REPORT FOR THE HEARING*

in Case E-26/13

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 Supreme Court of Iceland (*Hæstiréttur Íslands*) in the case between

The Icelandic State

and

Atli Gunnarsson

concerning the interpretation of Article 28 of the EEA Agreement and Article 7 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.

I Introduction

1. In a letter of 14 November 2013, registered at the Court on 15 November 2013, the Supreme Court of Iceland requested an Advisory Opinion in a case pending before it between the Icelandic State and Atli Gunnarsson. The case before the national court concerns a claim for the annulment of a decision by the tax authorities, and a claim for the repayment of taxes.

II Legal background

European law

2. Article 28 EEA reads:

> *1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member*

* Revised in paragraphs 14 and 19.

States and EFTA States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of EC Member States and EFTA States for this purpose;

(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

…

3. 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 ("the Directive") (OJ 2004 L 158, p. 77) was incorporated into Annex V to the EEA Agreement at point 1 and Annex VIII at point 3 by Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 ("the Decision") (OJ 2008 L 124, p. 20, and EEA Supplement No 26, 8.5.2008, p. 17).

4. All three EEA/EFTA States indicated constitutional requirements for the purposes of Article 103 EEA. As the last of the three, Norway gave notification on 9 January 2009 that the constitutional requirements had been fulfilled. Consequently, the Decision entered into force on 1 March 2009.

5. Article 1 of the Decision reads as follows:

Annex VIII to the Agreement shall be amended as follows:

(1) …

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'.

…

6. The Joint Declaration by the Contracting Parties to the Decision reads as follows:

The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

…

7. Article 3 of the Directive, as adapted for the purposes of the EEA Agreement, reads:

Beneficiaries

1. 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.

…

8. Article 7 of the Directive, as adapted for the purposes of the EEA Agreement, reads:

Right of residence for more than three months

1. 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;

…

9. Article 21 of the Treaty on the Functioning of the European Union ("TFEU") reads:

> *1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.*
>
> *2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.*
>
> *3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.*

National law

10. Article 1 of Act No 90/2003 ("the Income Tax Act") stipulates that all persons domiciled in Iceland, or who spend more than 183 days in Iceland during each twelve-month period, are obliged to pay tax on all their income, irrespective of where it is earned.

11. Articles 61 and 66 of the Income Tax Act contain provisions on the calculation of income tax for these taxpayers. After income tax has been calculated, a personal tax credit specified in the first paragraph of part A of Article 67 of the Income Tax Act is deducted. If a taxpayer of this type is married and the spouse cannot utilise the tax credit in full, the part of the tax credit that the spouse does not utilise is added to the taxpayer's tax credit. This follows from the second paragraph of part A of Article 67 of the Income Tax Act.

12. On the other hand, Article 3 of the Income Tax Act exhaustively lists persons who are subject to limited tax liability in Iceland. This category includes everyone who spends 183 days or less in Iceland each year and who either receives wages or other payments in Iceland, including old-age pension, other pension benefits or comparable payments. Income tax is to be paid on such income in Iceland.

13. Article 70 of the Income Tax Act contains a special rule that applies to old-age pensioners and recipients of other pension benefits who are subject to limited tax liability in Iceland under Article 3 of the Act. For such taxpayers, a personal tax credit may not be transferred between spouses unless they are both old-age pensioners or recipients of other pension benefits from Iceland.

14. Act No 156/2010 added Article 70a to the Income Tax Act, entitling individuals resident in other EEA States, and who are subject to limited tax liability in Iceland, to the same rights as individuals resident in Iceland and subject to full tax liability there. This includes the unconditional transfer of tax credits between spouses, unless they receive less than 75% of their total annual income from Iceland.

III Facts and procedure

15. Mr Gunnarsson and his wife are both Icelandic citizens who were resident in Denmark from 24 January 2004 to 3 September 2009. During that period, the couple's total income consisted of unemployment benefit that Mr Gunnarsson's wife received in Iceland until 1 May 2004 and of Mr Gunnarsson's own disability benefit from the Icelandic Social Insurance Administration, together with benefit payments he received from two Icelandic pension funds.

16. Mr Gunnarsson paid tax on his income in Iceland. He claims that he was overcharged in the period from 1 May 2004 to 1 October 2009 because he was prevented from utilising his wife's personal tax credit while they resided in Denmark. Under the Icelandic tax legislation applicable at the time, the couple had to reside in Iceland for Mr Gunnarsson to be entitled to utilise his wife's personal tax credit in addition to his own.

