REPORT FOR THE HEARING

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; "the Administrative Court"), 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. [1]

I Introduction

1. By a letter of 14 February 2011, registered at the EFTA Court on 16 February 2011, 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.

[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/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158, p. 77, referred to at point 3 of Annex VIII to the EEA Agreement.

II Legal background

European law

3. 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.*
>
> …

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 ("Directive 2004/38" or "the Directive") was incorporated into the EEA Agreement by EEA Joint Committee Decision No 158/2007 of 7 December 2007 ("EEA Joint Committee Decision No 158/2007").[2]

4. The Directive's scope *ratione personae* is defined in Chapter I – *General provisions* – in Article 3 under the heading "Beneficiaries" 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.*
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> …

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

> *For the purposes of this Directive:*
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> ...
>
> *2. "family member" means:*
>
> *(a) the spouse;*
>
> ...

6. 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:*

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[2] OJ 2008 L 124, p. 20.

(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) …

…

7. Article 16 of the Directive sets out the general rule concerning the right of permanent residence. It provides:

General rule for Union citizens and their family members

(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.

8. Article 24 of the Directive – *Equal treatment* – reads as follows:

(1) Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

…

Adaptations to the EEA

9. Joint Declaration by the Contracting Parties to Decision No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement 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.*
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> ...

Sectoral adaptations

10. Annex V to the EEA Agreement states:

> ...
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> *The provisions in the SECTORAL ADAPTATIONS in Annex VIII concerning Liechtenstein shall apply, as appropriate, to this Annex.*
>
> …

11. The Sectoral Adaptations in Annex VIII concerning Liechtenstein read as follows:

> *The following shall apply to Liechtenstein. Duly taking into account the specific geographic situation of Liechtenstein, this arrangement shall be reviewed every five years, for the first time before May 2009.*
>
> *I*
>
> *Nationals of Iceland, Norway and the EU Member States may take up residence in Liechtenstein only after having received a permit from the Liechtenstein authorities. They have the right to obtain this permit, subject only to the restrictions specified below. No such residence permit shall be necessary for a period less than three months per year, provided no employment or other permanent economic activity is taken up, nor for persons providing cross-border services in Liechtenstein.*
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> …

III

Family members of nationals of Iceland, Norway and EU Member States residing lawfully in Liechtenstein shall have the right to obtain a permit of the same validity as that of the person on whom they depend. They shall have the right to take up an economic activity, in which case they will be included in the number of permits granted to economically active persons. However, the conditions in point II may not be invoked to refuse them a permit in the event that the annual number of permits available to economically active persons is filled.

Persons giving up their economic activity may remain in Liechtenstein under conditions defined in Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State and in Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity: they will no longer be counted in the number of permits available to economically active persons nor will they be included in the quota defined in point IV.[3]

National law[4]

12. The Act of 20 November 2009 on the free movement of EEA and Swiss citizens ("PFZG"),[5] and the Regulation on the Free Movement of Persons ("PFZV"),[6] entered into force 1 January 2010.

13. Article 24 of the PFZG concerns the principles of the permanent residence permit. It reads as follows:

... Principle:

(1) Subject to Articles 43 and 46, EEA citizens shall be granted on request a permanent residence permit if:

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[3] Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State, OJ, English Special Edition 1970 (II), p. 402, and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, OJ 1975 L 14, p. 10, were repealed from Annex V of the EEA Agreement and replaced by Directive 2004/38.

[4] Translations of national provisions are unofficial and are based on translations contained in the documents of the case.

[5] *Gesetz über die Freizügigkeit für EWR- und Schweizer Staatsangehörige (Personenfreizügigkeitsgesetz)*, Law Gazette 2009 No 348, as amended.

[6] *Verordnung über die Freizügigkeit für EWR- und Schweizer Staatsangehörige (Personenfreizügigkeitsverordnung)*, Law Gazette 2009 No 350, as amended.

(a) they have resided in Liechtenstein for a continuous period of five years; and

(b) there is no ground for revocation or expulsion.

(2) The permanent residence permit entitles the beneficiary to permanent residence in Liechtenstein. The permit may not be linked to any conditions.

(3) The control period for the purposes of examining the actual presence in Liechtenstein is five years. The residence card shall be submitted two weeks before the expiry of the control period with a view to obtaining an extension.

