REPORT FOR THE HEARING
in Case E-4/19

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Supreme Court of Norway (*Norges Høyesterett*), in the case between

Melissa Colleen Campbell

and

The Norwegian Government, represented by the Immigration Appeals Board (*Utlendingsnemnda – UNE*),

concerning the interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the EU 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, and in particular Article 7(1)(b) read in conjunction with Article 7(2) thereof.

I Introduction

1. By a letter of 28 June 2019, registered at the Court on the same day, the Supreme Court of Norway (*Norges Høyesterett*) made a request for an Advisory Opinion in a case pending before it between Melissa Colleen Campbell and the Norwegian Government, represented by the Immigration Appeals Board.

2. The case before the referring court concerns the validity of the Immigration Appeals Board's decision of 23 December 2016 to reject Ms Campbell on the grounds that she did not have a right of residence in Norway, see Chapter 13 of the Norwegian Immigration Act (*utlendingsloven*). Ms Campbell is a Canadian national and is married to a Norwegian national.

3. Ms Campbell has based her claim to residence in Norway on Article 7(1)(b) of Directive 2004/38/EC of the European Parliament and of the Council ("the Directive") read in conjunction with Article 7(2) thereof. The referring court states that the question in the

case before it is whether the Directive gives Ms Campbell a derived right of residence in Norway, following her return and the return of her spouse to Norway after a period of residence in Sweden. The case also raises questions concerning the proper construction of certain of the Directive's conditions for residence.

4. The referring court states that it seeks guidance on the issue of application by analogy, as addressed in Case E-28/15 *Yankuba Jabbi* v *The Norwegian Government, represented by the Immigration Appeals Board* [2016] EFTA Ct. Rep. 575, in the light of subsequent case-law of the Court of Justice of the European Union ("ECJ"). The EFTA Court is also requested to interpret the condition that residence in the host State must have had a continuous duration of three months or longer. Finally, the Supreme Court asks the EFTA Court to provide further clarification of the condition that residence in the host State must be genuine, also having regard to the provision on abuse of rights in Article 35 of the Directive.

II Legal background

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 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), as corrected by OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34, ("the Directive") was incorporated in the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") by Decision of the EEA Joint Committee No 158/2007 (OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17; "Decision No 158/2007"), which added it at point 3 of Annex VIII, and points 1 and 2 of Annex V. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway, and the decision entered into force on 1 March 2009.

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

Annex VIII to the Agreement shall be amended as follows:

'...

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

(a) The Directive shall apply, as appropriate, to the fields covered by this Annex.

(b) The Agreement applies to nationals of the Contracting Parties. However, members of their family within the meaning of the Directive possessing third country nationality shall derive certain rights according to the Directive.

(c) The words "Union citizen(s)" shall be replaced by the words "national(s) of EC Member States and EFTA States".

(d) In Article 24(1) the word "Treaty" shall read "Agreement" and the words "secondary law" shall read "secondary law incorporated in the Agreement".'

...

7. Together with the Decision of the EEA Joint Committee, the Contracting Parties adopted a 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 ("Joint Declaration"). This 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.

8. Recitals 5, 6, 7, and 10 of the Directive read:

(5) 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.

(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy

an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

(7) The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined, without prejudice to the provisions applicable to national border controls.

(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

9. Articles 6 and 7 of the Directive form part of the Directive's Chapter III, headed "Right of residence".

10. Article 6 of the Directive, headed "Right of residence for up to three months", provides, as adapted by Decision No 158/2007, as follows:

1. Nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of 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 national of an EC Member State or EFTA State.

11. Article 7 of the Directive, headed "Right of residence for more than three months", provides, as adapted by Decision No 158/2007, as follows:

1. All nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

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

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; 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 national of an EC Member State or EFTA State 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 national of an EC Member State or EFTA State in the host Member State, provided that such national of an EC Member State or EFTA State satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a national of an EC Member State or EFTA State who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

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

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

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

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

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a national of an EC Member State or EFTA State meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

12. Article 11 of the Directive, headed "Validity of the residence card", provides as follows:

…

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

13. Chapter IV of the Directive, headed "Right of permanent residence", includes a Section I, headed "Eligibility", in which Article 16 of the Directive is to be found.

14. Article 16 of the Directive, as adapted by Decision No 158/2007, is headed "General rule for nationals of EC Member States and EFTA States and their family members" and provides as follows:

1. Nationals of EC Member States and EFTA States 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 national of an EC Member State or EFTA State in the host Member State for a continuous period of five years.

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

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.

15. Article 35 of the Directive, headed "Abuse of rights", provides as follows:

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

National law and practice

16. The Act of 15 May 2008 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm ("Norwegian Immigration Act"),[1] Chapter 13, Section 114, provides that foreign nationals who are not EEA nationals have a right of residence in Norway for more than three months if they are family members of an EEA national with a right of residence under Section 112, first paragraph (a), (b) or (c), or if they are spouses, cohabitants or dependent children under the age of 21 who accompany or are reunited with an EEA national with a right of residence under Section 112, first paragraph (d).

[1] *Lov. 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her* - Act of 15 May 2008 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm (Immigration Act). All translations of national legal provisions are unofficial.

17. Section 110 of the Immigration Act reads as follows:

Family members of 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.

18. Section 112 of the Immigration Act reads as follows:

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*
>
> *(d) is enrolled at an approved educational institution. This is subject to the primary purpose of the stay being education, including vocational education, and to the person in question being covered by a health insurance policy that covers all risks during the stay and making a statement that the person in question is self-supporting and can provide for any accompanying family member.*

19. The relevant instruction from the Ministry of Labour and Social Affairs to the immigration authorities, Circular AI-2017 ("the Circular"), provides that, for a third-country national family member to obtain a derived right of residence under EEA law, the returning Norwegian national has to have been an employee, a self-employed person, a service provider or student or has to have lived in another EEA State with sufficient funds to support himself and his family. [2]

20. The Circular confirms that the protection of EEA law extends to situations where Norwegian nationals who have never moved their residence to another EEA State, but who have provided services in another EEA State or travelled in the course of professional activities, fall under the protection of the relevant EEA law, mirroring the ECJ's judgments in Cases C-60/00 *Carpenter* and C-457/12 *S and G*.

21. Point 3 of the Circular provides that the assessment of whether the residence in the host State has been real and genuine has to be carried out separately and lists factors which might be relevant in that assessment. According to the Circular, the listing of factors is non-exhaustive and it is possible to present all types of documentation that can confirm the use of the right to move and reside freely in another EEA State. Nevertheless, the Circular

[2] *Instruks i saker om familiegjenforening etter EØS-regelverket*, adopted on 31 May 2017 by the Norwegian Ministry of Labour and Social Affairs.

expressly states that one of the conditions of assessment is whether the Norwegian citizen has been an employee, self-employed person, service provider, student or had his or her own resources and stayed in the other EEA State for at least three months continuously before returning to Norway (making reference to *Jabbi*, cited above, paragraph 80). Shorter stays such as weekends and holidays do not fulfil the conditions themselves if they together last longer (making reference to the judgment of the ECJ of 12 March 2014, *O.* v *Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel* v *B.* ("*O and B*"), C-456/12, EU:C:2014:135, paragraph 59).

III Facts and procedure

22. Since June 2012, Melissa Colleen Campbell, a Canadian national, has been married to a Norwegian national, Cecilie Arntzen Gjengaar. Her application for family reunification to reside in Norway with Ms Gjengaar was rejected by decision of the Directorate of Immigration of 8 October 2012. That decision was upheld on 12 December 2012 by the Immigration Appeals Board.

23. Later in December 2012, the couple moved to Sweden, where Ms Gjengaar registered with the local authorities and entered into a lease for a flat in Mörsil, approximately 200 kilometres from Trondheim, Norway. Ms Gjengaar applied for work unsuccessfully in Sweden until 21 February 2013, a period of approximately seven weeks. On 21 February 2013, Ms Gjengaar began working aboard the Hurtigruten coastal ships in Norway in shifts of three weeks aboard and three weeks off. Ms Gjengaar had previously worked aboard the ship during several periods between 2007 and 2012. During her time off, Ms Gjengaar travelled back to Sweden, but she also occasionally stayed in Trondheim, and from time to time took holidays in other countries. Ms Gjengaar left her job on the ship on 10 September 2013.

24. In January 2014, Ms Gjengaar formally registered as having moved back to Norway. From March 2014, Ms Gjengaar returned to work aboard the Hurtigruten coastal ships. Borgarting Court of Appeal found that she predominantly stayed in Norway from the end of November 2013.

25. Ms Gjengaar has never had permanent employment aboard the Hurtigruten coastal ships, but has worked in accordance with fixed-term contracts, which she completed.

26. On 5 June 2014, Ms Campbell applied for a right of residence as a family member of an EEA national. She stated that she had lived with Ms Gjengaar in Sweden from December 2012 until January 2014.

27. The Directorate of Immigration refused the application on 23 September 2014, and at the same time adopted a decision to reject Ms Campbell from Norway on the ground that

she lacked the necessary permit under Section 17, first paragraph, point (d) of the Immigration Act.