17. On 22 December 2006, Mr Gunnarsson and his wife applied to the Icelandic Directorate of Internal Revenue asking that they be allowed to utilise his wife's tax credit in respect of his income in Iceland. Article 62 of the Income Tax Act permits the transfer of unused credits between spouses. On 9 January 2007, the Directorate turned down the request. It was denied on the grounds that transfer was only possible between taxpayers with unlimited tax liability in Iceland (essentially, resident taxpayers) or where both spouses were in receipt of an Icelandic pension. As Mr Gunnarsson and his wife were neither resident in Iceland nor both in receipt of an Icelandic pension during the relevant period, the Directorate concluded that the conditions authorising the transfer of unused personal tax credits between spouses were not fulfilled.

18. In a letter dated 8 February 2008, Mr Gunnarsson complained to ESA. On 7 July 2010, ESA issued a letter of formal notice to Iceland, stating that Iceland had failed to fulfil its obligations under Article 28 EEA and Article 7 of the Directive by refusing to allow pensioners who were resident in another EEA State to utilise their spouses' personal tax credit, as they would have been able to do if they had been resident in Iceland.

19. The Income Tax Act was amended with effect from 28 December 2010 to allow persons receiving at least 75% of their income in Iceland to request the tax treatment accorded to residents. That included the right to transfer tax credits

between spouses. Had this provision been in force at the time in question, Mr Gunnarsson would have been able to make use of his wife's unused tax credits.

20. On 22 July 2010, Mr Gunnarsson demanded repayment of the income tax he had paid on his income during the relevant period that would not have been payable had he been able to use his wife's tax credits. In support of the demand, Mr Gunnarsson referred to ESA's letter of formal notice. On 10 August 2010, the Directorate of Internal Revenue refused to adopt a position on the demand. It considered that the time had not yet come to do so, because the formal notice did not constitute a final conclusion on the matter.

21. On 9 November 2010, Mr Gunnarsson brought the present action against the Icelandic State before the District Court. He has entered a claim for the annulment of the decision of the Directorate of Internal Revenue, and repayment of the alleged excess taxes paid. In the alternative, he claims damages for the Icelandic State's failure to fulfil its obligations under the EEA Agreement. The District Court upheld Mr Gunnarsson's action for annulment and the repayment of taxes, except for the part of his claim that related to taxes due prior to 9 November 2006, which had lapsed because of expiry of the period of prescription. The District Court held that the decision by the Directorate of Internal Revenue was incompatible with the obligations imposed by the EEA Agreement.

22. Both Mr Gunnarsson and the Icelandic State appealed to the Supreme Court of Iceland. In the view of the Supreme Court, there was doubt about whether Mr Gunnarsson's position should be assessed pursuant to Article 28 EEA, Article 7 of the Directive, both of them, or other EEA rules. As conclusions regarding these matters could influence the outcome of the case, the Supreme Court found it appropriate to seek an Advisory Opinion from the Court.

23. The Supreme Court referred the following questions to the Court:

1. **Is it compatible with Article 28 of the Agreement on the European Economic Area and/or Article 7 of Directive 2004/38/EC that a State (A), which is party to the Agreement, does not give spouses the option of pooling their personal tax credits in connection with the assessment of income tax in circumstances in which both spouses move from State (A) and live in another State (B) in the European Economic Area and one of them receives a pension from State (A) while the other has no income, if the tax position of the couple would be different if both lived in State (A), including the fact that they would be entitled to pool their personal tax credits?**

2. **When Question 1 is answered, is it of significance that the Agreement on the European Economic Area does not contain**

any provision corresponding to Article 21 of the Treaty on the Functioning of the European Union?

IV Written observations

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

- the Icelandic State, represented by Óskar Thorarensen, Supreme Court Attorney, Office of the Attorney General (Civil Affairs), acting as Agent;
- Atli Gunnarsson, represented by Stefán Geir Þórisson, Supreme Court Attorney;
- ESA, represented by Xavier Lewis, Director, and Gjermund Mathisen and Maria Moustakali, Officers, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Richard Lyal and Wim Roels, Members of its Legal Service, acting as Agents.

V Summary of the arguments submitted

The Icelandic State

25. The Icelandic State observes that, at the time Mr Gunnarsson moved to Denmark with his wife, he was in receipt of pension benefits that provided for their subsistence. There is nothing to suggest that Mr Gunnarsson had the status of a worker for the purpose of Article 28 EEA. In the circumstances of the case, there is thus no inconsistency between the national tax provisions relied on by Mr Gunnarsson before the Supreme Court and Article 28 EEA.

