guidelines concerning the examination of individual cases, exercise of discretion etc., but may not give instructions in an individual case.

22 Challenges to decisions made by UNE are regulated in Section 79 of the Immigration Act, entitled "Legal proceedings", which reads, in extract:

In the event of legal proceedings against the State concerning the lawfulness of administrative decisions of the Immigration Appeals Board under this Act or concerning compensation resulting from such administrative decisions, the State shall be represented by the Immigration Appeals Board. In the event of legal proceedings against the State concerning the lawfulness of administrative decisions of the Directorate of Immigration under this Act or concerning compensation resulting from such administrative decisions, the State shall be represented by the Directorate of Immigration.

If the Immigration Appeals Board has made an administrative decision under this Act in favour of a foreign national, the Ministry may have the validity of the administrative decision reviewed by instituting legal proceedings. Legal proceedings must have been brought within four months of the administrative decision being made. Legal proceedings shall be brought against the foreign national. There shall be no mediation before the Conciliation Board.

Proceedings against the State concerning the validity of administrative decisions made by the Immigration Appeals Board under this Act, or concerning compensation resulting from such administrative decisions, shall be brought before Oslo District Court. The same applies to proceedings concerning administrative decisions made by the Directorate of Immigration, the Ministry and the King in Council. Section 32-4(2) of the Dispute Act does not apply.

23 An exception to the main rule of the Ministry not being competent to instruct in an individual case, as stated in Section 76 of the Immigration Act, is provided in Section 128 of the Immigration Act, entitled "Authority to issue instructions, etc.", which reads, in extract:

The Ministry may, independently of the limitations specified in section 76, issue instructions on procedural matters and on all procedural decisions in cases that may involve fundamental national interests or foreign policy considerations. …

The Ministry may in all cases instruct subordinate agencies to grant a residence permit for Norway or to make another administrative decision or other decision in favour of a foreign national if the case involves fundamental national interests or foreign policy considerations.

…

24 Moreover, it follows from Section 129 of the Immigration Act, entitled "Right of appeal, etc.", that the Ministry will be the appellate body in cases where fundamental national interests or foreign policy considerations have been decisive. The provision reads, in extract:

The Ministry is the appeals body in cases that have not been decided by the Ministry itself at first instance and where fundamental national interests or foreign policy considerations have been decisive, in whole or in part, for the outcome of the case.

III FACTS AND PROCEDURE

Background of the case

25 The request concerns AO and IM, who are married and have a child born in 2018.

26 AO is a Polish national. She arrived in Norway on 2 May 2016, registered as a jobseeker on 7 June 2016 and as a worker on 11 August 2016. On 7 June 2016, she was issued with a registration certificate as an EEA national under Section 117 of the Immigration Act, read in conjunction with Section 112 thereof.

27 Public registers show the following for her employment and income situation in Norway in the period 2016–2022:

Jun 2016 to Sep 2017	Employment income	NOK 247 191
Oct 2017 to Oct 2018	No income	
Oct 2018 to Aug 2019	Unemployment benefits from NAV	NOK 105 560
Aug 2019 to Feb 2022	No income	

28 IM is an Egyptian national. On 14 October 2016, he applied for a residence card as a family member of an EEA national under Section 118 of the Immigration Act, read in conjunction with Section 114 thereof, on the basis of his marriage with AO. That application was granted by Oslo Police District's decision of 30 November 2016.

29 IM's tax returns and "*A-meldinger*" (monthly income and tax reports sent to various government authorities) suggest that he has been in full-time employment since July 2017, with the following income information:

2017	NOK 317 329
2018	NOK 520 636
2019	NOK 537 717
2020	NOK 568 761
2021	NOK 627 278
2022	NOK 766 195
2023	NOK 800 727

30 AO and IM have separate pending appeal cases before UNE.

AO's pending appeal

31 On 10 November 2022, AO applied for a permanent residence certificate as an EEA national under the first paragraph of Section 119 of the Immigration Act, read in conjunction with Section 115 thereof. In the application, she stated that she had been in Norway since 2 May 2016, and that she had been a worker and self-employed person in Norway. Together with her application, she submitted her passport, employment contract from 2016, income and tax information for her spouse IM and the decision of the Norwegian Labour and Welfare Administration (*Arbeids- og velferdsetaten – NAV*) of November 2018, by which she had been granted unemployment benefits (*dagpenger*).

