JUDGMENT OF THE COURT
26 July 2011[*]

(Directive 2004/38/EC – Family reunification – Right of residence for family members of EEA nationals holding a right of permanent residence – Condition to have sufficient resources)

In Case E-4/11,

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

Arnulf Clauder

concerning the interpretation of Article 16(1) in conjunction with Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, as adapted to the EEA Agreement by Protocol 1 thereto,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur), and Benedikt Bogason (ad hoc), Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

- the Complainant, Arnulf Clauder;
- the Liechtenstein Government, represented by Dr Andrea Entner-Koch and Thomas Bischof of the EEA Coordination Unit, acting as Agents;
- the Netherlands Government, represented by Corinna Wissels, Mielle Bulterman and Jurian Langer, respectively head and staff members of the

[*] Language of the request: German.

European Law Division of the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Florence Simonetti, Senior Officer, Department of Legal & Executive Affairs, acting as Agents;
- the European Commission ("the Commission"), represented by Christina Tufvesson and Michael Wilderspin, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Liechtenstein Government, represented by its agent, Dr Andrea Entner-Koch; the Government of Denmark, represented by its agent, Christian Vang; ESA, represented by its agent, Florence Simonetti; and the Commission, represented by its agent, Christina Tufvesson, at the hearing on 28 June 2011,

gives the following

Judgment

I Introduction

1 By a letter of 14 February 2011, registered at the EFTA Court on 16 February 2011, the Administrative Court of the Principality of Liechtenstein ("the Administrative Court") made a request for an Advisory Opinion in a case pending before it concerning Arnulf Clauder ("Mr Clauder" or "the Complainant").

2 The case before the Administrative Court concerns the decision by the Liechtenstein Government not to grant the Complainant, who is economically inactive and in receipt of social welfare benefits, a family reunification permit for his spouse.

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

II Legal background

European Convention on Human Rights

4 Article 8 of the European Convention on Human Rights ("ECHR") – *Right to respect for private and family life* – reads as follows:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

…

EEA law

5 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 (OJ 2004 L 258, p. 77), as adapted to the EEA Agreement by EEA Joint Committee Decision No 158/2007 of 7 December 2007 ("Directive 2004/38" or "the Directive"), is referred to at point 1 of Annex V and point 3 of Annex VIII to the EEA Agreement. In particular, point 3(c) of Annex VIII provides that for the purposes of the EEA Agreement, the words 'Union citizen(s)' shall be replaced by the words 'national(s) of EC Member States and EFTA States'.

6 Article 2 of the Directive – *Definitions* – reads as follows:

For the purposes of this Directive:

...

2. "family member" means:

(a) the spouse;

...

7 Article 3 of the Directive – *Beneficiaries* – reads as follows:

(1) 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.

...

8 Article 7 of the Directive – *Right of residence for more than three months* – reads 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

…

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

…

9 Article 16 of the Directive – *General rule for Union citizens and their family members* – provides:

(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.

…

(4) Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

National law

10 Pursuant to the Liechtenstein Act of 20 November 2009 on the free movement of EEA and Swiss citizens ("PFZG") and the Regulation on the Free Movement of Persons ("PFZV"), economically inactive foreigners holding a permanent residence permit may have their family members take up residence with them only upon provision of evidence of the necessary financial means for maintaining all family members, obviating any claim for social welfare benefits.

III Facts and pre-litigation procedure

11 Mr Clauder, a German national, has been continuously resident in Liechtenstein since 1992. His first wife, of German nationality, took up residence in Liechtenstein and, initially, Mr Clauder was granted a right of residence as a family member of a worker.

12 In 2002, after repeated renewals of his residence permit, Mr Clauder received a permanent residence permit. Under Liechtenstein legislation, a permanent residence permit is issued for an indefinite period.