26. For the same reason, the Icelandic State submits that Article 7 of the Directive, seen in conjunction with Article 28 EEA, does not assist Mr Gunnarsson in the case before the Supreme Court. Insofar as Article 7 implements Article 45 TFEU, which corresponds to Article 28 EEA, it is clear from the wording of Articles 7(1)(a) and (3)(a) to (d) of the Directive that the right of residence in a host State is premised on the individual's status as a worker. For those who retain the status of a worker, because of circumstances listed in paragraph 3(a) to (d), it is equally clear that the provision is premised on their presence in the host State as a worker before the circumstances described in (3)(a) to (d) arise.

27. The Icelandic State submits that it follows from case law that persons who have carried out all their occupational activity in the EEA State of which they are

nationals and who have only exercised the right to reside in another EEA State after their retirement, without any intention of working in that other State, cannot rely on the freedom of movement as a worker.[1]

28. In the event that the Court assesses Mr Gunnarsson's circumstances pursuant to Article 28 EEA, the Icelandic State submits that it follows from consistent case law concerning Article 45 TFEU that the right of a national of an EEA State, who has taken up residence in another EEA State than his home State or State of employment, is dependent on the person in question having the status of a worker at the time in question.[2] Only in exceptional circumstances will an economically inactive person be deemed to retain the status of a worker when moving from the EEA State of employment.[3]

29. The Icelandic State observes that, taken together, the questions can be understood as asking whether the provisions of the Tax Act applicable in the situation before the Supreme Court are compatible with Article 7 of the Directive and what significance it has for the assessment of Article 7 in the context of the EEA Agreement that there is no provision in the EEA Agreement equivalent to Article 21(1) TFEU.

30. The Icelandic State suggests that the question should be understood as relating to Article 7(1)(b) of the Directive. This provision obliges EEA States to allow nationals of other EEA States, not otherwise entitled to do so, to reside in their territory for a longer period than three months, provided that they have comprehensive sickness insurance cover and that they have resources for themselves and their family members that are sufficient for them not to become a burden on the social assistance system of the host State.

31. The Icelandic State submits that, in this respect, Article 7(1)(b) of the Directive implements the right of free movement and residence, regardless of economic activity, which Article 21(l) TFEU provides for Union citizens.

32. Contrary to the position taken in ESA's letter of formal notice of 7 July 2010, the Icelandic State submits that Article 7(1)(b) of the Directive does not impose obligations on the home States. It follows from the case law of the Court of Justice of the European Union ("ECJ") that the obligation on the EU Member States to remove obstacles to the right of free movement and residence by their own nationals as Union citizens is based on Article 21(1) TFEU.

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1 Reference is made to Cases C-520/04 *Turpeinen* [2006] ECR I-10685, paragraph 16, and C-544/07 *Rüffler* [2009] ECR I-3389, paragraph 56.

2 Reference is made to Cases C-152/03 *Ritter-Coulas* [2006] ECR I-1711, paragraphs 31 to 32, C-212/05 *Hartmann* [2007] ECR I-6303, paragraph 17, and C-287/05 *Hendrix* [2007] ECR I-6909, paragraph 46.

3 Reference is made to Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265.

33. It is the freedom of movement unconnected to economic activity, guaranteed to Member State nationals in Article 21(1) TFEU, that has developed to become the core of the operative concept of Union citizenship.[4] As Advocate General Poiares Maduro suggested in *Nerkowska,*[5] the conceptual underpinning is that of a notion of citizenship where (discriminatory) restrictions are prohibited in one space where Member State territory is no longer relevant.

34. Article 21(1) TFEU and the concept of Union citizenship are not included in the EEA Agreement. It is clear from the Joint Declaration on the decision of the EEA Joint Committee incorporating the Directive into the EEA Agreement that the incorporation was intended to be without prejudice to the relevance of the development of the concept of Union citizenship for the EEA Agreement. The Icelandic State therefore submits that the EEA Agreement cannot be interpreted in conformity with the case law of the ECJ concerning citizenship. This is a clear instance where the obligation to ensure such conformity, as expressed in Article 6 EEA, as well as in Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), is not applicable.

35. It is also submitted that an interpretation by the Court that adds new rights to those rights that are based on the Directive's express text could have serious implications for the autonomy of the EEA/EFTA States to regulate their internal affairs.[6] In particular, it could have considerable fiscal implications for the EEA/EFTA States in their relationship with their own nationals, who are not simultaneously citizens of the Union.