28. The Immigration Appeals Board upheld that decision on 23 December 2016, as, in its opinion, Ms Campbell did not meet the conditions for a right of residence under the EEA rules. Nor did the Immigration Appeals Board find it disproportionate for the purposes of the Immigration Act to reject Ms Campbell. Following an application for reversal of the decision, on 19 January 2017, the Immigration Appeals Board adopted a decision not to reverse its earlier decision. That decision was upheld by decision of 25 January 2017, by way of reply to notice of legal action.

29. The case was brought before the courts by Ms Campbell by writ of 1 February 2017, lodged before Oslo District Court (*Oslo tingrett*). On 18 May 2017, Oslo District Court overturned the decision of the Immigration Appeals Board as invalid. Oslo District Court held that, as a rule, Directive 2004/38/EC can give a derived right of residence for third country nationals following a return from another EEA State in a case such as the present. Oslo District Court also took the view that the conditions of the Directive were met. Oslo District Court considered that the condition of continuous residence in the host State exceeding a period of three months cannot preclude an EEA national from making "brief trips to their home State or other States" during that time. Oslo District Court further held that the residence in Sweden was sufficiently genuine and that, during the residence in Sweden, Ms Campbell's spouse satisfied the condition of sufficient resources provided for in Article 7(1)(b) of the Directive.

30. The Norwegian Government, represented by the Immigration Appeals Board, appealed against that judgment and, by judgment of 31 October 2018, Borgarting Court of Appeal (*Borgarting lagmannsrett*) found in favour of the Government. Borgarting Court of Appeal did not find it necessary to rule on whether an application by analogy of Directive 2004/38/EC would give a derived right of residence for a third country national upon return to Norway in a case such as the present. It took the view that the condition of continuous residence in the host State was in any event not met "where the work stays in the home State are of such a duration as in the case at hand".

31. Ms Campbell appealed Borgarting Court of Appeal's judgment to the Supreme Court of Norway on points of law. By decision of 25 February 2019, the Supreme Court's Appeals Selection Committee granted leave to appeal. By decision of 27 March 2019, the proceedings before the Supreme Court of Norway were limited pursuant to Section 30-14(3) of the Norwegian Dispute Act (*tvisteloven*), so that provisionally the conditions of sufficient resources and health insurance specified in Article 7(1)(b) of the Directive would not form part of the proceedings.

32. Ms Campbell then put forward a new claim concerning a derived right of residence as a result of her spouse having exercised her freedom of movement as a worker on the

basis of Article 28 EEA. By decision of 5 April 2019, the Supreme Court's Appeals Selection Committee refused leave to put forward that claim. Thus, the rules concerning workers under Article 28 EEA do not form part of the case before the Supreme Court.

33. The case was heard by a chamber of the Supreme Court on 30 April and 2 May 2019. Following that, on 3 May 2019, the Supreme Court, also sitting in chamber, ruled that the case would be reassigned to an enlarged composition of the court. On the same day, the preparing justice took the decision that questions in the case would be referred to the EFTA Court. On 27 May 2019, the Chief Justice of the Supreme Court decided that the case is to be heard by a Grand Chamber consisting of 11 justices.

34. The Supreme Court's request, dated 28 June 2019, was registered at the Court on the same date.

35. The Supreme Court of Norway has referred the following questions to the Court:

I. In the light of the EU Court of Justice's recent case law in which the view of the Grand Chamber in its judgment of 12 March 2014 in Case C-456/12 *O and B* concerning the derived right of residence has been maintained, and on the basis of the homogeneity principle, is Article 7(1)(b) of Directive 2004/38/EC, read in conjunction with its Article 7(2), applicable by analogy to a situation where an EEA citizen returns to the home State together with a family member?

II. What does the requirement of 'continuous' residence under the Directive as expressed in paragraph 80 of the EFTA Court's judgment of 26 July 2016 in Case E-28/15 *Jabbi* entail? It would be especially useful if the EFTA Court could comment on:

> **a. whether and, if so, to what extent there can be interruptions in residence, and**
>
> **b. whether the cause of a possible interruption – such as its being for work-related reasons – may be of import for the assessment of whether the residence is continuous within the meaning of the Directive.**

III. What is required by the condition that the EEA citizen's residence in the host State must have been 'genuine such as to enable family life in that State', as expressed in, inter alia, paragraph 80 of the EFTA Court's judgment of 26 July 2016 in Case E-28/15, *Jabbi*; paragraph 51 of the judgment of the EU Court of Justice of 12 March 2014 in Case C-456/12, *O and B*, read in conjunction with paragraphs 56 and 57 thereof; and paragraphs 24 and 26 of the latter Court's judgment of 5 June 2018 in Case C-673/16, *Coman*, and read also in the light of the abuse of rights provision in Article 35 of the Directive?

IV Written observations

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

– Ms Campbell, represented by Anne-Marie Berg, advocate;

– the Norwegian Government, represented by Pål Wennerås, advocate with the Attorney General of Civil Affairs, acting as Agent;

– the EFTA Surveillance Authority ("ESA"), represented by Ewa Gromnicka, Erlend Møinichen Leonhardsen and Carsten Zatschler, members of its Department of Legal & Executive Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Albine Azema and Michael Wilderspin, members of its Legal Service, acting as Agents.

V Summary of the arguments submitted

Ms Campbell

37. First, as regards the question of the application of the Directive, Ms Campbell considers that the Court held in *Jabbi*[3] that Article 7 of the Directive can be applied by analogy to grant derived rights of residence to the family members of EEA nationals when they return to their home State after a period of residence in a host State. Accordingly, the Court has already answered in the affirmative the question of whether the Directive can be applied by analogy in circumstances such as in the present case. There is nothing to suggest that the state of the law in *Jabbi* should be altered. Furthermore, free movement of persons is at the core of EEA law, and an interpretation of the Directive giving equal protection to EEA nationals is consistent with the objective of uniformity expressed by the Court in *Jabbi*. Finally, since the Court's judgment in *Jabbi*, none of the Contracting Parties to the EEA Agreement have taken any steps to modify the state of the law as expressed in that judgment. There is, consequently, nothing to suggest that the Court's view of the law in *Jabbi* should be set aside.

38. In relation to Question 2(a), Ms Campbell submits that no requirement exists for actual presence for a continuous period of three months in the host State, in order to return to the home State with a family member pursuant to Article 7(1)(b) of the Directive, read in conjunction with Article 7(2) thereof. Nor was any such requirement expressed by the ECJ in *O and B*.[4] The Court's statement in paragraph 80 of *Jabbi* as regards "continuous

[3] Reference is made to *Jabbi*, cited above.

[4] Reference is made to the judgment in *O and B*, cited above.

residence" should be read in conjunction with paragraph 73 of the same judgment, which refers to the requirement of "lawful residence" in the host State for three months. Lawful residence is not the same as actual residence.

39. In relation to Question 2(b), Ms Campbell submits that "residence" is not interrupted when an EEA national does shift work, and, for that purpose, travels in and out of the host State on a regular basis. This is particularly true for employment such as that at issue in the present case, where Ms Gjengaar worked on a ship, but was domiciled in the host State. If lawful residence in a host State were to be interrupted each time the person travelled out of the host State, this would be an impediment to free movement, since family members would equally be required to travel in and out of the host State with the EEA national.

40. On the third question, Ms Campbell submits that, in *O and B*, the ECJ held that, in order for a third-country family member to derive rights of residence from an EEA national upon return the home State, the EEA national must have resided in the host State in a manner such as to have genuinely placed them in a position to create or strengthen family life in the host State.[5] Residence under Article 7(1) of the Directive will be sufficient to indicate genuine residence, since residence under that provision shows a person's intention to reside in such a way as to create or strengthen family life. However, there is nothing in the ECJ's judgment in *O and B* to suggest that there is an *absolute* temporal requirement of three months' residence in the host State prior to return to the home State. According to the ECJ's judgment in *O and B*, the *intention* to reside in the host State under Article 7 of the Directive is decisive, not the actual length of the residence. In individual cases, therefore, a residence of under three months in the host State may be sufficiently genuine, as long as the intention was otherwise. It thus depends on a specific assessment in the individual case, which must be based on a number of factors. In particular, if the objective of the Directive is to facilitate efficient free movement of persons, the determination of whether residence is sufficiently genuine should include more factors than the objective duration of residence in the host State.

41. In the present case, Ms Gjengaar intended to reside in Sweden for longer than three months. She rented housing, registered her move, and applied for work in Sweden. The spouses had no living arrangements other than the housing in Sweden, and they resided there to the extent that could be expected in light of their situation.

42. Finally, as regards safeguarding against the abuse of rights, Ms Campbell submits that, provided the marriage and the residence in the host State were genuine, the situation is not caught by the provision on abuse of rights.

43. Ms Campbell does not propose any specific wording for the answers of the Court.

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[5] Reference is made to the judgment in *O and B*, cited above.

The Norwegian Government

Question 1

44. As a preliminary remark, the Norwegian Government submits that, in its judgment in *O and B*, the ECJ held that it follows from a literal, systematic and teleological interpretation of the Directive that the Directive does not establish a derived right of residence for third-country nationals who are family members of an EU citizen in the Member State of which that citizen is a national.[6] In view of this statement, the Norwegian Government considers that, in *Jabbi*, the Court deviated consciously from the ECJ's judgment in *O and B*, which the Court explicitly acknowledged.[7] However, the Court's reasoning in *Jabbi* is ambiguous as to why it chose not to follow the ECJ.