13 In 2009, Mr Clauder and his first wife divorced. In 2010, Mr Clauder remarried. His new wife, Mrs Eva-Maria Clauder, née Verlohr, a German national, was resident at that time in Germany. On 1 February 2010, Mr Clauder applied to the

Liechtenstein Office for Immigration and Passports for a family reunification permit for his second wife.

14 Mr Clauder is a pensioner in receipt of old-age pensions from both Germany and Liechtenstein. As the old-age pensions, even in combination, are relatively modest, Mr Clauder receives supplementary benefits in Liechtenstein pursuant to the Act of 10 December 1965 on supplementary benefits to old-age, survivors' and invalidity insurance.

15 According to the order for reference, if Mrs Clauder were allowed to reside with her husband in Liechtenstein, the amount of the supplementary benefits received by Mr Clauder would increase, even if Mrs Clauder were to take up employment.

16 On 12 February 2010, the Office for Immigration and Passports rejected Mr Clauder's application for family reunification. The basis for the rejection was that Mr Clauder, who was granted a permit of permanent residence as an economically inactive person, could not prove that he had sufficient financial resources for himself and his wife without having recourse to social welfare benefits. Mr Clauder submitted written observations to that office on 19 February 2010. In an administrative notice of 12 April 2010, the Office for Immigration and Passports confirmed the position it had previously taken and formally rejected the application for family reunification.

17 Mr Clauder lodged an administrative complaint on 26 April 2010 against this administrative notice. The complaint was rejected by the Liechtenstein Government in November 2010. On 6 December 2010, Mr Clauder challenged the Government's decision before the Administrative Court.

18 In its request for an Advisory Opinion, the Administrative Court appears inclined towards the view that a person in Mr Clauder's position, that is, an economically inactive person who is a national of one EEA State who enjoys a right of permanent residence in another EEA State, does not need to demonstrate that he has sufficient means of subsistence in order for a family member to benefit from a derived right of residence in that other EEA State. Notwithstanding that general position, the Administrative Court submits the following three questions to the Court:

> *1. Is Directive 2004/38/EC, in particular Article 16(1) in conjunction with Article 7(1), to be interpreted such that a Union citizen with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host Member State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits?*
>
> *2. Is it of relevance for the answer to Question 1, whether the Union citizen with a right of permanent residence was employed or self-employed in the host Member State prior to attaining retirement age?*

3. Is it of relevance for the answer to Question 1, whether the family member will be employed or self-employed in the host Member State and still be claiming social welfare benefits?

IV The first question

Observations submitted to the Court

19 Mr Clauder, ESA and the Commission assert that the Directive, in particular Article 16(1) in conjunction with Article 7(1), should be interpreted as meaning that an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits.

20 They note that Article 16 of the Directive states that EEA nationals who have been residing legally for a continuous period of five years in the host Member State shall be granted a right of permanent residence in that State, and that this right of permanent residence also applies to family members who themselves fulfil the same criteria. They observe, however, that Article 16 of the Directive does not contain any express provision regarding the acquisition of a right of residence for a family member seeking to join an EEA national who has already acquired a right of permanent residence when the family member himself does not fulfil the requirements for permanent residence.

21 In their view, although Article 16 of the Directive, unlike Articles 6 and 7, does not contain an explicit provision conferring on the beneficiary of the right of permanent residence the right to have (existing or future) family members who are not already resident with him in the host State join him in order to reside there, the legislature clearly intended such a right to be conferred. They argue that since the right of permanent residence represents the highest level of integration in the host State, it is inconceivable that the legislature did not intend to confer derived rights on family members.

22 According to Mr Clauder, ESA and the Commission, the silence of the Directive on this point should be interpreted to the effect that family members who do not yet fulfil the requirements laid down in Article 16 of the Directive in their own right derive a right of residence from the EEA national with the right of permanent residence. The family member does not have to fulfil the conditions laid down in Article 7. They stress that Article 16 of Directive 2004/38 clearly states that, once acquired, the right of permanent residence shall not be subject to the conditions provided for in Chapter III, *inter alia*, the condition to have sufficient resources. They observe that this is in contrast to the situation under earlier legislation, which entitled the host State to monitor whether EEA nationals who enjoyed a right of residence continued to meet the conditions laid down for that purpose, including the condition to have sufficient resources, throughout the period of their residence.