36. The Icelandic State submits that the only provision of EEA law that Mr Gunnarsson could demand an examination of is the principle of non-discrimination on grounds of nationality in Article 4 EEA. However, direct or indirect discrimination against own nationals is not a situation foreseen by Article 4 EEA.[7]

37. Accordingly, the Icelandic State submits that it is a matter for national law to determine the requirements concerning equal treatment of own nationals, resident and non-resident, in circumstance like those in the present case.

38. Should the Court not accept the above submissions, the Icelandic State submits, in the alternative, that, if Article 7 of the Directive precludes the

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4 Reference is made to *Turpeinen*, cited above, paragraphs 18, 20, 22 and 40, and the case law cited.

5 C-499/06 *Nerkowska* [2000] ECR I-3993.

6 Reference is made to Catherine Barnard, *The Substantive Law of the EU. The Four Freedoms* (Oxford 2013), pp. 291 and 292.

7 Reference is made to Case C-224/98 *D'Hoop* [2002] ECR I-6191, where the ECJ found that disadvantages for an own national who had exercised the right to move were contrary to the principles that underpin the status of citizen of the Union, that is a guarantee of the same treatment in law in the exercise of the citizen's freedom to move, and not Article 12 TEC (now Article 18 TFEU), which is identical in substance to Article 4 EEA.

provisions of the Tax Act at issue in the case, those obligations could not be binding before the Directive entered into force in the EEA on 1 March 2009.

39. Moreover, according to the Icelandic State, any inequality of treatment deemed to flow from such an interpretation may be justified on the grounds of fiscal cohesion and the effectiveness of fiscal supervision in Iceland.[8]

40. Tax credits are aimed at adjusting the individual taxpayer's ability to pay income tax and to take into account relevant personal circumstances. Allowing married and cohabiting couples to be taxed together and to pool their tax credits is based on similar considerations, taking family circumstances into account.

41. Making it possible for individuals subject to limited taxation and in receipt of benefits from the social security system in Iceland, such as disability benefits, to use the tax credits in question aligns the situation of this group with both the situation of individuals earning income from private sources in Iceland and with the situation of individuals receiving similar benefits as the defendant while living in Iceland.

42. The alignment resulting from the provision is not complete, however. Choosing to differentiate between the groups in respect of how they can use the tax credits and choosing not to make any remaining tax credits transferable between spouses unless they both receive benefits or pension payments, reflects the fact that the income is to some extent derived from the State itself, and not from private sources.

43. The Icelandic State submits that this choice, which reflects considerations of fiscal cohesion, more specifically the cohesion of the tax system and the social security system in Iceland, is of such a nature that it justifies the different rules that apply to residents and non-residents.

44. The Icelandic State proposes that the Court should answer the questions as follows:

> *Article 28 EEA and Article 7(1)(a) and (3)(a)-(d) of Directive 2004/38/EC, implementing that provision, do not preclude tax provisions that do not give spouses the option of pooling their personal tax credits, in circumstances such as those in the present case, where the incumbent person who moves to another EEA state is in receipt of disability benefit and pension benefits and does not have or retain the status of a worker.*
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> *Article 7(1)(b) of Directive 2004/38/EC grants nationals of EU Member States and EFTA states the right of residence in a host state within the European Economic Area, under conditions and limitations set out in the Directive. In the context of the EEA Agreement, that provision of the*

[8] Reference is made, *inter alia*, to Case C-204/90 *Bachmann* [1992] ECR I-249.

Directive cannot be interpreted so as to place restrictions on the Contracting Parties' fiscal autonomy in respect of their own nationals who are economically inactive. As the legal status of Union citizenship and, in particular, Article 21(1) TFEU, has no equivalence in the EEA Agreement, such a restriction on the Contracting Parties' fiscal autonomy can, in that context, not be based on case law of the Court of Justice interpreting Article 21 TFEU, a provision that grants Union citizens a personal and fundamental right of free movement and residence within the territory of the Union.

Atli Gunnarsson

45. Mr Gunnarsson submits that settled case law of the ECJ shows that the non-discrimination obligation under the free movement rules is not limited to discrimination on grounds of nationality. It also includes other kinds of limitations on the free movement rules, such as the Icelandic rule in this case. It deprives Mr Gunnarsson of tax benefits in Denmark that he would enjoy if residing in Iceland.