45. According to the Norwegian Government, the most likely interpretation of the Court's reasoning in *Jabbi* is that the Court considered that the interpretation of the Directive was not settled by *O and B*, in light of a perceived tension between *Eind*[8] and *O and B*.[9]

46. However, the Norwegian Government contends that the legal situation is now different. *O and B* was confirmed by the ECJ in four subsequent judgments.[10] Three of these cases[11] concerned situations where – like in *O and B* and the present case – the EU citizen and the family member had resided in another Member State and thereafter claimed derived rights of residence upon return to the home Member State of the EU citizen. Furthermore, the fourth case demonstrates a strict adherence to the scope of the Directive, since this judgment declared that an EU citizen loses the right of residence in another Member State, under the Directive, if the person concerned obtains citizenship in that Member State and, in this capacity, becomes resident in the State of his or her nationality.[12] Accordingly, the Norwegian Government considers it now apt, in accordance with the principle established in *L'Oréal*,[13] to accept the Supreme Court of Norway's invitation to realign the interpretation of the Directive with the ECJ's judgment in *O and B* and subsequent ECJ case-law.

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[6] Reference is made to *O and B*, cited above, paragraph 37.

[7] Reference is made to *Jabbi*, cited above, paragraphs 65 to 68.

[8] Reference is made to the judgment of 11 December 2007, *Eind*, C-291/05, EU:C:2007:771.

[9] Reference is made to *O and B*, cited above.

[10] Reference is made to the judgments of 12 July 2018, *Banger*, C-89/17, EU:C:2018:570; of 10 May 2017, *Chavez-Vilchez*, C-133/15, EU:C:2017:354; of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862; and of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385.

[11] Reference is made to the judgments in *Banger*, *Chavez-Vilchez*, and *Coman and Others*, all cited above.

[12] Reference is made to the judgment in *Lounes*, cited above.

[13] Reference is made to Joined Cases E-9/07 and E-10/07 *L'Oréal* [2008] EFTA Ct. Rep. 259.

47. The Norwegian Government considers that there is also an alternative way of interpreting the Court's reasoning in *Jabbi*. In essence, it could be understood as meaning that the principle of homogenous interpretation entails that the same rights must be available in the EEA and the EU, irrespective of the legal differences between the two systems. Were this in fact the basis for the Court's reasoning in *Jabbi*, such an approach, entailing a different interpretation of the Directive in the EEA and the EU, would, in the view of the Norwegian Government, conflict both with the principle of homogenous interpretation and the rule of law.

48. As regards the principle of homogenous interpretation, the Norwegian Government submits that, in accordance with Article 6 EEA and Article 3(2) of Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), the Court has interpreted EEA rules in the same way as the ECJ has interpreted corresponding EU rules in so far as they are "identical in substance".[14] In this regard, it is established case-law that the Court will interpret EEA rules in conformity with the case-law of the ECJ, irrespective of whether the ECJ's judgment was rendered before or after the conclusion of the EEA Agreement.[15] A logical corollary of this approach – as expressed in *L'Oréal*[16] and recently confirmed in *Fosen-Linjen II*[17] – is that EEA law will be interpreted in line with new case-law of the ECJ regardless of whether the Court had previously ruled on the question.

49. The Norwegian Government submits that the assessment of the Directive in the present case is straightforward. The Directive has been incorporated in the EEA Agreement with the same wording as its counterpart in the EU. Hence, a presumption of identity in substance exists. Furthermore, the Directive has been incorporated by Decision No 158/2007 without any reservations that, for the present purposes, would suggest that specific differences exist as to the scope and purpose of the Directive. This is also true in relation to the Joint Declaration, which states that the incorporation of the Directive is without prejudice to differences at the level of primary law, i.e. the absence in the EEA of provisions corresponding to Articles 20 and 21 TFEU and their concept of EU citizenship. Thus, since the ECJ's assessment in *O and B* was separate from its subsequent assessment under Article 21 TFEU,[18] the ECJ's analysis of the context and objective of the Directive is equally applicable in the EEA.

50. For the sake of completeness, the Norwegian Government contends further that, if, in the absence of a provision corresponding to Article 21 TFEU, the Directive were to be

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[14] Reference is made to Case E-9/97 *Erla María Sveinbjörnsdóttir* v *Iceland* [1998] EFTA Ct. Rep. 95, paragraphs 52 to 54 and 56.

[15] Reference is made to *L'Oréal*, cited above, paragraph 28.

[16] Reference is made to *L'Oréal*, cited above, paragraph 28.

[17] Reference is made to Case E-7/18 *Fosen-Linjen II*, judgment of 1 August 2019, not yet reported.

[18] Reference is made to the judgment in *O and B*, cited above, paragraphs 37 to 43 in comparison to paragraphs 44 et seq.

considered not identical in substance, the consequence would be that the principle of homogenous interpretation would not apply. The more limited scope and purpose of the EEA Agreement would then, presupposing that this factor is relevant, weigh in favour of construing the scope of the Directive more narrowly in the EEA than in the EU. To argue that a less extensive scope and purpose at the level of primary law (the main part of the EEA Agreement) militate in favour of construing secondary law (the Directive) more extensively in the EEA would defy logic. This would not only reintroduce the *Polydor* doctrine[19] into EEA law, but would put that doctrine on its head.

51. Moreover, the Norwegian Government argues that, in so far as the Court's reasoning in *Jabbi* may be considered to be based on "homogeneity in result" (i.e. reading rights into the EEA Agreement which in the EU have been established on a legal basis which does not exists in the EEA), such a notion would be incompatible with the principle of homogenous interpretation and other EEA principles. First, homogenous interpretation is limited to substantially identical rules. Accordingly, it is outside the scope of homogenous interpretation to interpret EEA rules (the Directive) in conformity with EU rules that are not incorporated in the EEA Agreement (Article 21 TFEU). Second, this would produce results which are contrary to homogenous interpretation, with rules that are incorporated in the EEA interpreted differently from the corresponding rules in the EU. Third, the principle of equal treatment does not entail that rights and obligations stemming from Article 21 TFEU should be extended to the EEA Agreement, since this would amount to treating situations that are different in the same way. Fourth, homogeneity "in result" would entail that the judiciary engages in homogenous *law making*, by bridging legal differences in the two systems, which, in turn, conflicts with the principle of separation of powers including the prerogative of the Contracting Parties under Article 118 EEA to extend the scope of the Agreement.

52. In addition, the Norwegian Government contends that the most fundamental element of homogenous interpretation is that the Court and the national courts apply the same *legal methodology* as the ECJ. EEA rules must thus be interpreted in conformity with the *CILFIT*[20] doctrine, which ensures not only homogenous interpretation, but also that the interpretation of EEA law benefits from the underlying rule of law principles. The rule of law is a foundational principle of EU law.[21] The two foremost principles that emerge from the rule of law are legality and legal certainty.[22] The principle of legality also overlaps with the principle of separation of powers and all of these principles – legality, separation of powers and legal certainty – are enshrined in the principles of statutory interpretation in the EU and the EEA, which is reflected, in particular, in the ban on interpretation *contra*

[19] Reference is made to the judgment of 9 February 1982, *Polydor*, 270/80, EU:C:1982:43.

[20] Reference is made to the judgment of 6 October 1982, *CILFIT*, 283/81, EU:C:1982:335.

[21] Reference is made the judgment of 23 April 1986, *Les Verts*, 294/83, EU:C:1986:166, paragraph 23.

[22] Reference is made to Communication by the Commission "A New Framework to Strengthen the Rule of Law", COM(2014) 158, p. 4.

legem.[23] Thus, according to the methodology of the ECJ, there is no justification for reaching an interpretation different to what follows from the wording, context, and purpose of a provision.[24]

53. The Norwegian Government contends further that the interpretation of the Directive in *O and B* gives concrete expression to these principles. Article 3(1) of the Directive provides that the Directive applies to EU citizens who move or reside "in a Member State other than that of which they are a national", and accordingly, the wording is clear.[25] This is strengthened by the ECJ's contextual reasoning in *O and B* which, having regard to Articles 6, 7 and 16 of the Directive, supported the literal interpretation of Article 3(1) of the Directive.[26] The objective of the Directive also does not leave any room for doubt, since, as the ECJ recalled, international law guarantees a citizen a right of residence in his or her State of nationality, thus supporting the conclusion that the Directive only intended to regulate residence in other Member States.[27] Thus, to interpret the Directive differently in the EEA would entail a departure from the methodology for interpreting EU and EEA law, including the prohibition of interpretation *contra legem*, and, ultimately, the rule of law.

Questions 2 and 3

54. In view of its submission on the first question, the Norwegian Government does not consider that it is necessary to answer the second and third questions. However, without prejudice to its observations in relation to the application of the Directive, the Norwegian Government comments also on the second and third questions.