...

14. The PFZG provides in the chapter entitled "Family reunification, Family members, General Provisions" as follows:

Article 40:

Principle:

The purpose of family reunification is to allow family members to jointly take up residence

Article 41:

Requirements:

(1) Foreign persons with a residence permit may have their family members join them at any time on provision of the following evidence:
…
(d) in cases pursuant to Articles 17, 18 and 22, evidence of the necessary financial means for maintaining all family members obviating any claim for social welfare benefits; …

15. "Social welfare benefit" within the meaning of the foregoing provision is defined in Article 8(2) of the PFZV as follows:

In cases under Article 41(1)(d) PFZG, social welfare benefit, in addition to the benefits under paragraph 1, also refers to supplementary benefits under the ELG.[7]

16. Articles 17 and 18 referred to in Article 41(1)(d) of the PFZG are not relevant to the present case. Article 22 of the PFZG states as follows:

...

Economically inactive persons

(1) A residence permit without gainful employment may only be issued if:

(a) also no permanent and regular gainful employment is being pursued abroad;

(b) the necessary financial means are available to provide a living, thereby obviating any claim for social welfare benefit; and

(c) evidence of comprehensive sickness insurance is provided which covers all risks in Liechtenstein.

(2) The evidence of sufficient financial means may be verified after two years.

17. Article 44 of the PFZG reads as follows:

(1) Family members of persons who have a permanent residence permit or a settlement permit shall be granted, subject to Article 45, a residence permit with a validity period of 5 years.

(2) Family members of persons who have a short-term residence permit or a residence permit shall be granted a permit valid for the same period as the person from whom they derive their right.

III Facts and procedure

18. Mr Clauder, a German national, has been continuously resident in Liechtenstein since 1992. His first wife, also 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.

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[7] The "ELG" is the Act of 10 December 1965 on supplementary benefits related to old-age, survivors' and invalidity insurance (*Gesetz vom 10. Dezember 1965 über Ergänzungsleistungen zur Alters-, Hinterlassenen- und Invalidenversicherung*), Law Gazette 1965 No 46, as amended.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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 but, 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.

24. Mr Clauder lodged an administrative complaint against this administrative notice on 26 April 2010. This 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.

25. 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 submitted the following three questions to the EFTA 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 Written observations

26. 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 Complainant;
- the Liechtenstein Government, represented by Dr Andrea Entner-Koch and Thomas Bischof of the EEA Coordination Unit, Vaduz, acting as Agents;
- the Netherlands Government, represented by Corinna Wissels, Mielle Bulterman and Jurian Langer, respectively head and staff members of the European Law Division of the Legal Affairs Department of the Ministry of Foreign Affairs, The Hague, acting as Agents;
- the EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Florence Simonetti, Senior Officer, Department of Legal & Executive Affairs, acting as Agents;
- the European Commission, represented by Christina Tufvesson and Michael Wilderspin, Legal Advisers, acting as Agents.

The Complainant

The first question

27. The Complainant contends that Directive 2004/38 cannot be interpreted in such a way as to govern merely the right to permanent residence for Union citizens themselves and not family members seeking to join them. He submits that Article 16 of the Directive, which is the legal basis for the right of permanent residence for Union citizens, expressly precludes reference to the conditions set out in Chapter III. He further argues that Article 16(1) expressly provides for a right to permanent residence not only for Union citizens, but also for their family members. Moreover, since Article 16(2) allows for such integration even in the

case of family members who are not Union citizens, subject to the condition of a 5-year period of residence, it is the Complainant's view that reunification with family members who are themselves Union citizens is unconditional. The Complainant submits, therefore, that what may be regarded as legislative silence in relation to the acquisition of the right to join a Union citizen with permanent residence does not constitute a gap in the law but that an unconditional right of reunification was presupposed by the Community legislature to be obvious.

28. Mr Clauder contends that this conclusion is strengthened in the present case, as he already had a right to permanent residence when the Directive entered into force in 2004. That, in turn, justifies application of Article 37 of the Directive which provides that the Directive's provisions may not affect more favourable national provisions.

29. The Complainant submits further that if the Court takes the view that the principle according to which a right of free movement is restricted where an individual is in receipt of social assistance applies also to the right of permanent residence under Article 16(1) of the Directive, the question presumably arises whether this covers all recourse to social assistance or only such where persons become an "unreasonable" burden on the social assistance system.