32 UDI rejected the application by decision of 3 January 2024. UDI referred to the fact that AO was registered as being without income in the period September 2017 to October 2018 and in the period August 2019 to the date of the decision, whilst she received unemployment benefits in the period October 2018 to August 2019. UDI accordingly took the view that it had not been documented that she had exercised EEA rights in Norway during those periods and that, as a result, she had not had five years' continuous

lawful residence in Norway at the time of the decision. UDI further took the view that IM's income had no bearing on the determination of whether AO was exercising rights under EEA law in Norway.

33 AO appealed against the decision on 15 January 2024. In the appeal, she referred to the fact that she was a worker in the period June 2016 to July 2017, but that she subsequently was unemployed due to pregnancy. Furthermore, she did not apply for sickness benefits (*sykepenger*), as she and IM were, in any event, due to move to XXX, and there was no point in being employed in a company that was 400 km away from where she was going to move. AO further stated that she did not obtain new employment right away in XXX, and that she received unemployment benefits during the period October 2018 to August 2019. She further stated that her spouse, IM, had income and that she regularly received money from him.

34 UDI assessed the information in the appeal but found no ground to reverse its own decision. UDI referred to the reasons in the decision, adding that IM's income could not be included in any determination of whether AO was exercising rights under EEA law in Norway on the basis of sufficient resources under letter (c) of the first paragraph of Section 112 of the Immigration Act.

35 On 25 January 2024, UDI referred the case to UNE for appeal proceedings.

IM's pending appeal

36 On 13 January 2022, IM applied for a permanent residence card as a family member of an EEA national under the second paragraph of Section 119 of the Immigration Act, read in conjunction with Section 116 thereof. Together with his application, he submitted his own and AO's passports, employment contract and payslips, an extract from the Brønnøysund Register of Business Enterprises relating to an enterprise operated by AO and a contract of purchase for housing.

37 UDI rejected the application by decision of 14 November 2022. In the rejection decision, UDI referred to the fact that AO was registered as being without income in the period September 2017 to October 2018 and in the period August 2019 to the date of the decision, whilst she received unemployment benefits in the period October 2018 to August 2019. UDI accordingly took the view that it had not been documented that AO had exercised EEA rights in Norway during those periods and that, as a result, IM had not had five years' continuous lawful residence in Norway at the time of the decision.

38 IM appealed against the decision on 28 November 2022. In the appeal, he referred to the fact that AO was a worker in the period June 2016 to July 2017, but that she subsequently was unemployed due to pregnancy. Furthermore, AO did not apply for sickness benefits, as she and IM were, in any event, due to move to XXX, and there was no point in being employed in a company that was 400 km away from where she was going to move. IM

further stated that AO did not obtain new employment right away in XXX, and that she received unemployment benefits during the period October 2018 to August 2019.

39 Lastly, IM referred to the fact that he had a good income throughout that period, and that the parties accordingly had sufficient resources for residence purposes and were not dependent on AO being continuously in employment.

40 UDI assessed the information in the appeal but found no basis to reverse its own decision. UDI referred to the reasons in the decision, adding that IM's own income could not be included in any determination of whether AO was exercising rights under EEA law in Norway on the basis of sufficient resources under letter (c) of the first paragraph of Section 112 of the Immigration Act.