55. On the basis of the ECJ's assessment in *O and B*, in which that Court gave clear and absolute rules in two scenarios at each end of the spectrum of residence, the Norwegian Government argues that it must first be ascertained whether the EU citizen and the family member stayed in the host Member State pursuant to Article 7 of the Directive, i.e. for more than three months (the "temporal requirement"). Second, while a period of residence fulfilling this temporal requirement is, in principle, evidence of settling, the national authorities are still able to verify whether that residence was "genuine" and actually allowed family life to be created or strengthened (the "substantive requirement").

56. In detail, as regards the temporal requirement of Article 7 of the Directive, the Norwegian Government argues that this requirement concerns, in essence, the delimitation

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[23] Reference is made to the Opinion of Advocate General Bobek in *Commission* v *Germany*, C-220/15, EU:C:2016:534, points 32 to 41.

[24] Reference is made to the judgment of 7 June 2018 in *Scotch Whisky Association*, C-44/17, EU:C:2018:415, paragraph 27, and case-law cited.

[25] Reference is made to the judgment in *O and B*, cited above, paragraphs 38 to 39.

[26] Reference is made to the judgment in *O and B*, cited above, paragraph 40.

[27] Reference is made to the judgment in *O and B*, cited above, paragraph 42.

between the scope of application of Article 6 and that of Article 7 of the Directive. The wording of both Article 6 and Article 7 of the Directive indicate that there must be one period ("a period") of residence exceeding three months before the EEA citizen is no longer subject to Article 6 of the Directive. One or more shorter periods of residence – none of which exceeds a period of three months – each fall within the scope of Article 6 of the Directive and its more lenient conditions. This is also supported by the fact that Article 6 of the Directive does not prescribe a quarantine period before the EU citizen may re-enter the host Member State for another period of residence of up to three months. The only provision that seems applicable in this case is Article 35 of the Directive concerning abuse. This conclusion is further supported by a teleological interpretation. It would conflict with the objective to facilitate and strengthen the right to move and reside freely, if the authorities in the host Member State were allowed to treat cumulatively periods of residence which are shorter than three months, and thereby make the EEA citizen subject to the stricter conditions of Article 7 of the Directive once the total exceeds three months. Thus, a literal, contextual and teleological interpretation suggest that the authorities in the host Member State are not allowed to cumulate periods shorter than three months in order to bring the person concerned under the stricter conditions of Article 7 of the Directive. This is also how the authorities in Norway and Sweden have understood the demarcation between Articles 6 and 7.

57. Further, the Norwegian Government contends that this conclusion follows from *O and B* itself. One of the cases in that judgment concerned periods of residence which amounted – taken together – to an accumulated period of residence of more than 6 months. Nonetheless, the ECJ did not consider these periods of residence to be sufficient to satisfy the conditions of Article 7 of the Directive.[28] The Court, too, stated positively in *Jabbi* that the duration of residence in the host Member State must exceed a continuous period of three months.[29] By adding "continuous" to the singular "a period" the Court made clear that the residence in the host Member State must not be interrupted during these three months.

58. As regards the substantive requirement (i.e. "to settle" and "genuine residence"), the Norwegian Government contends that it follows from *O and B*[30] that fulfilment of the temporal requirement alone is not necessarily sufficient to conclude that the condition of "genuine residence" is fulfilled. Equating "genuine residence" with any stay coming within the ambit of Article 7 of the Directive – which covers stays from five years of co-habitation in the host Member State to as little as three months and one day – could produce results removed from the facts of *Singh*[31] and *Eind*.[32] Should the ECJ have intended to say that merely fulfilling the conditions in Article 7 constituted *per se* settling and thus genuine

[28] Reference is made to the judgment in *O and B*, cited above, paragraph 59.

[29] Reference is made to *Jabbi*, cited above, paragraph 80.

[30] Reference is made to the judgment in *O and B*, cited above, paragraphs 53 to 57.

[31] Reference is made to the judgment of 7 July 1992, *Singh*, C-370/90, EU:C:1992:296.

[32] Reference is made to the judgment in *Eind*, cited above.

residence, contrary to the caveat represented by "in principle", there would have been no need to make further references to "genuine residence" and family life during that period. Therefore, the ECJ allowed for an independent assessment of whether the substantive condition of "genuine residence" is fulfilled.

59. The Norwegian Government interprets the ECJ's statements in *O and B* as laying down that genuine residence means to "settle" in the host Member State.[33] In turn, the notion of settling is largely synonymous with "habitual residence". According to settled case-law, "habitual residence" is determined by having regard to a number of facts such as "the employed person's residence; the fact (where it is the case) that he is in stable employment; and his intention as it appears from all the circumstances".[34] Those non-exhaustive factors have now been codified in Article 11 of Regulation (EC) No 987/2009 of the European Parliament and of the Council.[35] As Advocate General Sharpston observed in her Opinion in *O and B*,[36] these factors seem similarly relevant for determining whether an EU citizen settled in the host Member State. The conditional wording used by the ECJ, together with the use of the notion of "evidence", indicates that fulfilment of the temporal minimum requirement entails an evidentiary presumption in favour of genuine residence. As with all presumptions, this may thus be rebutted by countervailing evidence.

60. The Norwegian Government contends that the requirement of genuine residence is substantively different from the notion of abuse, as is apparent from the conditions governing the latter concept.[37] Finally, the Norwegian Government submits that the condition of genuine residence is antecedent to, and therefore distinct from, application of the prohibition on abuse in EU/EEA law.

61. The Norwegian Government proposes that the questions be answered as follows:

Answer to Question 1:

It follows from a literal, systematic and teleological interpretation of Directive 2004/38, as well as settled case law of the ECJ, that a third-country national in a situation such as that of Ms C. is not entitled, on the basis of Directive 2004/38, to a derived right of residence in the Member State of which her sponsor is a national.

In the alternative, answers to Questions 2 and 3:

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[33] Reference is made to the judgment in *O and B*, cited above, paragraphs 52, 53 and 57.

[34] Reference is made to the judgments of 25 February 1999, *Swaddling*, C-90/97, EU:C:1999:96; and of 5 June 2014, *I* v *Health Service Executive*, C-255/13, EU:C:2014:1291, paragraph 45, and the case-law cited.

[35] Reference is made to the judgment in *I* v *Health Service Executive*, cited above, paragraph 46.

[36] Reference is made to the Opinion of Advocate General Sharpston in *O and B* and *S and G*, Cases C-456/12 and C-457/12, EU:C:2013:837, point 100.

[37] Reference is made to the judgment in *O and B*, cited above, paragraph 58.

A derived right of residence in the Member State of which the sponsor is a national requires inter alia that the residence in the host Member State has been sufficiently genuine so as to enable family life to be created or strengthened.

Residence in the host Member State pursuant to and in conformity with the conditions in Article 7(1) and (2) of Directive 2004/38 is, in principle, evidence of settling there and therefore of the EEA citizen's genuine residence.

The duration of residence in the host Member State must thus exceed a continuous period of three months. This means that there must as a minimum have been a period of uninterrupted residence for more than three months, while shorter periods, even when consider together, fall within the scope of Article 6 of Directive 2004/38 and do not fulfil that condition.

While fulfilment of that temporal minimum requirement is, in principle, evidence of settling and thus genuinely residing in the host Member State, that presumption may be rebutted based on countervailing evidence. Therefore, it is for the national courts to determine whether the EEA citizen in fact settled and, therefore, genuinely resided in the host Member State so as to enable family life to be created or strengthened. In this regard, account may be taken of factors such as the EEA citizen's family situation; the reasons which led her to move, the length and continuity of her residence; the fact (where it is the case) that she was in stable employment; and her intention as it appears from all the circumstances.

Genuine residence is a condition for a derived right of residence, based on Article 21 TFEU, in the State of which the sponsor is a national. It is therefore antecedent to, and distinct from, application of the general principle that the scope of EEA law cannot be extended to cover abuse, which inter alia presupposes formal observance of the conditions laid down by the EEA rules.

ESA

62. ESA submits that the referring court has sought guidance on two interrelated aspects of the Directive, described by the referring court as a "requirement of 'continuous' residence", and the question as to what constitutes "genuine" residence. The case touches

on the Court's established case-law: *Jabbi*[38] and *Gunnarsson*,[39] in the light of the line of ECJ case-law: *O and B*,[40] *Chavez-Vilchez*,[41] *Lounes*,[42] *Coman and Others*,[43] and *Banger*.[44]

63. According to ESA, although the referring court has limited its questions to the interpretation of certain paragraphs of the case-law alone, such a situation does not prevent the Court from providing the referring court with all the elements of interpretation of EEA law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in its questions.[45] The answer in such a case cannot be limited to an analysis of only certain specified paragraphs in existing case-law without taking into account the overall aims of the Directive and its purpose.

64. ESA proposes that the Court answer Questions 2 and 3 together, and in reverse order. ESA submits that a third-country family member of an EEA national can derive rights of residence under the Directive, applied to home EEA States, by analogy.[46] The reasoning for this is largely contained in *Jabbi*. The divergence in application and interpretation of the Directive between the EU and EFTA pillars of the EEA is required from the perspective of analysing the relevant provisions in light of their context and the principle of homogeneity, for the reasons set out in the Court's judgments in *Jabbi* and *Gunnarsson*.