The second question

30. As regards the Administrative Court's second question, the Complainant contends that this question must be expanded to consider whether it is relevant whether the Union citizen with a right of permanent residence was employed or self-employed in the host Member State after reaching retirement age.

The Liechtenstein Government

The first question

31. The Liechtenstein Government notes that the Directive, which brought together previous rules on residence rights of nationals of EEA States, continues to distinguish between economically active and non-active nationals of EEA States especially with regard to the conditions nationals of EEA States have to fulfil in order to have the right to reside in another EEA State.

32. It notes further that the Directive also confers derived rights of entry into and residence in the host EEA State on family members of a national of an EEA State, within the meaning of point 2 of Article 2 of the Directive, who accompany or join the national of an EEA State in an EEA State other than that of which he is a national.

33. With regard to family members, the Liechtenstein Government draws attention to the fact that the Directive explicitly provides for three types of residence status. First, the residence status for up to three months governed by Article 6 of the Directive (referred to as "informal residence status"), the

residence status for more than three months governed by Article 7 of the Directive (referred to as "temporary residence status"), and the permanent residence status provided for in Article 16 of the Directive.

34. The Liechtenstein Government notes 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, in the view of the Liechtenstein Government, it must be assumed that the EC 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 to those mentioned in Articles 6 and 7 of the Directive.

35. With this in mind, the Liechtenstein Government submits that two questions have to be analysed in order to answer the first question of the referring court. First, whether a family member's residence status conferred by the Directive is directly dependent on and determined by the residence status of the national of an EEA State whom he accompanies or joins, and, second, if a family member's residence status is determined independently of the residence status of the nationals of an EEA State whom he accompanies or joins, which criteria apply for the purposes of determining the family member's residence status.

36. With regard to the first of these questions, the Liechtenstein Government is of the opinion that a family member's residence status has to be assessed independently according to that family member's own merits and the fulfilment of the relevant conditions. Were it otherwise, i.e. that the family member's residence status always corresponds to the status of the person from whom he derives his residence rights, certain provisions of the Directive, for example, Article 16(2), would, in the Government's view, be rendered meaningless. The Liechtenstein Government contends that a family member has no individual right to acquire permanent residence status if the relevant conditions of Article 16 of the Directive are not fulfilled. According to the Liechtenstein Government, this contention is supported by the provisions of the Directive dealing with the retention of the right of residence by family members both in the event of death or departure of the national of an EEA State (Article 12) and in the event of divorce, annulment of marriage or termination of registered partnership (Article 13).

37. As regards the second of these questions, i.e. the criteria which determine the family member's residence status, the Liechtenstein Government submits that a family member may acquire any of the three residence statuses in Articles 6, 7 and 16 of the Directive (informal residence status, temporary residence status, and permanent residence status) if he fulfils all relevant conditions. In this context, the residence status which the national of an EEA State, whom the family member is joining, already acquired in the host EEA State is not necessarily decisive in determining the individual residence status of the family member.

38. Turning specifically to the acquisition of a temporary residence status for more than three months, the Liechtenstein Government observes that such a right is dependent on the fulfilment of the conditions mentioned in Article 7(1)(d) in conjunction with Article 7(1)(b) of the Directive, i.e. that the family member must not become a burden on the social assistance system of the host EEA State during their period of residence and have comprehensive sickness insurance cover in the host EEA State. According to the Liechtenstein Government, the family member must prove that either he himself or the national of an EEA State whom he is joining has sufficient resources in order to be entitled to take up residence in the host EEA State for more than three months.[8] The Liechtenstein Government notes that resources are considered to be sufficient where the level of the resources is higher than the threshold under which a minimum subsistence benefit is granted in the host EEA State.[9] It submits further that for the purposes of Article 7 of the Directive social assistance benefits must be understood to mean non-contributory benefits paid for from public funds which compensate for a lack of stable, regular and sufficient resources.[10]

39. As regards the facts of the present case, the Liechtenstein Government contends that Mrs Clauder would be dependent on supplementary benefits payable under the Act of 10 December 1965 on supplementary benefits related to old-age, survivors' and invalidity insurance[11] ("the ELG") at the time of taking up residence in Liechtenstein. Since supplementary benefits under the ELG must be understood as social assistance and not as part of the own resources of the national of an EEA State or the family member, both Mr and Mrs Clauder are (or would be) recipients of social assistance benefits in Liechtenstein. Thus, the condition of having sufficient resources not to become a burden on the social assistance system of the host EEA State is obviously satisfied neither by Mrs Clauder as a family member nor by Mr Clauder as a national of an EEA State whom Mrs Clauder wishes to join in the host EEA State.