46. Mr Gunnarsson submits that it is clear from the case law of the ECJ that any EU national who has exercised the right to free movement of workers and been employed in another EEA State falls within the scope of Article 45 TFEU, which corresponds to Article 28 of the EEA Agreement, irrespective of his residence or nationality. A worker residing in another EEA State can invoke the rights inherent in that provision against the EEA State of which he is a national.

47. Mr Gunnarsson contends that a person who has lost the status of worker in the strictest sense may still enjoy the protection of the provision of the TFEU concerning the free movement of workers, which is in substance the same as Article 28 EEA.[9]

48. Mr Gunnarsson submits that a pensioner like himself, who has Icelandic nationality but is residing in Denmark with his wife, must not be precluded from receiving tax credits when pensioners in the same or a similar situation residing in Iceland receive such tax credits.[10]

49. In the view of Mr Gunnarsson, it does not make any difference to his legal status when the Directive entered into force in the EEA. Article 28 EEA provides for all the necessary legal protection in his case. Initially, the free movement of persons established by the EEA Agreement only applied to persons moving to another EEA State in order to pursue economic activity. Directive 90/365/EEC[11] extended the right of residence to persons who had ceased their economic

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[9] Reference is made to *Leclere and Deaconescu*, cited above, paragraphs 55 to 61.

[10] Reference is made to Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 36 and 38.

[11] 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 (OJ 1990 L 180, p. 28).

activity. Directive 90/365/EEC was part of the EEA Agreement until repealed by the Directive, that is for most of the disputed period.

50. Mr Gunnarsson also refers to the arguments put forward by ESA in its letter of formal notice of 7 July 2010 to Iceland, and to the fact that the Icelandic State has admitted its breach by amending the tax legislation.

51. Finally, as regards the second question, Mr Gunnarsson submits that, irrespective of the Directive and Directive 90/365/EEC, the legal protection provided by Article 28 EEA constitutes fully sufficient grounds for his claims. It therefore has no bearing on his legal status that the EEA Agreement does not contain a provision corresponding to Article 21 TFEU.

52. Mr Gunnarsson proposes that the Court should answer the questions as follows:

> *1. It is not compatible with Article 28 of the Agreement on the European Economic Area that a State (A), which is party to the Agreement, does not give spouses the option of pooling their personal tax credits in connection with the assessment of income tax in circumstances in which both spouses move from State (A) and live in another State (B) in the European Economic Area and one of them receives a pension from State (A) while the other has no income, where the tax position of the couple would be different if both lived in State (A), including the fact that they would be entitled to pool their personal tax credits.*
>
> *2. When Question 1 is answered, it is of no significance that the Agreement on the European Economic Area does not contain any provision corresponding to Article 21 of the Treaty on the Functioning of the European Union.*

ESA

53. Article 28 EEA concerns the free movement of workers. Whereas the concept of a worker has received a broad interpretation in case law, it is difficult to see that it could encompass Mr Gunnarsson and his dependent wife when the couple's only income at the relevant time was his disability benefit, together with benefit payments he received from two pension funds.

54. According to ESA, the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person in return for which he receives remuneration. In order to qualify as a worker, the person concerned must pursue effective and genuine activities, which are not on such a small scale as to be regarded as purely

marginal and ancillary.[12] In ESA's view, those requirements do not seem to be met in the present case.

55. ESA observes that Mr Gunnarsson does not seem to have previously made any use of his right to freedom of movement for workers. At least, he received no form of pension from any other EEA State, which would be indicative of his previously having moved within the EEA as a worker. Furthermore, the right to utilise his wife's personal tax credit was not refused him for any reason consequent to the exercise of the right to freedom of movement for workers. ESA thus submits that Mr Gunnarsson cannot be in the position of the retired complainant in Case C-39/10 *Commission* v *Estonia*, who received less favourable treatment in his home State because he had previously made use of his right to freedom of movement for workers (and thus received a considerable part of his total pension in his State of residence).[13]

56. In this context, ESA also recalls that persons who have carried out all their occupational activity in the EEA State of which they are nationals and who have gone on to reside in another EEA State only after their retirement, without any intention of working in that State, cannot rely on the freedom of movement guaranteed by Article 28 EEA.[14]

57. Turning to the Directive, ESA submits that the Directive was incorporated into the EEA Agreement by EEA Joint Committee Decision No 158/2007 of 7 December 2007, subject to fulfilment of constitutional requirements by all three EEA/EFTA States. Upon the expiry of the six-month period, Liechtenstein notified such fulfilment, whereas it appears that Iceland and Norway did not submit such notification until 29 August 2008 and 9 January 2009, respectively. However, on 2 June 2008 Norway gave notification pursuant to Article 103(2) EEA that provisional application could not take place. Consequently, EEA Joint Committee Decision No 158/2007 did not enter into force provisionally, pending notification of fulfilment of the constitutional requirement.