65. ESA submits that the notions of "genuine" and "continuous" residence are not separate concepts, and do not introduce additional criteria for granting derived rights to third-country family members of EEA nationals. ESA contends that these terms appear to be misinterpreted by the referring court, as well as in national administrative and judicial practice.

66. At the outset, ESA notes that *Jabbi* was preceded by a complaint to ESA by Yankuba Jabbi, originally dealt with in the context of and under a general family reunification case. ESA initiated formal infringement proceedings against Norway in that case but closed it on 15 May 2018 after Norway amended its immigration legislation and internal guidelines. However, the complaint case in *Jabbi* was kept open due to ongoing proceedings before national courts and in order to assess the practice of the Norwegian authorities and courts in relation to the assessment of the requirement of "genuine"

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[38] Reference is made to *Jabbi*, cited above.

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

[40] Reference is made to the judgment in *O and B*, cited above.

[41] Reference is made to the judgment in *Chavez-Vilchez*, cited above, paragraphs 54 and 55.

[42] Reference is made the judgment in *Lounes*, cited above.

[43] Reference is made to the judgment in *Coman and Others*, cited above.

[44] Reference is made to the judgment in *Banger*, cited above.

[45] Reference is made to the judgments of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraph 24; of 19 September 2013, *Montull*, C-5/12, EU:C:2013:571, paragraph 41; and of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 20.

[46] Reference is made to *Jabbi*, cited above, paragraph 80.

residence as well as the concept of "continuous" residence. For that purpose, ESA has been in engaged formal correspondence with Norway. ESA's further assessment in the complaint case is now pending the Court's judgment in the current case.

67. ESA notes that, since *Jabbi* was handed down, Norwegian courts have had occasion to address the matters at issue in the case in two separate lines of cases. The first of these concerns the applicant in *Jabbi*, where, on 4 May 2018, the Court of Appeal found in favour of the Norwegian Government on the grounds that the residence in the host State was not sufficiently genuine. The second is the series of proceedings leading to the present case before the Court. ESA submits that the decisions of the national courts in these cases exemplify some of the ways in which the criteria in *Jabbi* may be understood, not all of which, in ESA's view, are in conformity with EEA law.[47]

Question 1

68. ESA submits that by its first question, the referring court in effect invites the Court to reflect on its established case-law in *Jabbi* concerning the applicability of the Directive to a returning EEA national, in light of the ECJ's line of case-law starting with *O and B,*[48] and continuing through *Chavez-Vilchez*, *Lounes, Coman and Others,* and *Banger.*

69. In examining *Jabbi* in detail, ESA begins by considering the question referred in that case. ESA observes that the Court noted that a "gap" between the two pillars of the EEA had emerged and widened over the years.[49] The Court discussed and distinguished *O and B* in which the ECJ had relied at least in part on the notion of EU citizenship in Article 21(1) TFEU, a legal basis not available in the EFTA pillar of the EEA and in a legal context which did not exist in EEA law. Thus, the Court emphasised that free movement of persons is at the core of the EEA Agreement and consequently examined whether "homogeneity in the EEA can be achieved based on an authority included in the EEA Agreement".[50] In *Jabbi*, the Court considered whether the refusal of a derived right of residence in Norway for the third-country national constituted an obstacle to the Norwegian citizen's freedom of movement under EEA law,[51] concluding, as the ECJ has done, that when an EEA national who has availed himself of the right to free movement returns to his home State, EEA law requires that his spouse is granted a derived right of residence in that State.

70. The Court observed that while the case-law concerned economically active citizens, the reasoning was equally relevant when an inactive person, who has exercised the right to free movement under Article 7(1)(b) of the Directive, returns to his home EEA State with a spouse who is a third-country national. Nevertheless, ESA notes, this derived right is

[47] Reference is made to Annexes 2, 3, 4, and 5 to ESA's written observations.

[48] Reference is made to the judgment in *O and B,* cited above, paragraph 54.

[49] Reference is made to *Jabbi*, cited above, paragraph 62.

[50] Reference is made to *Jabbi*, cited above, paragraphs 60 and 68.

[51] Reference is made to *Jabbi*, cited above, paragraph 76.

subject to a number of conditions.[52] In reaching its conclusion, the Court recalled that all EEA States are parties to the European Convention on Human Rights, which enshrines in Article 8(1) the right to respect for private and family life.[53] On this basis, the Court held that third-country nationals who are spouses of EEA nationals must enjoy by analogy derived rights of residence from the Directive, where the residence of the EEA national has been such as to create or strengthen family life during genuine residence in a host State.

71. ESA considers that the ECJ case-law subsequent to *O and B* and *Jabbi* does not impact on the conclusion reached in *Jabbi*. The Court in *Jabbi* followed its previous ruling in *Gunnarsson*,[54] and achieved homogeneity in the EEA even though it could not rely on EU citizenship. It did so by using the law available within the EEA, using a purposive interpretation of the free movement of persons and the Directive and relying on the principle of homogeneity.[55] According to ESA, any departure from the Court's conclusions would drive the divide between the EU and EEA legal orders deeper, and undermine the Agreement and the realisation of its objectives. The Court's aim was to achieve a particular legal outcome, that of the equal treatment of individuals and economic operators as regards the four freedoms, in accordance with the fifteenth recital of the Preamble to the EEA Agreement. This meant achieving homogeneity between the protection afforded by the EU legal order, as recognised by the ECJ in *O and B*, and that afforded by the EEA Agreement.[56] Since the treatment of individuals recognised by the ECJ in *O and B* has simply been reaffirmed by subsequent case-law, ESA calls upon the Court to reaffirm its ruling in *Jabbi*, so as to ensure that the protection offered to individuals and economic operators within the EEA is equal. *O and B* was discussed in detail by both the parties and the Court in *Jabbi*, and the Court was well aware that the ECJ's interpretation of the Directive was different from its own. In order to make the rights in the Directive effective in the EEA and ensure compatibility of the protection and scope of rights in the EEA and EU legal orders, the Court had to derive these rights from the Directive itself, as it could not use Article 21 TFEU. That the ECJ has repeated its interpretation does not add anything.

72. Moreover, ESA submits that the principle of homogeneity must be applied in a manner that is compatible with the purpose and objectives of the EEA legal instrument in question. The principle of homogeneity cannot be used to deprive EEA provisions of their effectiveness. In the present case, that means looking to the context and objectives of the Directive. The Court has held that the context and objective of the Directive is to promote "the right of nationals of [EU] Member States and EFTA States and their family members

[52] Reference is made to *Jabbi*, cited above, paragraphs 77, 79, and 80.

[53] Reference is made to *Jabbi*, cited above, paragraph 81.

[54] Reference is made to *Gunnarsson*, cited above, paragraph 79.

[55] Reference is made to *Jabbi*, cited above, paragraph 68.

[56] Reference is made to *Jabbi*, cited above, paragraph 70.

to move and reside freely within the territory of the EEA States".[57] The Court has also stressed the importance of ensuring the protection of the family life of EEA nationals in order to eliminate obstacles to their exercising the right to freedom of movement.[58] In order to achieve these objectives and ensure their effectiveness, the Court used the legal instrument available to it, the Directive, to confer derived rights of residence on third-country nationals. Any other interpretation of the Directive would have frustrated its objective and rendered it ineffective.

73. Additionally, ESA emphasises that the Court has underlined the importance of interpreting EEA law in light of fundamental rights.[59] The principle of homogeneity cannot be used to the detriment of fundamental rights. In ESA's view, therefore, the Court was right in *Jabbi* to apply the principle of homogeneity in order to ensure equal treatment.

Question 3

74. ESA understands the referring court as asking for the interpretation, and guidance on the application, of the conditions for a derived right of residence under Article 7(1) and (2) of the Directive. ESA submits that the concepts of "genuine residence" and "continuous residence" raised in these questions are not separate conditions. Instead, "continuous residence" is a factor which may be indicative of the fulfilment of "genuine residence". As such, ESA will begin by considering the third question.

75. First, ESA notes that there is no legal definition of "residence" for the purposes of the Directive. In its view, therefore, the term must be interpreted uniformly and autonomously in accordance with the Directive's provisions and may not be subject to divergent interpretations by the EEA States.[60] According to settled case-law, where a provision of EEA law does not make reference to the law of EEA States for the purpose of ascertaining its meaning and scope, the provision in question must normally be given an independent and uniform interpretation throughout the EEA.[61] In order to determine the

[57] Reference is made to Case E-4/11 *Arnulf Clauder* [2011] EFTA Ct. Rep. 216, paragraph 34, and Case E-15/12 *Wahl* [2013] EFTA Ct. Rep. 534.Reference is also made to the judgment of the ECJ in *Coman and Others*, cited above, paragraph 18 and case-law cited.

[58] Reference is made to *Arnulf Clauder*, cited above, paragraph 35.

[59] Reference is made to *Jabbi*, cited above, paragraph 81.

[60] Reference is made by analogy to the judgments of 21 December 2011, *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraphs 32 and 33; and of 17 July 2008, *Kozłowski*, C-66/08, EU:C:2008:437, paragraphs 41 and 42.