The second question

40. In the Liechtenstein Government's view, by its second question, the referring court essentially seeks to establish whether a pensioner can still invoke his/her former status as an economically active person (worker or self-employed person) in order to continue to assert rights conferred by the Directive on economically active persons.

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8 Reference is made to Case C-408/03 *Commission* v *Belgium* [2006] ECR I-2647, paragraphs 40–42.

9 Reference is made to Communication from the Commission to the European Parliament and the Council of 2 July 2009 on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, p. 8.

10 The Government of Liechtenstein refers to Case C-578/08 *Chakroun* [2010] ECR I-0000, paragraph 49.

11 *Gesetz vom 10. Dezember 1965 über Ergänzungsleistungen zur Alters-, Hinterlassenen- und Invalidenversicherung*, Law Gazette 1965 No 46, as amended.

41. According to the Liechtenstein Government, it follows from the wording of Article 17(1)(a), (b) and (c) of the Directive, concerning the right of permanent residence of certain groups of persons (amongst them pensioners), who stopped being economically active in the host EEA State before completion of a continuous period of five years of residence, that a pensioner has a status that is different to the status of an economically active person (worker or a self-employed person). As a consequence, a pensioner cannot invoke his former status as an economically active person in order to continue to assert rights conferred by the Directive on economically active persons.

The third question

42. The Liechtenstein Government contends that the possibilities for a national of an EEA State to claim a right to family reunification do not depend on whether the family member may possibly be economically active in the host EEA State either as a worker or a self-employed person.

43. Thus, the Liechtenstein Government proposes that the Court should answer the questions as follows:

1. *Directive 2004/38/EC, in particular Article 16(1) in conjunction with Article 7(1) thereof, is not to be interpreted such that a national of EC Member States and EFTA States with a right of permanent residence, who is a pensioner and in receipt of social assistance benefits in the host EEA State, may claim the right to family reunification, if the family member will also depend on social assistance benefits.*

2. *It is of no relevance for the answer to Question 1, whether the national of EC Member States and EFTA States with a right of permanent residence was employed or self-employed in the host EEA State prior to attaining retirement age.*

3. *It is of no relevance for the answer to Question 1, whether the family member will be employed or self-employed in the host EEA State and still be claiming social assistance benefits.*

The Netherlands Government

44. At the outset, the Netherlands Government finds it necessary to distinguish between (i) the personal right of residence that the family member as an EU citizen may have and (ii) the right of residence that the family member may derive from his status as family member of an EU citizen holding a right of permanent residence. The Netherlands Government submits that in both situations Directive 2004/38 allows Member States to set the requirement of sufficient resources.

45. As regards (i), that is a personal right of residence of the family member, the Netherlands Government notes that Directive 2004/38 confers upon the

family member a personal right of residence if the conditions of Article 7(1)(a), (b) or (c) are satisfied by the family member himself. This means that if the family member qualifies as a worker or self-employed person, the person concerned can rely upon Article 7(1)(a) to claim a right of residence. Family members who are not economically active, on the other hand, have a right of residence on the basis of Article 7(1)(b) or (c) if they have sufficient resources and comprehensive sickness insurance cover in the host Member State.

46. Turning to (ii), that is, a derived right of residence as a family member, the Netherlands Government notes that only where the EU citizen himself does not satisfy the conditions of Article 7(1)(a), (b) or (c) of Directive 2004/38 does the question arise whether a right of residence can be derived from the status as a family member of an EU citizen holding a right of permanent residence in the host State. The Netherlands Government observes 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 EU citizen who satisfies the conditions in Article 7(1)(a), (b) or (c).