58. In ESA's view, it appears that Mr Gunnarsson and his wife would have enjoyed a number of rights under the Directive in connection with their stay in Denmark, from the time Joint Committee Decision No 158/2007 became applicable.

59. The Directive would in principle apply to their situation given that they moved to/resided in an EEA State (Denmark, the host State) other than that of which they are nationals (Iceland, their home State). They would thus fall under the definition of beneficiaries in Article 3(1) of the Directive.

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[12] Reference is made, *inter alia*, to Case C-46/12 *N*, judgment of 21 February 2013, not yet reported, paragraphs 40 to 42, and the case law cited.

[13] Case C-39/10 *Commission* v *Estonia*, judgment of 10 May 2012, not yet reported.

[14] Reference is made, *inter alia*, to *Turpeinen*, cited above, paragraph 16.

60. Moreover, assuming that they had sufficient resources not to become a burden on Denmark's social assistance system during their period of residence, and assuming that they had comprehensive sickness insurance cover in Denmark, the couple would enjoy rights under Article 7 of the Directive.

61. However, ESA submits that those rights cannot be invoked against the home State.

62. According to ESA, Article 7 – indeed the whole of Chapter III of the Directive – is drafted with the host State in mind. In contrast, Article 4, for example, is drafted so as to apply in relation to Member States in general, including the home State. Interpreting Article 7 of the Directive such that it could also be invoked against the home State would indeed be an extensive interpretation.

63. Importantly, ESA continues, there are indications in case law that the ECJ has not envisaged such an extensive interpretation of the Directive. Arguably, case law can be interpreted as excluding it. Similar cases that are analogous to the present case in the sense that they concern complaints against the home State from non-economically active persons resident in a host Member State seem to fall directly under Article 21(1) TFEU, not under the Directive.[15]

64. Accordingly, ESA submits that the application of the more specific provision of Article 7 must be excluded in the present case. If this provision of secondary law were applicable, it seems the ECJ would have had to apply it in cases analogous to the present case. The fact that the ECJ instead applied Article 21(1) TFEU directly means, by implication, that a case such as the present one falls outside the scope of Article 7 of the Directive.

65. Finally, for the sake of good order, ESA observes, and acknowledges, that the above interpretation of Article 7 of the Directive is at variance with the position previously taken in its letter of formal notice of 7 July 2010. In light of the renewed assessment it has carried out for the purposes of the present case, ESA has been led to reconsider its position.

66. Turning to the second question, ESA observes that there is no provision corresponding to Article 21 TFEU on Union citizenship in the EEA Agreement. ESA submits that there is no basis for reading into Article 7 of the Directive *qua* EEA law obligations that, in the EU, flow only from Article 21 TFEU directly, and not from the Directive. On the contrary, homogeneity must be ensured. Homogeneity requires that the interpretation of Article 7 of the Directive be the same as in the EU.

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[15] Reference is made to *Nerkowska*, cited above, and Cases C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, C-221/07 *Zablocka-Weyhermüller* [2008] ECR I-9029, and C-269/09 *Commission* v *Spain*, judgment of 12 July 2012, not yet reported.

67. In this respect, ESA continues, the present case is analogous to Case E-15/12 *Wahl*, where the Court found that the exclusion of the concept of Union citizenship could have no material impact on the interpretation of the provisions of the Directive at issue in that case.[16] That is, neither a more narrow nor a more extensive interpretation of Article 7 of the Directive can follow from the non-inclusion of the concept of Union citizenship in the EEA Agreement.

68. For the sake of completeness, ESA adds that nor can the principle of homogeneity be overridden by considerations of reciprocity. There is no basis in the EEA Agreement for concluding that Article 7 of the Directive *qua* EEA law gives rise to one set of obligations for the EEA/EU States and a different set of obligations for the EEA/EFTA States. Quite apart from the inequality inherent in such an interpretation, this would also raise an issue of legal certainty: it would make obligations, which, in the EU, flow from Article 21 TFEU on Union citizenship, a part of the EEA Agreement despite the fact that the Agreement contains no corresponding provision and despite the fact that the Contracting Parties have agreed, explicitly, that the concept of Union citizenship has no equivalent in the EEA Agreement.