41 On 2 March 2023, UDI referred the case to UNE for appeal proceedings.

42 Against this background, UNE decided to stay the proceedings and referred the following questions to the Court:

a. To what extent can a third-country national's income/resources form part of the assessment of whether the EEA national has "sufficient resources" for himself or herself and his or her family members: see Article 7(1)(b) of Directive 2004/38/EC?

b. If the answer to question a entails that the third-country national's resources cannot form the entire basis in order for the EEA national to have "sufficient resources", is it then required that the EEA national make an "own contribution" on a continuous basis in order for the requirement of "sufficient resources" to be fulfilled, or can the EEA national's contribution be limited to a shorter period, for example that the EEA national has gainful employment for one year, subsequently to which the parties rely on the third-country national's income during the following four years?

43 Acting on a report from the Judge-Rapporteur, the Court decided to dispense with the oral part of the procedure after having received the consent of the parties pursuant to Article 70 of the Rules of Procedure.

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

IV ANSWER OF THE COURT

Admissibility

45 The Norwegian Government has questioned whether UNE is a "court or tribunal" within the meaning of Article 34 SCA.

46 The Court recalls that, under Article 34 SCA, any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers an advisory opinion necessary to enable it to give judgment. The purpose of Article 34 SCA is to establish cooperation between the Court and national courts and tribunals. It is intended to be a means of ensuring a homogenous interpretation of EEA law and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law (see the judgment of 25 January 2024 in *A Ltd* v *Finanzmarktaufsicht*, E-2/23, paragraph 34 and case law cited).

47 It is settled case law that the purpose of Article 34 SCA does not require a strict interpretation of the notion of "court or tribunal", which is an autonomous notion of EEA law. When assessing whether a referring body qualifies as a court or tribunal within the meaning of Article 34 SCA, the Court takes account of a number of factors. These include, in particular, whether the referring body is established by law, has a permanent existence, exercises binding jurisdiction, applies rules of law, is independent, and, as the case may be, whether its procedure is *inter partes* and similar to a court procedure (see the judgment of 16 July 2020 in *Scanteam AS* v *The Norwegian Government*, E-8/19, paragraphs 41 and 42 and case law cited).

48 In the present case, it is clear from the relevant national legal framework, such as Section 77 of the Immigration Act, that UNE is established by law, has a permanent existence, exercises binding jurisdiction, and applies rules of law. As regards the Norwegian Government's argument that the procedure before UNE is not an *inter partes* procedure, it must be noted that this is not an absolute criterion (see the judgment in *Scanteam*, E-8/19, cited above, paragraph 43 and case law cited).

49 The Norwegian Government has questioned, in particular, whether UNE is sufficiently independent in the light of the case law of the European Court of Justice ("ECJ") concerning Article 267 of the Treaty on the Functioning of the European Union. Although the Court has recognised the principle of procedural homogeneity, it follows from well-established case law that while the reasoning which has led the ECJ to its interpretation of the term court or tribunal may be relevant, the Court is not required by Article 3 SCA to follow that reasoning when interpreting the main part of the SCA. It is for the Court to determine the relevance of the case law of the ECJ as regards the interpretation of Article 34 SCA (see the judgment in *Scanteam*, E-8/19, cited above, paragraph 45 and case law cited).

50 The Court recalls in this respect that the interpretation of the notion of court or tribunal under Article 34 SCA must pay due regard to the constitutional and legal traditions of the EFTA States. Accordingly, that interpretation must take account of the important role played by administrative appeal boards in the EFTA States, also in the application of EEA law. An interpretation that would render administrative appeal boards ineligible to request an advisory opinion would undermine the objective of Article 34 SCA, which is to establish a system of cooperation as a means of ensuring a homogenous interpretation of EEA law (see the judgment in *Scanteam*, E-8/19, cited above, paragraph 46 and case law cited).

51 The concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision. As such, the concept of independence has both an external and an internal aspect. The external aspect entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. The internal aspect is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests in relation to the subject-matter of those proceedings (see the judgment in *Scanteam*, E-8/19, cited above, paragraph 48 and case law cited).

