



REPORT FOR THE HEARING

in Case E-28/15

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo tingrett (Oslo District Court), in the case of

Yankuba Jabbi

and

The Norwegian Government

concerning the interpretation of Article 7(1)(b) in conjunction with Article 7(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/ECC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/36/EEC.¹

I Introduction

1. By a letter of 1 November 2015, registered at the Court on 18 November 2015, Oslo tingrett (Oslo District Court) made a request for an Advisory Opinion in a case pending before it between Yankuba Jabbi (“the plaintiff”) and the Norwegian Government (“the defendant”).

2. The case before Oslo tingrett concerns the validity of the Norwegian Immigration Appeals Board’s (“the Appeals Board”) decision of 13 May 2014, which rejected an application for residence by the plaintiff and expelled him from Norway, and the Appeals

¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/ECC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/36/EEC, OJ 2004 L 158, p. 77, as corrected by OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34, as incorporated into the EEA Agreement at point 1 of Annex V and point 3 of Annex VIII, Norwegian EEA Supplement 2012 No 5, p. 243.

Board's refusal to reverse that decision in its subsequent decisions of 8 July 2014 and 15 January 2015.

II Legal background

EEA law

3. Article 28 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") provides as follows:

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 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.

...

4. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/36/EEC ("the Directive") was incorporated into the EEA Agreement at point 1 of Annex V and point 3 of Annex VIII to

the Agreement by EEA Joint Committee Decision No 158/2007 (“Decision No 158/2007”) of 7 December 2007.² The decision entered into force on 1 March 2009.

5. Recital 1 in the preamble to the Directive reads as follows:

Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

6. Recital 3 in the preamble to the Directive reads as follows:

Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

7. Recital 5 in the preamble to the Directive reads as follows:

The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of “family member” should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

8. Article 1 of the Directive reads as follows:

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

...

9. Under the heading “Definitions”, Article 2 of the Directive provides:

For the purposes of this Directive:

² OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17.

1. “Union citizen” means any person having the nationality of a Member State;

2. “family member” means:

(a) the spouse;

...

3. “host Member State” means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

10. Article 3(1) of the Directive reads:

This Directive shall apply to all Union citizens 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.

11. Article 6 of the Directive, which addresses the right of residence for up to three months, states:

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

12. Article 7 of the Directive, which addresses the right of residence for more than three months, provides as follows:

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

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

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

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

...

13. Article 10(1) of the Directive reads:

The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called “Residence card of a family member of a Union citizen” no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

14. Article 16(1) of the Directive reads:

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.

15. Article 1 of Decision No 158/2007 reads:

...

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

...

(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”.

...

16. Attached to Decision No 158/2007 was a Joint Declaration by the Contracting Parties to the decision. That declaration reads:

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.

The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.

*National law*³

17. In Norway, the Directive has been implemented by the Act of 15 May 2008 No 35 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm (“the Immigration Act”).⁴

18. Chapter 13 of the Immigration Act (Sections 109 to 125) contains special rules relating to foreign nationals covered by the EEA Agreement. Paragraph 2 of Section 110 of the Immigration Act reads:

Family members of an EEA national are subject to the provisions of this chapter as long as they accompany or are reunited with an EEA national. Family members of

³ Translations of national provisions are unofficial.

⁴ *Lov om utlendingers adgang til riket og deres opphold her.* LOV-2008-05-15-35.

a Norwegian national are subject to the provisions of this chapter if they accompany or are reunited with a Norwegian national who returns to the realm after having exercised the right to free movement under the EEA Agreement or the EFTA Convention in another EEA country or EFTA country.

19. Section 112 of the Immigration Act, which concerns the right of residence for more than three months for EEA nationals, reads:

An EEA national has a right of residence for more than three months as long as the person in question:

(a) is employed or self-employed,

(b) is to provide services,

(c) is self-supporting and can provide for any accompanying family member and is covered by a health insurance policy that covers all risks during the stay, or

...