[61] Reference is made to the judgments of 19 September 2000, *Linster*, C-287/98, EU:C:2000:468, paragraph 43; and of 18 October 2011, *Brüstle*, C-34/10, EU:C:2011:669, paragraph 25.

meaning and scope of such a term within EEA law, regard must be had, *inter alia*, to the context in which it occurs, and the purpose of the rules of which it forms part.[62]

76. The Directive introduced a gradual system as regards rights of residence in host States, culminating in a right to permanent residence. In that regard, it reproduced the legal position under the previous directives and case-law. The Directive regulates residence on the basis of an individual's intended duration of stay in the host EEA State.[63] ESA notes the nature of short-term residence, of under three months, on the basis of Article 6(1) of the Directive. A right of residence of more than three months is conditional upon migrant EEA nationals either engaging in economic activity in the host State or possessing sufficient resources and health insurance to support themselves as well as family members, as set out in Article 7(1) of the Directive. Both Articles 6(2) and 7(2) of the Directive confer derived rights to family members of EEA nationals who are nationals of third countries. In this context, under Article 7(1) of the Directive, EEA nationals are allowed to create and strengthen family life in a host State with a third-State spouse.[64] According to the ECJ's and the Court's own case-law, this may only occur where the EEA national has "genuine residence" in the host State.

77. The notion of "genuine residence", as mentioned in *Jabbi*, is a loose translation of the French "*séjour effectif*", which appears in the French language version of the judgment in *O and B*[65], in other words the working language of the ECJ. According to ESA, the original French would more literally translate as "actual stay", and not "genuine residence". It notes in passing that the word "*effectif*" also appears in the Directive itself, in Article 31(2), and has been translated there as "actual" in the English language version. Consequently, ESA submits that the word "genuine" should not be seen as carrying any weight as to the intentions of the persons seeking to claim rights under the Directive. Instead, the proper test is concerned with whether the EEA national in question sought to create or strengthen family life in the host State. The presumption expressed in both *O and B* and *Jabbi* is that residence under Article 7(1) of the Directive does indeed satisfy that test.[66]

78. ESA further notes that the term "genuine" is not found in Article 7 of the Directive itself, nor in other relevant provisions of the Directive. However, in one of the predecessor Directives, Directive 90/364/EEC, the fifth recital provided that residence can "only be genuinely exercised if it is also granted to members of the family". In this context,

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[62] Reference is made to the judgments of 10 March 2005, *EasyCar*, C-336/03, EU:C:2005:150, paragraph 21; of 22 December 2008, *Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraph 17; of 29 July 2010, *UGT-FSP*, C-151/09, EU:C:2010:452, paragraph 39; and in *Brüstle*, cited above, paragraph 31.

[63] Elspeth Guild, Steve Peers and Jonathan Tomkin, *The EU Citizenship Directive*, OUP, 2014, p. 109.

[64] Reference is made to the judgment in *O and B*, cited above, paragraphs 51 to 56.

[65] Reference is made to the judgment in *O and B*, cited above, paragraph 51 et seq.

[66] Reference is made to the judgment in *O and B*, cited above, paragraph 51.

"genuineness" is not a condition, but a description of the full enjoyment of the right of residence.[67]

79. ESA contends that, in *O and B*, "genuine" residence is first discussed as a way to describe the situation in which obstacles to free movement are created in this context.[68] This may occur when, upon the return of an EEA national from a host State to the home State, the home State refuses to confer a derived right of residence on the family members of that EEA national who are third-country nationals, where that EEA national resided with his family members in the host State pursuant to, and in conformity with, EEA law.[69] However, this obstacle may not be created by just any kind of "residence". It is only when the residence in question has been "sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State" that the home State's refusal to confer derived rights of residence can create an obstacle to free movement.[70]

80. In ESA's assessment, the reason for distinguishing between different types of residence is that, while Article 21(1) TFEU gives every EU citizen the right to move and reside freely within the Member States, this is subject to the limitations and conditions laid down in the Treaties and by secondary legislation. Articles 6 and 7 of the Directive are examples of such limitations on the right to move and reside freely, and describe different types of "residence", in which different rights and obligations arise.

81. ESA contends further that, in the ECJ's assessment, the right of residence conferred in Article 6 of the Directive was not sufficiently genuine as to enable EU citizens exercising that right to intend to settle in the host State in a way which would create or strengthen family life in that State. As such, a refusal to confer such rights after a period of residence under Article 6 of the Directive would not create a barrier to free movement.[71] By contrast, a refusal to confer derived rights after a period of residence under Article 7(1) of the Directive may create such an obstacle. According to the ECJ, the type of residence described in that provision provides, "in principle", evidence of settling in the host State, which goes hand in hand with creating and strengthening family life in the host State.[72] On that basis, ESA submits that, in order to be considered "genuine", the residence in question simply needs to be "pursuant to and in conformity with" Article 7(1) of the Directive. In ESA's view, paragraphs 24 and 26 of Case C-673/16 *Coman and Others* do not alter any of these conclusions as in those paragraphs the ECJ simply reaffirmed its ruling in *O and B*.

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[67] Reference is made to Council Directive 90/364/EEC of 28 June 1990 on the right of residence, previously referred to at point 6 of Annex VIII to the EEA Agreement and repealed by Directive 2004/38/EC.

[68] Reference is made to the judgment in *O and B*, cited above, paragraph 51.

[69] Reference is made to the judgment in *O and B*, cited above, paragraph 51, read in the light of paragraph 47.

[70] Reference is made to the judgment in *O and B*, cited above, paragraph 51.

[71] Reference is made to the judgment in *O and B*, cited above, paragraph 52.

[72] Reference is made to the judgment in *O and B*, cited above, paragraph 53.

82. While the referring Court's question[73] appears to have been prompted by *Jabbi*, paragraph 80, in ESA's view, the Court did not place particular emphasis on the term "genuine" residence.[74] The Court's dictum is entirely in line with the reasoning of the ECJ in *O and B* and *Coman and Others*. The introduction of a separate condition would be contrary to the principle of homogeneity, as it would introduce a condition in the EFTA pillar that is not present in the EU. This is unlikely to have been the intention of the Court in the absence of specific reasoning to that effect. In *Jabbi*, the term "genuine" is simply used to describe a type of residence which enables the creation and strengthening of family life in the host State.[75] In the context of derived rights for third-country nationals, this simply entails a residence which complies with Article 7(1) of the Directive.

83. The corollary, ESA submits, is that "genuine residence" does not describe residence of a particular degree, intensity or duration, apart from being residence pursuant to Article 7(1) of the Directive. In other words, it simply describes residence where the EEA national intends to reside in the host State for more than three months in a manner capable of creating or strengthening family life in the host State.

84. ESA submits therefore that the answer to the third question is that, in the context of derived rights for family members of EEA nationals returning to their home EEA State, for a residence to be considered "sufficiently genuine so as to enable that citizen to create or strengthen family life in that State" the term "genuine" must be understood as residence[76] pursuant to and in accordance with Article 7(1) of the Directive which is capable of creating or strengthening family life.

85. The assessment of whether residence qualifies under Article 7(1) of the Directive must be made on the basis of objective factors, i.e. whether an actual move to another EEA State took place on the basis of Article 7(1) of the Directive. According to ESA, without prejudice to Article 35 of the Directive, the motives of the EEA national in taking up residence in the host State are of no account, and must not be taken into consideration.[77]

86. ESA contends that the genuineness or effectiveness of residence in the host State may be relevant to a consideration of whether there has been an abuse of rights. This assessment, pursuant to Article 35 of the Directive, is a separate issue, different from that concerning "genuine residence". In *Jabbi*, "genuine residence" and "abuse" are listed as separate concepts.[78] According to ESA, abuse involves a dual test: (i) a combination of

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[73] Reference is made to the Request for an Advisory Opinion, paragraph 35.

[74] Reference is made to *Jabbi*, cited above, paragraphs 65 and 80; and more narrowly in paragraph 82 and the operative part.

[75] Reference is made to *Jabbi*, cited above, paragraph 80.

[76] Reference is made to Chiara Berneri, *Family Reunification in the EU*, Hart, 2017, p. 63.

[77] Reference is made to the judgments of 23 March 1982, *Levin*, 53/81 EU:C:1982:105, paragraph 23; and of 23 September 2003, *Akrich*, C-109/01, EU:C:2003:491, paragraphs 56 and 61.

[78] Reference is made to *Jabbi*, cited above, paragraph 80.

objective circumstances in which, despite formal observance of the conditions laid down by EEA rules, the purpose of those rules has not been achieved, and (ii) the existence of a subjective intention to obtain an advantage from EEA rules by artificially creating the conditions laid down for obtaining it.[79] The burden of proving that abuse has occurred lies with the authorities of EEA States. National courts and authorities must verify the existence of abuse based on evidence in individual cases which must be adduced in accordance with the rules of national law, provided that the effectiveness of EEA law is not thereby undermined.[80] Essentially, the provisions on abuse seek to avoid the enjoyment of rights created by EEA law through fraudulent means.[81] National authorities must assess the conduct of persons concerned in light of the objectives pursued by EEA law and act on the basis of objective evidence. They also cannot infer that residence in the host State is not genuine simply because the EEA national maintains some ties to their home State, such as owning property there. Finally, the mere fact that a person consciously places himself in a position that could give rise to rights under EEA law does not constitute a sufficient basis for assuming that there is an abuse of those rights.[82] In line with the Commission's guidance, ESA submits that if the use of EEA rights was genuine, the home State should not enquire into the EEA national's motives that triggered the previous move.[83]

87. ESA stresses that the rights in the Directive are supposed to be used. If EEA nationals adapt their lives so that they may exercise their rights, this does not constitute abuse. The exercise of such rights facilitates the free movement of persons, a key objective of the EEA Agreement.[84]

88. In terms of assessing the abuse element in the present case, ESA contends that it would be relevant, for example, had the couple not actually lived in the rented apartment or had Ms Gjengaar not returned to the apartment in periods where the nature of her job allowed her to do so.