69. In view of the above considerations, and in view of the assessment of the first question, ESA suggests that there is no need to give a separate reply to the second question.

70. ESA proposes that the Court should answer the questions as follows:

> *1a. For the purposes of applying Article 28 EEA, the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration. Moreover, in order to qualify as a "worker", the person concerned must pursue effective and genuine activities which are not on such a small scale as to be regarded as purely marginal and ancillary. In addition, the worker must have engaged in such occupational activity in an EEA State other than their home State. Where these criteria are not fulfilled, Article 28 EEA does not apply.*
>
> *1b. Article 7 of Directive 2004/38/EC does not preclude that a State (A), which is party to the Agreement, does not give spouses the option of pooling their personal tax credits in connection with the assessment of income tax in circumstances in which both spouses move from State (A) and live in another State (B) in the European Economic Area and one of them receives a pension from State (A) while the other has no income, yet the tax position of the couple would be different if both lived in State (A), including the fact that they would be entitled to pool their personal tax credits.*

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[16] Reference is made to Case E-15/12 *Wahl*, judgment of 22 July 2013, not yet reported, paragraphs 73 to 77.

The Commission

71. The Commission points out that Mr Gunnarsson was refused the benefit of favourable tax treatment to which he would have been entitled had he been resident in Iceland during the relevant period. He and his wife would also have been able to benefit from her personal tax credits. The sole reason for the refusal of the tax authorities to grant him that benefit was that he was not subject to unlimited tax liability in Iceland (that is to say, essentially, not resident in Iceland). It is well established that discrimination can arise through the application of different rules to comparable situations or the application of the same rule to different situations.[17]

72. According to the Commission, the question, then, is whether the situation of Mr Gunnarsson is to be regarded as comparable to that of a resident of Iceland. In relation to direct taxes, the situations of residents and non-residents in a State may in certain respects not be comparable, in particular as regards personal allowances and similar benefits. That is to say, the granting of tax allowances intended to reflect the personal and family circumstances of a taxpayer is normally a matter for his State of residence, since the income received by him in the territory of other States is in most cases only part of his total income, which is concentrated in his State of residence. It is therefore the latter State that is best placed to assess his personal ability to pay tax.[18]

73. However, that logic breaks down where the taxpayer concerned has little or no income in his State of residence and, instead, receives all or most of his income from another State. In that situation, the State of residence is likely to be unable to grant him the tax treatment appropriate to his personal and family circumstances. In such a situation, there is no objective difference between such a taxpayer and a resident of the State in which he receives his income. In order to ensure equal treatment, that State must take into account his personal and family circumstances and grant him the same benefits as it accords to resident taxpayers.[19]

74. Accordingly, the Commission submits that, in so far as Mr Gunnarsson is entitled to exercise a right of free movement or residence under EEA law, he must be allowed the benefit of his wife's unused tax credits in the same way as a resident of Iceland. It appears, moreover, that there is no dispute between the parties regarding that conclusion.

75. The Commission submits that the principal question in the present case is instead whether Mr Gunnarsson had, at the relevant time, right of free movement or residence under EEA law. The national court has referred to Article 28 EEA, Article 7 of the Directive and Article 21 TFEU (the latter only in order to

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17 Reference is made to *Schumacker*, cited above, paragraph 30.

18 Reference is made to Case C-169/03 *Wallentin* [2004] ECR I-6443, paragraph 15.

19 Reference is made to *Schumacker*, cited above, paragraphs 36 to 38 and 41.

determine the consequences of the absence of any corresponding provision in the EEA Agreement).

76. First of all, the Commission argues, Article 28 EEA creates a right of free movement for workers. The benefit of that provision and the corresponding provision of the TFEU has been extended to economically inactive persons only in very limited circumstances. Thus, persons who move to another EEA State in order to seek employment, even though they are not workers when they move, are entitled to rely on Article 28.[20] Equally, persons who have moved to another EEA State in order to work there are entitled to remain there after the termination of their employment (Article 28(d))[21] and may invoke the right of free movement in relation to their home State when they return after having worked abroad.[22]

77. Conversely, persons who have not exercised freedom of movement during their working life and who move to another State only after their retirement, without any intention of working in the latter State, may not rely on the freedom of movement granted by Article 28 EEA.[23] Accordingly, the Commission submits, Mr Gunnarsson is not able to rely on Article 28 in order to demonstrate a right of free movement.