III Facts and procedure

20. The plaintiff is a Gambian national. On 1 February 2012, he married Inger Johanne Martinsen Amoh, who is a Norwegian national, in Spain. They stayed together in Spain from September 2011 to October 2012. Ms Amoh did not engage in economic activity during her stay in Spain, but the plaintiff claims that she had her own funds for the stay. It is disputed whether Ms Amoh met the conditions for receiving a work assessment allowance during her stay in Spain, but it is undisputed that she was entitled to receive a disability pension there.

21. The parties differ on the documentation submitted concerning Ms Amoh's stay in Spain and her connection to Norway during the stay.

22. On 20 November 2012, the plaintiff applied for residence in Norway as the spouse of an EEA national, i.e. of Ms Amoh. The Directorate of Immigration decided on 19 February 2014 that the plaintiff did not meet the conditions for residence in Norway under Chapter 13 of the Immigration Act and expelled him from Norway. That decision was appealed and upheld by the Immigration Appeals Board's decision of 13 May 2014. The plaintiff subsequently requested a reversal of the decision, but his request was rejected by the Appeals Board's decisions of 8 July 2014 and 15 January 2015.

23. Following those decisions, the plaintiff instigated the proceedings before the referring court, claiming that he has a derived right of residence in Norway as a result of his wife's stay in Spain and subsequent return to Norway.

24. The following question was submitted to the Court:

Does Article 7(1)(b), cf. Article 7(2), of Directive 2004/38/EC confer derived rights of residence to a third-country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen?

IV Written observations

25. 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 plaintiff, represented by advokat Arild Humlen;
- the defendant, represented by advokat Pål Wennerås, the Attorney General of Civil Affairs;
- the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Carsten Zatschler, Director, Maria Moustakali, Senior Officer, and Marlene Lie Hakkebo, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Elisabetta Montaguti and Michael Wilderspin, members of its Legal Service, acting as Agents.

V Summary of the arguments submitted

The plaintiff

26. The plaintiff maintains that he has a derived right of residence in Norway following his wife’s stay in Spain and her subsequent return to Norway, based on Article 7(1)(b), cf. Article 7(2), of the Directive.

27. According to the plaintiff, Article 7(1)(b) of the Directive regulates the right of residence in another EEA State for EEA nationals who are not economically active. That person’s family members, who are not EEA nationals, derive their right of residence from Article 7(2).

28. The plaintiff states that the main legal issue at stake is the extent to which Article 7(1)(b), cf. Article 7(2), of the Directive applies to non-economically active EEA nationals and their family members upon their return to the EEA State of which the EEA national is

a citizen. Articles 28 and 31 EEA regulate the freedom of movement of economically active persons, while the Directive equates the movement of economically active and non-economically active persons.

29. The main objective of the EEA Agreement, according to the plaintiff, was to expand the European Union's internal market to the EEA/EFTA States. In this regard, the plaintiff recalls that the preamble to the EEA Agreement states that its objective is to establish a dynamic and homogeneous European Economic Area, based on common rules.

30. The plaintiff concludes that the objective of homogeneity must be decisive when it comes to the interpretation of Article 7(1)(b) of the Directive.

31. The plaintiff acknowledges that the concept of "Union citizenship" is without parallel in EEA law. He claims, notwithstanding that fact, that the right of free movement must be uniform throughout the EEA.

32. The plaintiff emphasises the importance of the judgment of the Court of Justice of the European Union ("ECJ") in the case of *O. and B.*⁵ There, the plaintiff maintains, the ECJ based its result upon Article 21(1) of the Treaty on the Functioning of the European Union ("TFEU"). Nonetheless, the plaintiff states that, the ECJ's judgment provides reasons for interpreting and applying the Directive in the manner claimed by the plaintiff, and thereby in accordance with the principle of homogeneity. Without such an interpretation, the right to free movement by EEA nationals would be hindered. In further support of this, the plaintiff refers to the case law of the Court.⁶

33. For all of those reasons, the plaintiff proposes that the Court should answer the question referred in the affirmative.