23 Mr Clauder, ESA and the Commission assert that the conditions imposed by Article 7(1)(d) of the Directive are logical when a family member claims rights derived from a person who falls within the scope of Article 7, since this reflects the conditions which that person himself must satisfy to acquire and retain a right of residence. The same reasoning does not hold good where the family member's right of residence is derived from a right of permanent residence, since Article 16 does not create different categories of beneficiaries with greater or lesser rights depending on the circumstances in which that right was acquired.

24 They argue further that EEA secondary legislation on free movement and residence cannot be interpreted restrictively and that, where a provision of EEA law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness.

25 In the view of Mr Clauder, ESA and the Commission, if the derived right to residence for family members of an EEA national holding a permanent residence right were subject to the conditions laid down in Article 7 of the Directive, including the condition to have sufficient resources, this would entail that economically inactive beneficiaries of a right of permanent residence who do not have sufficient resources may not be joined by members of their family. They submit that if EEA nationals are not allowed to lead a normal family life in the host State, the exercise of the right of residence granted to EEA nationals by Directive 2004/38 could be seriously obstructed and even deprived of any useful effect.

26 They contend that the abolition of the condition to have sufficient resources included in earlier directives was a deliberate choice of the legislature. This applies not merely to the enjoyment of the right of permanent residence by an EEA national himself but must equally extend to the circumstances in which his family members may themselves acquire a right of residence there.

27 Against this background, they consider that a refusal to recognise Mrs Clauder's derived right of residence in Liechtenstein because of the insufficient resources of her husband would constitute a breach both of Mr Clauder's right of permanent residence under Article 16 of Directive 2004/38 and of his right to family life.

28 The Governments of Liechtenstein, the Netherlands and Denmark submit that Article 16 of the Directive must be interpreted to the effect that a holder of a permanent residence right who is a pensioner may claim the right to family reunification only on the fulfilment of the conditions laid down in Article 7(1)(d) in conjunction with Article 7(1)(b) of the Directive. Accordingly, the family member must not become a burden on the social assistance system in the host EEA State and must have comprehensive sickness insurance cover.

29 The Governments observe that, in contrast to Articles 6 and 7 of the Directive, Article 16 does not explicitly regulate the right to family reunification. As a consequence, it must be assumed that the legislature did not intend to grant any

further right to family reunification to nationals of EEA States holding a permanent residence status in the host EEA State beyond those mentioned in Articles 6 and 7 of the Directive. They assert, therefore, that since the Directive is silent as regards the right to family reunification for holders of a permanent residence right, the EEA States are free to decide whether the right to family reunification shall be subject to a condition to have sufficient resources.

30 They contend further that a distinction must be made between (i) the personal right of residence that the family member as an EEA national may have and (ii) the right of residence that the family member may derive from his status as family member of an EEA national holding a right of permanent residence. In their view, in both situations Directive 2004/38 allows host States to set the requirement of sufficient resources.

31 According to the Governments, only where an EEA national himself does not satisfy the conditions of Article 7(1)(a), (b) or (c) of the Directive does the question arise whether a right of residence can be derived from the status as a family member of an EEA national holding a right of permanent residence in the host State. They observe further that a family member has a derived right of residence on the basis of Article 7(1)(d) of the Directive if the family member is accompanying or joining an EEA national who satisfies the conditions in Article 7(1)(a), (b) or (c).