78. Turning to the Directive, the Commission observes that Article 4 of EEA Joint Committee Decision No 158/2007 stated that it was to enter in to force on 8 December 2007, "provided that all the notifications under Article 103(l) of the Agreement have been made to the EEA Joint Committee". The last notification was made on 9 January 2009. However, under Article 103(2) EEA, if notification of the fulfilment of constitutional requirements is not made within six months, a decision of the Joint Committee is to be applied provisionally unless a Contracting Party has opposed such provisional application. Since it does not appear that Iceland presented such a notification under Article 103(2), the Commission submits that it must be concluded that Decision No 158/2007 was provisionally applicable from 8 June 2008.

79. In the view of the Commission, Article 7 of the Directive applies without distinction to workers, persons who establish themselves in another State in order to pursue an economic activity and persons who have no economic activity. Mr Gunnarsson therefore had a right of free movement and residence on the basis of that provision from the moment at which it came into force, namely 8 June 2008.

80. The Commission acknowledges that it may be objected that Article 7, by its terms, can be interpreted as only creating obligations for the host State, that is to say, the EEA State in which the person concerned wishes to take up residence.

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[20] Reference is made to Case C-292/89 *Antonissen* [1991] ECR I-745, paragraphs 9 to 14.

[21] Reference is made to Case 39/86 *Lair* [1988] ECR 3161, paragraphs 32 to 35.

[22] Reference is made, *inter alia*, to Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraphs 26 to 28.

[23] Reference is made to *Turpeinen*, paragraph 16, and *Rüffler*, paragraph 52, both cited above.

However, if regard were had merely to the wording of the respective provisions, the same could be said of Article 28 itself, of Article 31 EEA or of Article 27 TFEU. As the ECJ has pointed out in relation to the freedom of establishment, those provisions also prohibit the home Member State from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation.[24] The ECJ took the same approach in relation to what is now Article 45 TFEU,[25] as well as to what is now Article 21 TFEU.[26]

81. Similarly, the rights of free movement and residence envisaged by Article 7 of the Directive would be set at nought if the home State could set obstacles in the path of persons wishing to avail themselves of those rights. It may be observed, moreover, that Article 4 of the Directive expressly provides for a right to leave the territory of the State of origin.

82. The Commission therefore concludes that, from the date on which the Directive became provisionally applicable, 8 June 2008, Mr Gunnarsson was entitled to rely on Article 7 of the Directive in order to claim equal treatment with residents of Iceland in relation to the pooling of personal tax credits with his spouse.

83. Finally, concerning the second question, the Commission does not consider that the absence of a provision equivalent to Article 2l TFEU in the EEA Agreement is relevant to the outcome of the present case.

84. In this regard, the Commission observes that the Directive has been incorporated in Annexes V and VIII of the EEA Agreement by Decision No 158/2007 of the EEA Joint Committee, including the provisions that apply to economically inactive persons like Mr Gunnarsson. The decision notes in its preamble (point 8) that the concept of Union Citizenship is not included in the EEA Agreement and (point 9) that immigration policy is not part of the Agreement. Moreover, a joint declaration of the Contracting Parties expands on those elements, stating that the EEA Agreement does not provide a legal basis for political rights of EEA nationals. This qualification does not affect the application of Article 7(1)(b) as regards persons who do not pursue an economic activity.

85. The Commission therefore concludes that, notwithstanding the absence of a provision in the EEA Agreement equivalent to Article 21 TFEU, Mr Gunnarsson is entitled to rely on Article 7 of the Directive.

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[24] Reference is made to Case 81/87 *Daily Mail* [1988] ECR 5483, paragraph 16.

[25] Reference is made to Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 93 to 97.

[26] Reference is made to Case C-224/02 *Pusa* [2004] ECR l-5763, paragraphs 18 to 20.

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

It is incompatible with Article 7 of Directive2004l38/EC that a State (A), which is party to the Agreement, does not give spouses the option of pooling their personal tax credits in connection with the assessment of income tax in circumstances in which both spouses move from State (A) and live in another State (B) in the European Economic Area and one of them receives a pension from State (A) while the other has no income, whereas the spouses would be entitled to pool their personal tax credits if they both lived in State (A).

A taxpayer is entitled to rely on Article 7 of Directive 2004/38/EC with effect from the date on which that provision became provisionally applicable pursuant to Article 103(2) EEA.

Per Christiansen
Judge-Rapporteur