47. The Netherlands Government contends that the standard conditions for a derived right of residence laid down in Article 7(1)(d) of the Directive also apply if the EU citizen has obtained a right of permanent residence in the host State. It observes that Article 16(1) and Article 17 explicitly concern family members who are already residing in the host Member State, and that neither Article, nor any other provision in the Directive, explicitly addresses the position of a family member wishing to join an EU citizen holding a right of permanent residence. This means that a family member wishing to join an EU citizen holding a right of permanent residence can claim a right of residence under the Directive only where the holder of the right of permanent residence satisfies the conditions set out in Article 7(1)(a), (b) or (c).

48. The Netherlands Government argues that 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 Member State for a continuous period of five years. In its view, the fact that an EU citizen has acquired a right of permanent residence does not automatically bring about any changes in the residence status of his family members.

49. Thus, according to the Netherlands Government, in the present case, Mrs Clauder has a derived right of residence only in so far as Mr Clauder satisfies the criteria set out in Article 7(1)(b). It notes, however, that it is for the national court to decide whether he satisfies these criteria.

50. The Netherlands Government makes two additional remarks. First, it stresses that since Article 24(1) of the Directive provides that EU citizens must enjoy equal treatment with the nationals of the host State within the scope of the Treaty, it is only if domestic legislation requires a Member State’s own nationals

to prove that they have the necessary financial means to maintain the family members who wish to join them that such a requirement may be imposed on EU citizens with a right of permanent residence. Second, the right to respect for family life enshrined in Article 8 of the European Convention on Human Rights ("ECHR") may have to be taken into account. It argues, however, that on numerous occasions the European Court of Human Rights has ruled that a State is entitled under international law, subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. It submits further that on several occasions the European Court of Human Rights has held that Article 8 ECHR cannot be considered to impose on a Member State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to allow family reunion in its territory.[12] The Netherlands Government observes, nonetheless, that the question of whether the circumstances in this specific case are such that a right of residence may be derived from Article 8 ECHR requires a balanced assessment of the competing interests of the individuals concerned, and the interests of the community as a whole, in which the State may exercise a certain degree of discretion, and that such an assessment has to be made by the national court.

51. The Netherlands Government proposes that the Court should answer the referring court's questions as follows:

> *Article 7(1)(d) of Directive 2004/38 applies to the situation in which a family member wishes to join an EU citizen holding a right of permanent residence in the host State.*

The EFTA Surveillance Authority

The first question

52. The EFTA Surveillance Authority ("ESA") notes 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. It notes further that this right of permanent residence also applies to family members who have resided legally in the host State for a continuous period of five years. It notes, in addition, that Article 16 states that, once acquired, the right of permanent residence is not subject to the conditions laid down in Chapter III, including the condition to have sufficient resources.

53. ESA observes, 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

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[12] Reference is made to Eur. Court HR, *Gül* v *Switzerland* judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 173.

of permanent residence when the family member himself does not fulfil the requirements for permanent residence.

54. According to ESA, the silence of the Directive could lead to three different interpretations. Either it is the case (i) that the Directive does not grant family members of beneficiaries of a right of permanent residence any right to join and reside with this person (*no residence right*), (ii) that family members who do not fulfil the requirements for permanent residence pursuant to Article 16 of the Directive because they have not resided in the host State for five years are granted a right of residence pursuant to Article 7(1)(d) (*residence right conditional on sufficient resources and social security coverage*), or (iii) that family members who do not yet fulfil the requirements laid down in Article 16 of the Directive derive a right of residence from the right of permanent residence of the EEA national and do not have to fulfil the conditions laid down in Article 7 (*unconditional derived residence right*).

55. In ESA's view, the first interpretation (*no residence right*) must be rejected at the outset. As family members of EEA nationals who are entitled to a right of residence for more than three months but have not yet acquired permanent residence have a right of residence, the same must apply, *a fortiori*, to family members of EEA nationals with a right of permanent residence.

56. ESA submits that many arguments support the third interpretation (*unconditional derived residence right*). Even though the second construction (*residence right conditional on sufficient resources and social security coverage*) – which ESA understands has been chosen by Liechtenstein, Germany and other EEA States – appears to be supported by the fact that certain provisions of Directive 2004/38 draw a distinction between the rights of family members of economically active persons and the rights of family members of economically inactive persons, such an interpretation 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.