32 They assert that the standard conditions for a derived right of residence laid down in Article 7(1)(d) of the Directive also apply if the EEA national, whom the family member is joining, has obtained a right of permanent residence in the host State. This understanding of the Directive follows from the wording of Article 16, which stipulates that a family member can claim a right of permanent residence only where the family member himself fulfils the requirement of legal residence in the host State for a continuous period of five years. The fact that an EEA national has acquired a right of permanent residence does not automatically bring about any changes in the residence status of his family members. In this regard, the Governments argue that Articles 16(1) and 17 of the Directive explicitly concern family members who are already residing in the host State, and that neither these Articles, nor any other provision in the Directive, explicitly address the position of a family member wishing to join an EEA national holding a right of permanent residence.

Findings of the Court

33 As a preliminary point, the Court notes that Directive 2004/38 amended Regulation (EEC) No 1612/68 (OJ English Special Edition 1968 (II), p. 475) and repealed the earlier directives on freedom of movement for persons (Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ 1990 L 180, p. 26, and 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). As is apparent from recital 3 in the preamble to Directive 2004/38, it aims in particular to "strengthen the right of

free movement and residence" of EEA nationals (see, for comparison, Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 59).

34 Having regard to the context and objectives of Directive 2004/38 – promoting the right of nationals of EC Member States and EFTA States and their family members to move and reside freely within the territory of the EEA States – the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness (see, to that effect, *Metock and Others*, cited above, paragraph 84, and the case-law cited).

35 The Court notes further that even before the adoption of Directive 2004/38, the legislature recognised the importance of ensuring the protection of the family life of nationals of the EEA States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by EEA law (see, in a similar vein, *Metock and Others*, cited above, paragraph 56, and the case-law cited).

36 Moreover, as recital 5 in the preamble to the Directive points out, the right of all EEA nationals to move and reside freely within the territory of the EEA 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.

37 Consequently, Article 3(1) of the Directive provides that it is to apply to all EEA nationals who move to or reside in an EEA 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.

38 In this regard, the Court notes that, in contrast to Article 1 of Directive 90/364/EEC and Article 1 of Directive 90/365/EEC, Directive 2004/38 does not contain a general requirement of sufficient resources. Such a requirement exists neither with regard to workers and self-employed persons nor with regard to persons who have acquired a permanent right of residence pursuant to the Directive. Moreover, in comparison to the position under earlier legislation, the Directive has expanded the rights of family members also on several other points. For instance, Article 13 of the Directive now ensures that family members' rights of residence are retained in the event of divorce, annulment of marriage or termination of registered partnership.

39 The rights conferred on the family members of a beneficiary under the Directive are not autonomous rights, but derived rights, acquired through their status as members of the beneficiary's family (see, in a similar vein, Case C-434/09 *McCarthy*, judgment of 5 May 2011, not yet reported, paragraph 42). Family members who are themselves EEA nationals may also have an autonomous right of residence. However, such an autonomous right is not at issue in the present case.

40 Directive 2004/38 provides for three levels of residence rights for EEA nationals: first, in Article 6, the right of residence for up to three months; second, in Article 7, the right of residence for more than three months, which applies to

workers, economically self-supporting persons or other persons to be assimilated to them; and third, in Article 16(1), the right of permanent residence.

41 The Court observes that the first question essentially involves two issues, that is, whether an EEA national's right of permanent residence confers a derived right of residence in the host State on his family members, and, whether such a derived right may be exercised independently of the resources possessed by the family member and the primary beneficiary.

42 Article 16(1) of the Directive is silent on whether an EEA national's right to permanent residence pursuant to that article confers a right of residence on his family members. Article 7(1), which concerns the right of residence for more than three months, expressly stipulates in point (d) that family members may accompany or join the EEA national having a residence right, but only if the beneficiary satisfies the conditions in points (a), (b) or (c), in other words, that the beneficiary either is working or self-employed or has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host State.