The defendant

34. The defendant argues that the question referred has already been answered in the case of *O. and B.* There, the ECJ held that the Directive does not confer derived rights of residence for third-country nationals in the Member State of which their sponsors, i.e. the EU citizens, are nationals, and that such a derived right could only be established on the basis of Article 21(1) TFEU.⁷

35. In this regard, the defendant points out that the EEA Agreement does not contain a provision corresponding to Article 21 TFEU. Furthermore, the defendant stresses that the

⁵ Reference is made to the judgment in *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B.*, C-456/12, EU:C:2014:135, paragraphs 51, 54 and 56.

⁶ Reference is made to Case E-26/13 *Atli Gunnarsson* [2014] EFTA Ct. Rep. 254.

⁷ Reference is made to *O. and B.*, cited above, in particular paragraphs 37 to 56.

Court has already had occasion to point out that the Directive cannot introduce rights into the EEA Agreement based on the concept of Union citizenship in Article 21(1) TFEU.⁸

36. The defendant states that, since it is common ground that Ms Amoh did not pursue any economic activity in Spain, the provisions on the free movement of persons in the main part of the EEA Agreement, Articles 28, 31 and 36, are not applicable in the present proceedings. Ms Amoh's residence in Spain could therefore only have been based on Article 7(1)(b) of the Directive, subject to the conditions of that provision. It is disputed whether Ms Amoh fulfilled all of those conditions.

37. Turning to the plaintiff's arguments concerning homogeneity, the defendant acknowledges that the homogeneous interpretation and application of common rules is essential for the effective functioning of the internal market within the EEA. The principle of homogeneity therefore leads to a presumption that provisions framed in the same way in the EEA Agreement and in EU law are to be construed in the same way. Thus, Article 6 EEA provides that EEA rules, in so far as they are identical in substance to corresponding EU rules, shall be interpreted in conformity with the rulings of the ECJ given prior to the signing of the EEA Agreement. Conversely, the Court has repeatedly dismissed invitations to rely upon, by way of analogy or interpretation, provisions of EU law which have not been made part of EEA law.⁹ The defendant maintains that, accordingly, the principle of homogeneity dictates that the provisions of the Directive, which are rules common to the EEA and the EU, are interpreted uniformly and in conformity with the judgment in *O. and B.* In contrast, the rights established in that judgment on the basis of Article 21(1) TFEU may not be transposed by analogy when interpreting the Directive.

38. The defendant proposes that the Court should answer the question referred as follows:

Directive 2004/38/EC does not establish a derived right of residence for third-country nationals who are family members of an EEA national in the EEA state of which that citizen is a national.

Government of the Principality of Liechtenstein

39. Liechtenstein concurs with the defendant that the question referred has already been answered in the case of *O. and B.*¹⁰ For that reason, Article 7(1)(b), cf. Article 7(2), of the Directive cannot confer rights of residence on a third-country national who is a family

⁸ Reference is made to *Atli Gunnarsson*, cited above, paragraph 80.

⁹ Reference is made to Case E-1/01 *Hörður Einarsson* [2002] EFTA Ct. Rep. 2, paragraph 45, and Case E-1/02 *ESA v Norway* [2003] EFTA Ct. Rep. 1, paragraph 55.

¹⁰ Reference is made to *O. and B.*, cited above, in particular paragraphs 36, 37, 39, 49 to 51 and 56.

member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is citizen.

40. Liechtenstein submits that this finding is also supported by the Joint Declaration by the Contracting Parties to Decision No 158/2007. With regard to the ECJ's interpretation of Article 21(1) TFEU in the case of *O. and B.*, Liechtenstein adds that it must be borne in mind that the EEA Agreement does not contain a provision corresponding to Article 21(1) TFEU. The concept of "Union citizenship" therefore has no equivalence in the EEA Agreement.¹¹

41. According to Liechtenstein, it is for each of the EEA/EFTA States to decide for itself on the derived rights of residence for third-country nationals in situations such as that of the present case.

42. Liechtenstein proposes that the Court should answer the question referred as follows:

Article 7(1)(b) cf. Article 7(2) of Directive 2004/38/EC do not confer derived rights of residence to a third-country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen.