57. According to ESA, Article 16 of Directive 2004/38 clearly states that the right of permanent residence granted to EEA nationals who have already legally resided in the host Member State shall not be subject to the conditions provided for in Chapter III, *inter alia*, the self-sufficiency condition. It observes that this is in contrast to the previous situation under Council Directive 90/364/EEC of 28 June 1990 on the right of residence[13] 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[14] (now repealed) which entitled the host Member State to monitor whether citizens of the Union 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

[13] OJ 1990 L 180, p. 26.

[14] OJ 1990 L 180, p. 28.

their residence. In ESA's view, if the legislature had intended to make the right of permanent residence of economically inactive persons conditional on self-sufficiency, this would have been stated explicitly in Directive 2004/38 as was the case in the predecessor directives.

58. ESA further argues that it is settled case-law that EEA secondary legislation on free movement and residence cannot be interpreted restrictively.[15] In addition, it observes 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.[16] It submits that if EEA nationals are, indirectly, not allowed to lead a normal family life in the host Member 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.[17] In that connection, ESA stresses the importance – recognised by the EU legislature and acknowledged by the European Court of Justice – of ensuring protection for the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty.[18]

59. In addition, so ESA contends, the right to preserve family unity is intrinsically connected with the right to the protection of family life, a fundamental right granted by the ECHR, in the light of which Directive 2004/38 must be interpreted and applied.[19]

60. Against this background, ESA considers 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. Consequently, ESA submits that, in cases such as the main proceedings, there is no basis in the Directive for applying the self-sufficiency condition, as it no longer applies to the right of permanent residence of Mr Clauder himself nor to the right of residence that his wife derives from his right of permanent residence.

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[15] Reference is made to Case C-291/05 *Eind* [2007] ECR I-719, paragraph 43, and the case-law cited therein.

[16] ESA refers to Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923, paragraph 47, and the case-law cited therein.

[17] Reference is made to Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 45, Case C-310/08 *Ibrahim* [2010] ECR I-0000, and Case C-480/08 *Teixeira* [2010] ECR I-0000.

[18] Reference is made to *Eind*, cited above, paragraph 44, and the case-law cited therein.

[19] ESA refers to Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 79. In an EEA context, ESA refers, on a general basis, to Case E-8/97 *TV 1000 Sverige* v *Norway* [1998] EFTA Ct. Rep. 68, paragraph 26, and Case E-2/03 *Ákæruvaldið (The Public Prosecutor)* v *Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson* [2003] EFTA Ct. Rep. 185, paragraph 23.

The second question

61. ESA submits that, if the Liechtenstein Government is correct in its approach to family reunification, whether Mr Clauder was employed or self-employed before he retired is not relevant to the case, because the determining factor is the current economic status of the person concerned and his self-sufficiency. However, in its view, it is also clear that Article 17(3) of the Directive grants family members of former workers or former self-employed persons who fulfil the criteria laid down in Article 17(1) a right of residence whether the marriage took place before or after the right of permanent residence was granted to the former worker or self-employed person.

The third question

62. In ESA's view, even assuming that the right of residence of Mrs Clauder is subject to a condition of self-sufficiency of the family, the joint financial situation of the couple must be taken into account. Accordingly, ESA argues that if Mrs Clauder were to work, Liechtenstein cannot rely simply on the increase in the social welfare benefits received by Mr Clauder – a mere consequence of the application of Liechtenstein law – in order to conclude that the couple represents a greater burden on the Liechtenstein State and, thus, deny the right to family reunification.

63. In any event, ESA questions whether the supplementary benefits received by the complainant in the main proceedings can be qualified as social welfare benefits that may be taken into account to determine whether Mr and Mrs Clauder represent a burden on the Liechtenstein assistance system. Instead, ESA argues that the benefits in question must be regarded as special non-contributory social security benefits within the meaning of Regulation (EEC) No 1408/71 of 14 June 1971.[20]

64. ESA proposes that the Court should answer the referring court's questions as follows:

1. *Directive 2004/38/EC, in particular Article 16(1) in conjunction with Article 7(1), shall 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.*

2. *It is of no relevance for the answer to Question 1, whether the Union citizen with a right of permanent residence was employed or self-*

[20] Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ, English Special Edition 1971 (II), p. 416, as amended. ESA refers, *mutatis mutandis*, to Case C-160/02 *Skalka* [2004] ECR I-5613, paragraphs 26 and 30.

employed in the host Member State prior to attaining retirement age or whether the family member will be employed or self-employed in the host Member State and still be claiming social welfare benefits.