52 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. The assessment of whether a referring body is independent is based on an overall examination of the factors characterising the independence of that body. The rules relating to the referring body must be considered as a whole in order to determine if that body fulfils the necessary prerequisites to be considered independent (see the judgment in *Scanteam*, E-8/19, cited above, paragraphs 49 and 50 and case law cited).

53 In the present case, the Court notes that the second paragraph of Section 76 of the Immigration Act provides that UNE cannot be instructed in relation to decisions in individual cases, the interpretation of legislation or the exercise of discretion in cases other than cases involving return grants under section 90a thereof. Section 77 of the Immigration Act then lays down specific rules on the composition of UNE, as well as the length of service, appointment and dismissal of its board chairs and members. The Court understands that those rules are intended to ensure the impartiality of the members of UNE.

54 That finding is not called into question by the limited authority of the Ministry to intervene in cases involving fundamental national interests or foreign policy considerations, as provided for in Section 128 of the Immigration Act. As emphasised by

ESA, the Ministry acts as the appellate body in such cases, which indicates that they typically do not fall within UNE's jurisdiction. Moreover, nothing in the case file suggests that such a situation might arise in the case in the main proceedings.

55 The finding is neither called into question by the fact that UNE may have the status of a defendant if an appeal is made against its decision before the ordinary courts. Formal designation as a party for procedural purposes, due to the structure of legal remedies at the national level, cannot be decisive for the conclusion of whether a referring body is to be considered as independent (see, to that effect, the judgment in *Scanteam*, E-8/19, cited above, paragraphs 52 and 53).

56 The Court therefore holds that UNE constitutes a court or tribunal within the meaning of Article 34 SCA. The request for an advisory opinion is therefore admissible.

Substance

57 By its questions, UNE essentially asks to what extent the resources of a third-country national are relevant under Article 7(1)(b) of the Directive when determining whether EEA nationals meet the requirement of having sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host State.

58 The Court notes at the outset that, according to Article 1(2)(b) of the EEA Agreement, read in the light of the fifth recital thereof, the freedom of movement for persons constitutes one of the fundamental freedoms of the internal market and forms part of the core of the EEA Agreement (see, to that effect, the judgment of 26 July 2016 in *Yankuba Jabbi* v *The Norwegian Government*, E-28/15, paragraphs 49 and 68).

59 The general right to move and reside freely within the EEA is not unconditional, however, but may be subject to the limitations and conditions imposed by the EEA Agreement and by the measures adopted to give it effect (see the judgment of 2 July 2024 in *Criminal proceedings against MH*, E-6/23, paragraph 57 and case law cited).

60 It is settled case law that the Directive establishes a gradual system as regards the right of residence in the host State which reproduces, in essence, the stages and conditions laid down in the various instruments of EEA law and case law preceding that directive and culminates in the right of permanent residence (see the judgment of 12 December 2024 in *ESA* v *Norway*, E-16/23, paragraph 71 and case law cited).

61 Under Article 7(1) of the Directive, all EEA nationals shall have the right of residence on the territory of another EEA State for more than three months if they fulfil one of the conditions set out in points (a) to (d) (see the judgment in *Jabbi*, E-28/15, cited above, paragraph 72). Both ESA and the Commission argue that UNE should consider, in

addition to point (b), whether AO may still be considered a "worker" within the meaning of point (a).

62 It is settled case law that the Court may extract, from all the factors provided by the referring court, the elements of EEA law requiring an interpretation having regard to the subject-matter of the dispute in the main proceedings. Thus, although UNE has limited its questions to the interpretation of Article 7(1)(b) of the Directive, the Court may provide the national court with all the elements of interpretation of EEA law which may be of assistance in adjudicating the case before it, whether or not reference is made thereto in a question referred to the Court for an advisory opinion (see the judgment of 20 November 2024 in *Bygg & Industri Norge AS and Others* v *The Norwegian State*, E-2/24, paragraph 32 and case law cited).