ESA

43. ESA submits that the purpose of establishing a derived right of residence for family members of EEA nationals is to ensure that the right to free movement within the EEA is real and effective.¹²

44. ESA acknowledges that the purely hypothetical prospect of exercising the right to freedom of movement does not establish a sufficient connection with EEA law to justify the application of that law's provisions.¹³ Consequently, derived rights of residence of third-country national family members in principle only exist where these are necessary to ensure that the EEA national can exercise his or her free movement and residence rights effectively.

45. ESA points out that the parties seem to differ on the documentation concerning Ms Amoh's stay in Spain and her connection to Norway during the stay. ESA acknowledges that, on the basis of the information provided in the request for an Advisory Opinion, it

¹¹ Reference is made to *Atli Gunnarsson*, cited above, paragraph 80.

¹² Reference is made to the judgment in *Metock*, C-127/08, EU:C:2008:449, paragraphs 56, 62 and 84, and Case E-4/11 *Arnulf Clauder* [2011] EFTA Ct. Rep. 216, paragraph 49.

¹³ Reference is made to the judgment in *Friedrich Kremzow v Republik Österreich*, C-299/95, EU:C:1997:254, paragraph 16.

appears that Ms Amoh did not exercise her right to free movement as a worker. However, ESA states that, if she was a worker, which the referring court must assess, then the plaintiff would have a derived right of residence in the host State pursuant to Article 7 of the Directive, as well as in the home State on the basis of Article 28 EEA.

46. Proceeding on the basis that Ms Amoh was not economically active during her stay in Spain, ESA states that Article 7(1)(b) only requires that she must have sufficient resources not to become a burden on the Spanish social assistance system during her period of residence, and that she must have comprehensive sickness insurance cover in Spain during that time. According to ESA, this establishes that the rights guaranteed by Article 7 of the Directive are also applicable in circumstances where the EEA national is non-economically active.

47. Turning to the applicability of Article 7 of the Directive to the home State of an EEA national, ESA submits that the Court has already found that Article 7(1)(b) can be invoked by non-economically active EEA nationals, who have exercised their free movement rights, against their EEA State of nationality.¹⁴ ESA maintains that the same principle is at stake in this case. For any residence right to be truly effective, the home State must also be prohibited from hindering the exercise of the right. Similarly, the opportunities offered by the Directive could not be fully effective if a national of an EEA State could be deterred from availing himself of them by obstacles raised on his return to his country of origin by legislation penalising the fact that he has used them.¹⁵

48. In other words, despite the fact that Union citizenship does not exist under the EEA Agreement, ESA argues for a result that ensures homogeneity. The scope of free movement rights granted to EEA/EFTA nationals should be the same as for EU nationals. ESA adds that the lack of a citizenship concept in the EEA Agreement entails that the Directive should be accorded a more important role in the EEA context. Its scope must therefore be broadened on the basis of the principle of effectiveness.¹⁶

49. ESA submits that the derived rights of third-country family members of returning Norwegian nationals must be examined under EEA law on the premise that non-economically active nationals can invoke Article 7(1)(b) of the Directive against their own EEA State and that economically active EEA nationals derive their corresponding rights from Articles 28, 31 and 36 EEA. In both instances, the substance of the rights should be

¹⁴ Reference is made to *Atli Gunnarsson*, cited above, paragraphs 75, 77, 78 and 80.

¹⁵ Reference is made to the judgments in *Pusa*, C-224/02, EU:C:2004:273, paragraph 18, and in *D'Hoop*, C-224/98, EU:C:2002:432, paragraphs 30 and 31.

¹⁶ Regarding the principle of effectiveness, reference is made to Case E-17/15 *Ferskjar kjötvörur*, judgment of 1 February 2016, not yet reported, paragraph 66, *Clauder*, cited above, paragraphs 34 and 46, and Case E-15/12 *Jan Anfinn Wahl* [2013] EFTA Ct. Rep. 534, paragraph 54.

the same. ESA concludes that the plaintiff should thus be able to invoke Article 7(2) of the Directive.