43 The Court finds it apparent that although not explicitly stated in the wording of the provision, the right to permanent residence under Article 16(1) of the Directive must confer a derived right of residence in the host State on the holder's family members. It follows from the scheme and purpose of the Directive that the right to permanent residence, which represents the highest level of integration under the Directive, cannot be read as not including the right to live with one's family, or be limited such as to confer on family members a right of residence derived from a different, lower status. In that regard, it must be noted that the right to permanent residence under Article 16 does not confer an autonomous right of permanent residence on family members, but a right to reside with the beneficiary of a right of permanent residence as a member of his or her family. Hence, only on satisfying the condition of legal residence in the host State for a continuous period of five years may a family member acquire an autonomous right to permanent residence, either pursuant to Article 16(1) in the case of EEA nationals or Article 16(2) in the case of non-EEA nationals.

44 Turning to the second issue, the Court notes that Article 16 of the Directive explicitly states that, once acquired, the right of permanent residence is not subject to the conditions laid down in Chapter III of the Directive, in which Article 7 on the right to residence for more than three months, including the condition to have sufficient resources, is set out.

45 This is in contrast to the situation under the repealed Directives 90/364/EEC and 90/365/EEC, which entitled the host EEA State to monitor whether EEA nationals who enjoyed a right of residence continued to meet the conditions laid down for that purpose, including the condition to have sufficient resources, throughout the period of their residence.

46 If an EEA national who has a permanent and unconditional right to residence in an EEA State other than that of which he is a national were precluded from founding a family in that State, this would impair the right of EEA nationals to move and reside freely within the EEA, and thus be contrary to the purpose of the Directive and deprive it of its full effectiveness (see, in a similar vein, *Metock and Others*, cited above, paragraphs 89 and 93). This conclusion cannot be different even if the family member becomes a burden on the social assistance system of the host EEA State.

47 Since the retention of a right to permanent residence under Article 16 of the Directive is not subject to the conditions in Chapter III and it is apparent that the right must be understood to confer a derived right on the beneficiary's family members, it must be presumed *prima facie* that also the derived right is not subject to a condition to have sufficient resources.

48 This interpretation is underpinned by the discontinuation of a general requirement to have sufficient resources in the Directive, as mentioned in paragraphs 33 to 38. Thus, in the Court's view, whereas under the previous directives to have sufficient resources was a general condition for residence rights, under Directive 2004/38 it is only a legitimate condition for residence rights in the cases specifically mentioned in the Directive. In that regard, the Court also considers that, where a provision of EEA law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness (see, for comparison, Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923, paragraph 47, and the case-law cited).

49 Finally, it should be recalled that all the EEA States are parties to the ECHR, which enshrines in Article 8(1) the right to respect for private and family life. According to established case-law, provisions of the EEA Agreement are to be interpreted in the light of fundamental rights (see, for example, Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 18, paragraph 23, and Case E-12/10 *EFTA Surveillance Authority* v *Iceland*, judgment of 28 June 2011, not yet reported, paragraph 60 and the case-law cited). The Court notes that in the European Union the same right is protected by Article 7 of the Charter of Fundamental Rights.

50 In light of the foregoing, the answer to the referring court's first question must be that Article 16(1) of Directive 2004/38 is to be interpreted such that an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host EEA State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits.

V The second and third questions

51 As a result of the Court's reply to the first question, it is unnecessary for the Court to answer the second and third questions.

VI Costs

52 The costs incurred by the Liechtenstein Government, the Netherlands Government, the Danish Government, ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Verwaltungsgerichtshof des Fürstentums Liechtenstein, any decision on costs for Mr Clauder, who is a party to those proceedings, is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Verwaltungsgerichtshof des Fürstentums Liechtenstein hereby gives the following Advisory Opinion:

Article 16(1) of Directive 2004/38/EC is to be interpreted such that an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host EEA State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits.

Carl Baudenbacher Per Christiansen Benedikt Bogason

Delivered in open court in Luxembourg on 26 July 2011.

Skúli Magnússon
Registrar

Carl Baudenbacher
President