65. If the Court were to answer to the first question in the negative, ESA submits that the answers to the second and third question should be as follows:

2. *Directive 2004/38, in particular Article 17(3), shall be interpreted as meaning that an EEA national who was granted a right of permanent residence pursuant to Article 17(1) and is currently a pensioner 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.*

3. *Directive 2004/38/EC, in particular Article 7(1), shall be interpreted as meaning that a State cannot rely on the mere fact that the social welfare benefits received by the beneficiary of a right of permanent residence will increase as a result of a family reunification where the family member who is joining takes up paid employment and the increase in the social welfare benefits is a mere consequence of the application of the national law. Besides, only receipt of social assistance benefits can be considered relevant to determining whether the person concerned is a burden to the social assistance system.*

The European Commission

66. The European Commission ("the Commission") argues that the first question involves two issues that are closely related but logically separate. First, whether a Union citizen's right of permanent residence confers a derived right of residence in the host State on his family members and, second, whether such a derived right may be exercised independently of whether the primary beneficiary, by analogy with Article 7(1)(b) and (d) of Directive 2004/38, possesses sufficient resources.

67. Even though 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, in the Commission's view, the legislature clearly intended such a right to be conferred. It argues 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 for family members.

68. According to the Commission, once it is understood why the right of permanent residence conferred by Article 16 entails a derived right of residence for family members, it is comparatively easy to give an answer to the question whether that derived right is conditional on the beneficiary of the permanent right

of residence having sufficient resources or satisfying another of the conditions set out in Article 7(1).

69. In the Commission's view, the conditions imposed by Article 7(1)(d) are logical when the family member is claiming rights derived from a person who falls within the scope of Article 7, since they reflect the conditions which that person himself must satisfy to acquire and retain a right of residence. In particular, if he ceases to be a worker or to have sufficient resources, as the case may be, he will lose his own right of residence under Article 7. It is, thus, entirely in conformity with the system established by Article 7 that the family member enjoying the derived right also loses that right.

70. The Commission submits that 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 more or fewer rights according to the circumstances in which that right was acquired.

71. It argues that the right of permanent residence builds on the assumption that, after five years of residence in a State, the EEA national and his family are sufficiently integrated in the society of the host State and should thus be granted a right to stay in this State for an indefinite period of time. The abolition of the condition of self-sufficiency included in earlier directives was, according to the Commission, a deliberate choice of the EU legislature. The Commission contends that it applies not merely to the enjoyment of the right of permanent residence by an EEA national himself but must, by necessary implication, equally extend to the circumstances in which his family members may themselves acquire a right of residence there.

72. Against this background, the Commission considers that a refusal to recognise that Mrs Clauder has a right of residence in Liechtenstein would constitute a breach of Mr Clauder's right of permanent residence under Article 16 of Directive 2004/38, in particular in the light of the couple's right to family life as enshrined in the Directive and general principles of EEA Law.

The second question

73. The Commission considers that, in the light of the answer proposed to the first question and the reasoning in support of that proposal, the second question does not call for a reply.

The third question

74. Since the Commission contends that the right of residence of Mrs Clauder is independent of any condition of self-sufficiency of the couple, it is, in the Commission's view, not necessary to answer the third question of the referring court.

75. However, if Mrs Clauder were to take up employment in Liechtenstein, she would have an autonomous right of residence pursuant to Article 7(1)(a) of the Directive. The Commission recalls that it is settled case-law that the right of residence pursuant to Article 7(1)(a) applies even in the case of a part-time job or if the income generated by this employment is modest.[21] Moreover, the Commission argues that there is no doubt that such a right of residence is independent of any condition relating to the possession of sufficient financial means by Mrs Clauder or her husband.

76. The Commission proposes that the Court should answer the referring court's questions as follows:

1. *Directive 2004/38/EC, in particular Article 16(1) thereof, confers a derived right of residence on a family member of an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host Member State, even if the family member will also be claiming social welfare benefits.*

2. *Questions 2 and 3 do not call for a reply.*

Per Christiansen
Judge-Rapporteur

[21] The Commission refers to Case 344/87 *Bettray* [1989] ECR 1621, paragraphs 15 and 16, and Case C-188/00 *Kurz* [2002] ECR I-10691, paragraph 32.