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Judgment in Case E-26/13 *The Icelandic State v Atli Gunnarsson*

**UNFAVOURABLE TAX TREATMENT OF PERSONS WHO HAVE EXERCISED THE
RIGHT TO RESIDE IN ANOTHER EEA STATE**

The EFTA Court gave judgment today on questions referred to it by Hæstiréttur Íslands (Supreme Court of Iceland) regarding the interpretation of Article 28 of the EEA Agreement and Article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (“Directive 2004/38”).

Mr Gunnarsson and his wife are both Icelandic citizens. They were resident in Denmark from 24 January 2004 to 3 September 2009. Mr Gunnarsson paid tax in Iceland on his income. However, he was prevented from utilising his wife’s personal tax credit while they resided in Denmark. Under the Icelandic tax legislation applicable at the time, they had to reside in Iceland in order to pool their personal tax credits.

Mr Gunnarsson has brought an action against the Icelandic State, claiming repayment of the alleged excess taxes paid because he was unable to utilise his wife’s tax credit. The Supreme Court of Iceland asked whether it is compatible with Article 28 EEA and/or Article 7 of Directive 2004/38 if an EEA State does not give spouses who have moved to another EEA State the option of pooling their personal tax credits in connection with the assessment of income tax, whereas they would be entitled to do so if they lived in the home State, in a situation where one of them receives a pension from the home State, while the other has no income; and, second, whether the absence in the EEA Agreement of a provision corresponding to Article 21(1) in the Treaty of the Functioning of the European Union (“TFEU”) on Union Citizenship is of any significance in this regard.

The Court found that such less favourable tax treatment of a pensioner and his wife, who have exercised the right to move freely within the EEA, is not compatible with Article 7(1)(b) and (d) of Directive 2004/38. Article 1(1) and (2) of the former Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (“Directive 90/365”) applied in the EEA before Directive 2004/38. The substance of Article 1(1) and (2) of Directive 90/365 has been maintained in Article 7(1)(b) and (d) of Directive 2004/38.

First, the Court held that Article 1(1) and (2) of Directive 90/365 was intended in particular to create a right of residence in an EEA State other than the home State of a formerly economically active person and his spouse. However, taking up residence in another State presupposes a move from the EEA State of origin. Therefore, Article 1(1) of Directive 90/365 must be understood such that it also prohibits the home State from hindering the person concerned from moving to another EEA State.

Moreover, the Court found that it is of no consequence that the rights of economically inactive persons according to Directive 2004/38 were adopted by the Union legislature on the basis of Article 21 TFEU on Union Citizenship. That concept was introduced in the EU pillar through the Maastricht Treaty, which entered into force on 1 November 1993. However, the rights of economically inactive persons in Directive 90/365 were adopted on the basis of Article 235 EEC prior to the introduction of the concept of Union citizenship. This provision conferred on the EU legislature a general power to take the appropriate measures necessary for the operation of the common market where no specific legal basis existed in the Treaty. When Directive 90/365 was made part of the EEA Agreement in 1994, it conferred rights on economically inactive persons.

Furthermore, when Directive 2004/38 was incorporated into the EEA Agreement, the EEA Joint Committee and the Contracting Parties underlined that the concept of Union Citizenship has no equivalence in the EEA Agreement, and the EEA Agreement does not provide a legal basis for political rights of EEA nationals. Therefore, the Court held that the incorporation of Directive 2004/38 cannot introduce rights into the EEA Agreement based on the concept of Union Citizenship. However, individuals cannot be deprived of rights that they have already acquired under the EEA Agreement before the introduction of Union Citizenship in the EU, and which are maintained in Directive 2004/38.

The full text of the judgment may be found on the Internet at: www.eftacourt.int.

This press release is an unofficial document and is not binding upon the Court.