Question 2

89. ESA notes that the notion of continuity of residence appears only as a condition *expressis verbis* in Article 16(1) of the Directive. Article 16 of the Directive provides that temporary absences from a host State, not exceeding a total of six months a year, do not affect continuity of residence. Longer absences for reasons such as for compulsory military

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[79] Reference is made to the judgment in *O and B*, cited above, paragraph 58.

[80] Reference is made to the judgments of 14 December 2000, *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraph 54; of 17 February 2005, *Oulane*, C-215/03, EU:C:2005:95, paragraph 56.

[81] Reference is made to Dorota Leczykiewicz, "Prohibition of abusive practices as a 'general principle' of EU law", *Common Market Law Review*, vol. 56, 2019, pp. 703-742, at p. 705; and the Commission guidance for better transposition and application of Directive 2004/38 (COM(2009) 313 final), point 4, and point 4.3.

[82] Commission's guidance for better transposition and application of Directive 2004/38 (COM(2009) 313 final), point 4.

[83] Ibid.

[84] Reference is made to recital 5 of the EEA Agreement.

service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another EEA State or a third country, are permitted. In its view, it is clear from the wording of that provision that "continuous residence" does not mean "uninterrupted presence".

90. Unlike Article 16 of the Directive, Article 7 does not concern the obtaining of a right after a certain period and so does not contain the similar detailed rules. Rather, it addresses only the right to reside for more than three months in the host State, and as such does not require "continuous residence". In ESA's view, the Court in *Jabbi* did not establish continuity as a formal requirement for rights to be derived. "Genuine" residence and "continuity" in *Jabbi* are expressly stated to be one condition.[85] Moreover, the notion of "continuous residence" is not found in *O and B*, but only in *Jabbi*. Given this, ESA continues, it is unlikely that the Court intended to include, without explanation of justification, a rule in the EEA not present in the EU.

91. In terms of the duration of residence required for the conditions in Article 7(1) of the Directive to be fulfilled, ESA notes that there is nothing in the Article to suggest that the right of residence in question only starts after three months' continuous residence have elapsed. Article 7(1) of the Directive states that there is a right of residence for more than three months. The demarcation between Article 6 and 7 is based on the intended duration of residence in the host State. Both Articles 6 and 7 of the Directive apply from the moment that the EEA national begins residence in the host State, and residence pursuant to Article 7 is not necessarily preceded by residence pursuant to Article 6 for the first three months. To give an example, an EEA national could move to a host State intending to reside there for more than three months, but be unexpectedly called back to his home State by the illness of a relative before three months had elapsed. If the EEA national in that situation were not allowed to be accompanied on his return to the home State by a third-country national family member under Article 7(2) of the Directive, the EEA national could be discouraged from leaving the home EEA State in order to exercise his right of residence.[86]

92. ESA notes that in *O and B* one of the referring court's questions concerned the issue of a potential minimum duration.[87] On this point, Advocate General Sharpston observed as follows: "I see no basis for saying that, in such circumstances, the EU citizen should be required temporarily to sacrifice his right to a family life (or, put slightly differently, that he should be prepared to pay that price in order subsequently to be able to rely on EU law as against his own Member State of nationality)".[88] The ECJ's judgment does not appear to address this directly.[89] Importantly, however, the ECJ did not state that the "period of

[85] Reference is made to *Jabbi*, cited above, paragraph 80.

[86] Reference is made *mutatis mutandis* to the judgment in *O and B*, cited above, paragraph 54.

[87] Reference is made to the judgment in *O and B*, cited above, paragraph 32.

[88] Reference is made to the Opinion of Advocate General Sharpston in *O and B*, cited above, point 110.

[89] Reference is made to the judgment in *O and B*, cited above, paragraph 59.

residence" had to be a minimum of three months. In ESA's view, in light of the Advocate General's Opinion and the ruling of the ECJ, it would be inappropriate to infer that the ECJ intended to introduce a duration requirement in Article 7 of the Directive that is not found in the text. Indeed, ESA considers that one might reasonably infer the opposite.

93. In *Jabbi*, the Court noted, immediately following the sentence positing genuine residence, that "[t]he duration of residence in the host State must exceed a continuous period of three months". The notions of genuineness and duration appear together as part of the first of three conditions for a derived right of residence for a third-country national. Hence, in ESA's view, it is appropriate to consider them as part of a definition of the concept of "residence" under Article 7(1) of the Directive.[90] These requirements in *Jabbi* should thus be understood as a summary of the case-law of the ECJ and not an attempt by the Court to introduce independent requirements regarding residence under Article 7. As far as ESA is aware, none of the parties in *Jabbi* argued that such requirements should be introduced. In addition, the issue of duration was not mentioned in the summary in paragraph 82 of the judgment, nor in the judgment's operative part.

94. ESA contends that, in the assessment of continuity of residence, it is irrelevant whether the EEA national's physical presence in the host State is interrupted regularly or irregularly.[91] Indeed, a requirement of physical presence would function as a prohibition against taking small trips outside the host State. This might serve as a deterrent against exercising the rights conferred by Article 7(1) of the Directive in the first place.[92] For the same reason, in ESA's view, the cause of such an interruption is irrelevant so long as the residence still qualifies under Article 7(1) of the Directive.

95. ESA submits that if an EEA national moves to a host State and resides there (or intends to reside there) for more than three months (on the basis of Article 7 of the Directive), the residence is not interrupted just because this EEA national has travelled back to the home State during some weekends (or even longer periods) or made short trips to other EEA States. This can only be classified as interrupted presence, not as interrupted residence.

96. In the present case, Ms Gjengaar left Sweden every three weeks to work aboard a Norwegian ship for three weeks, but still resided in Sweden with her wife and lived there during her three weeks off. Her home appears to have been in Sweden with her spouse during this period. In the judgment which was appealed to the Supreme Court in the present proceedings, the Court of Appeal used the term "*sammenhengende opphold*", i.e. "continuous residence", and concluded that Ms Gjengaar's residence in Sweden was not "*sammenhengende*" for more than three months.[93] ESA submits that the conclusion that

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[90] Reference is made to *Jabbi*, cited above, paragraph 80.

[91] Reference is made to the Opinion of Advocate General Sharpston in *O and B*, cited above, point 102.

[92] Reference is made to the judgment in *O and B*, cited above, paragraphs 52 and 53.

[93] Reference is made to Annexes 2 and 3 to ESA's written observations.

Ms Gjengaar's residence in Sweden was interrupted by her trips abroad is a narrow and incorrect understanding and application of *Jabbi*.

97. In conclusion, ESA contends that all of its submissions support the argument that the notion of "continuous residence" lasting more than three months should be understood to mean that the residence in the host State must comply with Article 7(1) of the Directive. In other words, the EEA national and his or her spouse must have intended to reside in the host State for a period of more than three months.

98. ESA submits that the Court should answer the questions as follows:

1. Where an EEA national has created or strengthened a family life with a third country national during genuine residence, pursuant to and in conformity with the conditions set out in Article 7(1)(b) and (2) of Directive 2004/38, in an EEA State other than that of which he or she is a national, the provisions of that Directive apply by analogy where that EEA national returns with the family member in question, to his home State.

2. Residence in a host EEA State is sufficiently genuine so as to enable the creation or strengthening of family life in that EEA State, and thus create a derived right of residence for a third country national family member of an EEA national upon return to the home EEA State, if the residence is "pursuant to and in conformity with" Article 7(1) of Directive 2004/38. There is no requirement of a minimum duration of residence in the host EEA State, as long as there is an intention to reside there for more than three months, and temporary absences from the host EEA State during the period of residence do not constitute interruptions in residence.

The Commission

Question 1

99. The Commission submits that, in a series of judgments beginning with *O and B*,[94] the ECJ has held that during the genuine residence of an EU citizen in a Member State other than that of which he is a national, pursuant to and in conformity with the conditions set out in the Directive, where family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the EU citizen by Article 21(1) TFEU requires that that citizen's family life in that Member State may continue when he returns to the Member State of which he is a national, through the grant of a derived right of residence to the third-country national family member concerned.