50. ESA proposes that the Court should answer the question referred as follows:

Article 7(1)(b) in combination with Article 7(2) of Directive 2004/38/EC confer derived rights of residence to a third country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen.

The Commission

51. The Commission submits that, although the question referred only mentions an interpretation of the Directive, it should be expanded to encompass the issue of whether, where the third-country national spouse of an EEA national has acquired a derived right of residence in another EEA State on the basis of Article 7(1)(b) in conjunction with Article 7(2) of the Directive, the EEA Agreement equally confers such a derived right of residence on that family member when he accompanies the EEA national to reside in the EEA State of which she is a national.

52. The Commission acknowledges that in *O. and B.* the ECJ held, first, that the Directive was not intended to govern the rights of entry and residence of a Union citizen in a Member State of which he is national, and, second, that any rights that such a Union citizen, or a member of his family as derived rights, might be able to assert against that Member State must be derived, if at all, from Article 21(1) TFEU.¹⁷

53. The Commission provides three reasons why the result in the case of *O. and B.* does not apply to the present case. Firstly, the conclusion in that case, which purports to be based on *McCarthy I*, fails to take account of the fact that the latter case concerned a wholly internal situation.¹⁸ Second, the ECJ's holding in *O. and B.* concerning the applicability of the Directive must be read in conjunction with the ECJ's conclusion on the possibility of applying the Directive by analogy.¹⁹ Third, despite being a recent judgment, *O. and B.* cannot be regarded as the last word on this issue. More precisely, in a recent case, *McCarthy II*, the ECJ indicated, albeit with somewhat perfunctory reasoning, that the Directive may indeed be applicable to situations such as that of the present case.²⁰ The Commission contends that the Court should apply the same methodology to the present

¹⁷ Reference is made to *O. and B.*, cited above, paragraphs 42 to 44.

¹⁸ Reference is made to the judgment in *McCarthy I*, C-434/09, EU:C:2011:277, paragraphs 27 to 29.

¹⁹ Reference is made to *O. and B.*, cited above, paragraph 61.

²⁰ Reference is made to the judgment in *McCarthy II*, C-202/13, EU:C:2014:2450, paragraphs 31 to 38, and to the Opinion of Advocate General Szpunar in the same case, EU:C:2014:345, point 88.

case and adds that such a result would be consistent with the Court's reasoning in *Atli Gunnarsson*.²¹

54. Should the Court not agree with the preceding arguments, the Commission claims that the reference to a right under Article 21(1) TFEU in *O. and B.* has to be seen in the context of the case law on which that statement was based, in particular the cases of *Singh* and *Eind*.²² Hence, the reference in *O. and B.* to Article 21 TFEU does not mean that the principles laid down in *Singh* and *Eind*, which are based on free movement rather than citizenship, no longer apply. According to the Commission, this case law, which concerned circumstances before the Directive entered into force, still applies to the interpretation of EEA law where an EEA national has previously exercised the right of free movement as a worker. However, in the present case, the question is based upon the premise that the EEA national had acquired a right of residence in Spain as a non-economically active person. Such situations have, according to the Commission, been dealt with by the Court in *Atli Gunnarsson*, and the logic of the Court in that case can, therefore, be adopted in the present case.²³

55. The Commission proposes that the Court should answer the question referred as follows:

Where an EEA national has acquired a right of residence in another EEA State on the basis of Article 7(1)(b) of Directive 2004/38/EC (and family members have acquired such a right there on the basis of Article 7(2) thereof) the EEA Agreement requires the same rights of residence to be conferred on those family members when they accompany or join the EEA national to the EEA State of which that person is a citizen.

Páll Hreinsson
Judge-Rapporteur

²¹ Reference is made to *Atli Gunnarsson*, cited above.

²² Reference is made to the judgments in *Singh*, C-370/90, EU:C:1992:296, and in *Eind*, C-291/05, EU:C:2007:771.

²³ Reference is made to *Atli Gunnarsson*, cited above, paragraphs 71 to 83.