63 Article 7(3) of the Directive provides that, for the purposes of Article 7(1)(a), an EEA national who is no longer a worker or self-employed person shall nevertheless retain the status of worker or self-employed person in specific cases, inter alia, where he or she is temporarily unable to work as the result of an illness or accident (compare the judgment of 19 June 2014 in *Saint Prix*, C-507/12, EU:C:2014:2007, paragraph 27).

64 The Court observes that, according to settled case law, the concept of "worker", within the meaning of Article 28 EEA, in so far as it defines the scope of a fundamental freedom provided for by EEA law, must be interpreted broadly. It follows that classification as a worker under Article 28 EEA, and the rights deriving from such status, do not necessarily depend on the actual or continuing existence of an employment relationship (see the judgment of 21 April 2021 in *The Norwegian Government* v *L*, E-2/20, paragraphs 24 and 25 and case law cited, and compare the judgment in *Saint Prix*, C-507/12, cited above, paragraphs 33 and 37).

65 Although pregnancy must be clearly distinguished from illness, it follows from case law that the fact that physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth require a woman to give up work during the period needed for recovery does not, in principle, deprive her of the status of "worker" within the meaning of Article 28 EEA, provided she returns to work or finds another job within a reasonable period after confinement (compare the judgment in *Saint Prix*, C-507/12, cited above, paragraphs 29, 30, 40 and 41 and case law cited).

66 In order to determine whether the period that has elapsed between childbirth and starting work again may be regarded as reasonable, the national court should take account of all the specific circumstances of the case in the main proceedings and the applicable national rules on the duration of maternity leave, in accordance with Article 8 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who

have recently given birth or are breastfeeding (compare the judgment in *Saint Prix*, C-507/12, cited above, paragraph 42).

67 If UNE finds that AO did not retain her status as a worker under the Directive, it must assess whether she still had a right of residence under Article 7(1)(b) thereof. That provision grants EEA nationals the right to reside within the territory of another EEA State for more than three months if they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host State during their period of residence and have comprehensive sickness insurance cover in the host State (see the judgment in *ESA* v *Norway*, E-16/23, cited above, paragraph 53 and case law cited).

68 It is settled case law that to "have" sufficient resources within the meaning of that provision must be interpreted as meaning that it suffices that such resources are available to the EEA national. Article 7(1)(b) of the Directive hence merely requires that the EEA nationals concerned have sufficient resources at their disposal to prevent them from becoming an unreasonable burden on the social assistance system of the host State during their period of residence, without establishing any other conditions, in particular as regards the origin of those resources (see the judgment in *ESA* v *Norway*, E-16/23, cited above, paragraphs 56 and 57 and case law cited). Consequently, the resources available to the EEA national may be provided in full by a third-country national.

69 Any other interpretation would undermine the purpose of the Directive which, above all, is to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the EEA States. Since the freedom of movement for persons is the foundation of the Directive, any limitations to that freedom must be interpreted strictly. Therefore, in the light of the context and the aims pursued, the provisions of the Directive cannot be interpreted restrictively, and must not in any event be deprived of their practical effect (see the judgment in *ESA* v *Norway*, E-16/23, cited above, paragraph 73 and case law cited).

70 In light of the foregoing, the answer to the questions must be that, for the purposes of assessing whether an EEA national possesses sufficient resources within the meaning of Article 7(1)(b) of the Directive, account must be taken of all resources available to that EEA national, regardless of their origin and whether they were provided in whole or in part by a third-country national.

V COSTS

71 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by the Immigration Appeals Board (*Utlendingsnemnda*) hereby gives the following Advisory Opinion:

For the purposes of assessing whether an EEA national possesses sufficient resources within the meaning of Article 7(1)(b) 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, account must be taken of all resources available to that EEA national, regardless of their origin and whether they were provided in whole or in part by a third-country national.

Páll Hreinsson Bernd Hammermann Michael Reiertsen

Delivered in open court in Luxembourg on 11 March 2025.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President