100. If no such derived right of residence were granted, that EU citizen could be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State, because he is

[94] Reference is made to the judgment in *O and B*, cited above, paragraph 54.

uncertain whether he will be able to continue in his Member State of origin a family life which has been created or strengthened in the host Member State.[95]

101. Although the Directive does not cover such a return,[96] it must be applied by analogy to the conditions of the residence of an EU citizen in a Member State other than that of which he is a national given that in both cases it is the EU citizen who is the sponsor for the grant of a derived right of residence to a third country national who is a member of his family.[97] The conditions under which a derived right of residence may be granted must not be stricter than those laid down by the Directive for the grant of a derived right of residence to a third-country national who is a family member of an EU citizen having exercised his right of freedom of movement by settling in a Member State other than that of which he is a national.[98]

102. The Commission submits that while there is no horizontal provision in the EEA Agreement mirroring Article 21 TFEU, the Directive has applied since 1 March 2009 virtually unchanged on account of being included in the relevant annexes to the EEA Agreement. The Commission notes further that, in *Jabbi*, the Court held that *O and B* must be read in its proper legal context, including the concept of EU citizenship.[99]

103. The Commission notes that the Court held that when an EEA national makes use of his right to free movement, he may not be deterred from exercising that right by an obstacle to the entry and residence of a spouse in the EEA national's home State.[100] Consequently, when he returns to his home State, his spouse must be granted a derived right of residence in that State.[101]

104. On that basis, the Court ruled in *Jabbi* that where an EEA national has created or strengthened a family life with a third country national during genuine residence in an EEA State other than that of which he is a national, the provisions of the Directive will apply by analogy where that EEA national returns with the family member to his home State.[102]

105. The Commission submits that *O and B* has been followed on a number of occasions, without being called into question. There is no reason to call into question the approach of the EFTA Court in *Jabbi*, which follows *O and B*, with appropriate adaptation in order to take account of the context of the EEA Agreement. Any other conclusion would result in

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[95] Reference is made to the judgments in *Coman and Others*, cited above, paragraph 24; of 27 June 2018, *Altiner and Ravn*, C-230/17, EU:C:2018:497, paragraph 26; and in *Banger*, cited above, paragraphs 27 and 28.

[96] Reference is made to the judgment of 18 December 2014, *McCarthy and Others*, C-202/13, EU:C:2014:2450.

[97] Reference is made to the judgments in *O and B*, cited above, paragraph 50; and in *Altiner and Ravn*, cited above, paragraph 27.

[98] Reference is made to the judgment in *Coman and Others*, cited above, paragraphs 25 and 54.

[99] Reference is made to *Jabbi*, cited above, paragraph 67.

[100] Reference is made to *Gunnarsson*, cited above.

[101] Reference is made to *Jabbi*, cited above, paragraph 77.

[102] Reference is made to *Jabbi*, cited above, paragraph 82 and the operative part.

a situation whereby free movement of persons could not be exercised within the EEA under the same conditions as within the EU, which would undoubtedly undermine the development of the association and the realisation of the objectives pursued by the EEA Agreement.[103]

Questions 2 and 3

106. The Commission submits that these questions should be addressed together as "continuous" and "genuine" residence are two sides of the same coin.

107. The Commission submits that, in *Jabbi*, the Court concluded, *inter alia*, that, in order for derived rights of residence to arise, an EEA national must have been resident in the host State in a manner which was "genuine such as to enable family life in that State". The Court further held that the duration of residence must exceed a "continuous period of three months".[104] In *O and B*, the ECJ held that where an EU citizen has created or strengthened family life with a third-country national during genuine residence in a Member State of which he is not a national, pursuant to and in conformity with the conditions set out in Article 7 of the Directive, the provisions of the Directive apply by analogy when he returns with that family member, to his Member State of origin.[105]

108. As regards "genuine residence", the Commission observes that an obstacle to leaving the Member State of origin arises only where the residence of the EU citizen in the host Member State has been sufficiently genuine to enable the citizen to create or strengthen family life there. Where the citizen exercises rights only under Article 6 of the Directive, he does not intend to settle in the host Member State so as to create or strengthen family life there. However, the situation is different where the EU citizen intends to exercise his rights under Article 7(1) of the Directive. Hence, residence in the host Member State pursuant to and in conformity with the conditions set out in Article 7(1) of the Directive is, in principle, evidence of settling there and therefore of the EU citizen's genuine residence in the host Member State. The "genuine" nature of residence is thus assessed by checking whether the residence was in accordance with Article 7(1) and (2), or Article 16(1) and (2), of the Directive.[106] Only a period of residence satisfying Article 7(1) and (2), or Article 16(1) and (2), of the Directive will give rise to a derived right of residence for a family member of an EU citizen who is a third-country national on the citizen's return to the Member State of which he is a national.[107]

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[103] Reference is made to the judgment of 26 September 2013, *United Kingdom* v *Council*, C-431/11, EU:C:2013:589, paragraph 59.

[104] Reference is made to *Jabbi*, cited above, paragraph 80.

[105] Reference is made to the judgment in *O and B*, cited above, paragraph 61 and operative part.

[106] Reference is made to the judgment in *O and B*, cited above, paragraphs 51 to 53.

[107] Reference is made to the judgment in *O and B*, cited above, paragraph 59.

109. The Commission submits that Article 7 does not specify that such a right of residence may be exercised only once three months have expired. If, for example, the EU citizen satisfies one of the conditions set out in points (a) to (c) of Article 7(1) of the Directive immediately upon arrival in the host State, he will exercise a right of residence pursuant to Article 7 of the Directive immediately, provided that he intends to settle there.

110. Thus, in the present case, if it transpires that the Norwegian national satisfied, for example, point (b) of Article 7(1) when she arrived in Sweden, this would mean that she, and her spouse, were both resident in that EEA State pursuant to Article 7 of the Directive as from that date provided that they intended to settle there in such a way as to create or strengthen family life. This question must be answered according to the circumstances of the case.

111. The Commission submits that, in *O and B*, the ECJ did not require that the residence pursuant to Article 7 of the Directive be for a continuous period.

112. In the Commission's view, the statement in *Jabbi*, according to which a "continuous" residence of three months in the host State is required, should not be understood as an additional condition for a derived right of residence upon return, but as a reference to residence in accordance with Article 7, as opposed to residence in accordance with Article 6, of the Directive, as the latter can only last up to three months. Nor would additional requirements be warranted by the specificities of the EEA Agreement. It would have been sufficient had the Court limited itself to a finding that the appropriate test is whether the EEA national has "created or strengthened a family life with a third country national during genuine residence in an EEA State" as it did elsewhere in the judgment.[108]

113. In the alternative, the Commission submits that the precise meaning of "a continuous period of three months" of residence in the host State must be clarified. It cannot mean that the EEA national can never leave the host State. The Commission observes that, in *Jabbi*, the Court referred to "residence", a legal notion, and not (factual) physical presence. It submits that an analogy can be drawn with Article 16 of the Directive, under which, pursuant to paragraph 3 thereof, temporary absences from the host State do not affect continuity of residence. A further analogy may be made with Article 11(2) of the Directive. The conditions of that provision allow a person to be considered as resident in the host Member State even if, in reality, he is absent for up to six months a year.

114. *Mutatis mutandis*, any condition as to continuous residence should, in the Commission's view, be interpreted in a similar way, allowing for reasonable periods of absence provided that they are not so extensive as to be inconsistent with the pursuit of family life in the host State and an intention to settle there. Applied to the present case, it is common ground that the parties lived together for an uninterrupted period of two months in Sweden. Thereafter, the Norwegian national worked in Norway on board a boat on the

[108] Reference is made to *Jabbi*, cited above, paragraph 82, and operative part.

basis of three-week shifts, with three weeks off between shifts, during which she usually travelled back to Sweden. *A priori*, such a pattern is not inconsistent with the time being spent in Sweden being continuous, if one takes the conditions of Article 16(3) of the Directive as a yardstick.

115. In view of its above submissions, the Commission considers that any period of residence pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of the Directive by an EEA national in an EEA State other than that of which he is a national during which the EEA national has created or *strengthened* family life with a third-country national creates a derived right of residence for the third country national on the EEA national's return to his home State.

116. The Commission explains that its conclusion is without prejudice to Article 35 of the Directive, which allows Member States to tackle abuse or fraud within the conditions laid down in that provision. In this connection, the Commission emphasises that it follows from case-law[109] that the mere fact that a person consciously places himself in a situation conferring a right does not in itself constitute a sufficient basis for assuming abuse, as the right of residence in another Member State is inherent in the exercise of the right to free movement, no matter what the motives are that may have prompted the move.[110]

117. The Commission proposes that the questions be answered as follows:

(1) Where an EEA national has created or strengthened a family life with a third-country national during genuine residence, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38/EC, in an EEA State other than that of which he is a national, the provisions of that Directive apply by analogy where that EEA national returns, with the family member in question, to his home State.

(2) Any period of residence pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38 by an EEA national in an EEA State other than that of which he is a national during which the EEA national has created or strengthened a family life with a third-country national entails the application by analogy of the provisions of the Directive on the EEA national's return to his home State.

Bernd Hammermann
Judge-Rapporteur

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[109] Reference is made to the judgments of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 27; and of 7 July 2005, *Commission* v *Austria*, C-147/03, EU:C:2005:427, paragraphs 67 to 70.

[110] Reference is made to the judgment in *Akrich*, cited above, paragraph 55.