Registered at the EFTA Court under Nº E-23/24-04 on 26 day of November 2024.

EUROPEAN COMMISSION

Brussels, 26 November 2024
sj.g(2024)9678295

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

submitted by the **EUROPEAN COMMISSION**, pursuant to Article 20 of the Statute of the EFTA Court, represented by Elisabetta MONTAGUTI, Legal Adviser and Jonathan TOMKIN, Member of its Legal Service, acting as Agents, with an address for service at the Legal Service, *Greffe contentieux*, BERL 1/093, 1049 Brussels, and consenting to service by e-EFTACOURT, in

Case E-23/24,

A.O. and I.M.

Applicants

– and –

ULTENDINGSNEMNDA (UNE)

Respondent

concerning the interpretation of Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States 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 ("Directive 2004/38/EC").

Contents

1. THE LEGAL FRAMEWORK 2
1.1. EEA Law 2
1.2. National Law 5
2. THE FACTS AND THE PROCEDURE 6
3. THE PRELIMINARY REFERENCE 8
3.1. Preliminary observation 8
3.1.1. Admissibility 8
3.2. Question One 9
3.2.1. Introduction 9
3.2.2. On the possible application of Article 7(1)(a) of Directive 2004/38 to an EEA worker who has ceased an economic activity on grounds linked to maternity 10
3.2.3. On the existence of sufficient resources 12
3.3. Question 2 14
4. CONCLUSION 15

1. THE LEGAL FRAMEWORK

1.1. EEA Law

1. Part III of the EEA Agreement provides for the free movement of persons in the EEA. Chapter I (Articles 28 – 30) is entitled "Free movements of workers the self-employed"; Chapter II (Articles 31- 35) is entitled "The right of establishment"; Chapter III (Articles 36-39) is entitled "Services"; Chapter IV (Articles 40-45) is entitled "Capital".

2. Article 28(1), (3) and (5) of the EEA Agreement reads a follows:

"1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.

[...]

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

[...]

(b) to move freely within the territory of EC Member States and EFTA States for this purpose;

(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

[...]

5. Annex V contains specific provisions on the free movement of workers."

3. The detailed rules on the right of movement of Union citizens and their family members, as set out in Directive 2004/38/EC are applicable in the EEA legal order following the incorporation of that Directive into the EEA Agreement by the EEA Joint Committee Decision 158/2007 of 7 December 2007[1].

4. The Directive was incorporated into the EEA Agreement by its insertion in point 3 of Annex VIII ("Right of Establishment") to the Agreement. Pursuant to the second paragraph of point 3:

   a. The Directive is to apply, as appropriate, to the fields covered by Annex VIII.

---

[1] OJ L124, 8.5.2008, p.20.

b. The Agreement applies to nationals of the Contracting Parties. However, members of their family 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”.

5. Pursuant to Protocol 35 of the EEA Agreement the effect of implemented EEA law must be given precedence over national law[2].

6. Recital 2 of Directive 2004/38/EC recalls that the free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

7. Article 7 of Directive 2004/38, entitled “Right of residence for more than three months”, reads as follows:

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

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

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

(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

[2] Protocol 35 to the EEA Agreement sates that for cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.

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

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

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

3. For the purposes of paragraph 1(a), a Union citizen 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 Union citizen 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.*

8. Article 16 of Directive 2004/38, appearing under Chapter IV, 'Right of permanent residence', is the opening provision of Section I 'eligibility' and is entitled "General rule for Union citizens and their family members". It reads as follows:

"*1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.*

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

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."

1.2. National Law

9. The Commission refers to the provisions of national law as set out at pages 4-6 of the request for an Advisory Opinion.

2. THE FACTS AND THE PROCEDURE

10. The applicants in the main proceedings, A.O. and I.M. are a married couple who have a child born in 2018[3]. A.O. is a Polish national who arrived in Norway on 2 May 2016. A.O's spouse, I.M, is an Egyptian national.

11. On 14 October 2016, I.M applied for a residence card in his capacity as a family member of an EEA national. That application was granted by decision dated 30 October 2016.

12. Following her arrival, A.O. applied and was registered as a job-seeker on 7 June 2016. It appears from the request for an advisory opinion that in the period of June 2016 to February 2022, A.O. has been economically active in Norway for a period of approximately 15 months, from June 2016 until September 2017. Between October 2018 and August 2019, she received an unemployment benefit. In the periods when A.O. did not work or receive unemployment assistance, A.O was not in receipt of an income.

13. As regards, I.M., it appears that he has been in full-time employment since July 2017.

14. On 13 January 2022, I.M applied for a permanent residence card. By decision dated 14 November 2022 of the Directorate of Immigration (Utlendingsdirektoratet) ("**UDI**"), I.M.'s application was rejected.

15. In the rejection decision, the UDI referred to the fact that I.M.'s EEA national spouse, A.O., had ceased being economically active in Norway since September 2017 and had been in receipt of unemployment benefit between October 2018 and August 2019. In these conditions, the UDI considered that A.O. had not been documented as exercising rights under EEA law during those periods. UDI considered that since the EEA national spouse did not fulfil five years' continuous lawful residence in Norway, I.M, could not benefit from a derived right of permanent residence.

[3] Request for an advisory opinion, paragraph 11.

16. On 10 November 2022, A.O. applied for a permanent residence certificate. By decision dated decision dated 3 January 2024 of the UDI, A.O.'s application was rejected. In the rejection decision, the UDI referred to A.O.'s employment history. Considering that A.O. did not fulfil five years' continuous lawful residence in Norway, the UDI found that she was not eligible for a right of permanent residence.

17. On 28 November 2022 and 15 January 2024, I.M and A.O., respectively, requested the UDI to carry out a review of its rejection decisions. In support of this request, I.M and A.O. referred to the fact that I.M had been in continuous employment with a good income and that the family had sufficient resources within the meaning of Article 7(1)(b) of Directive 2004/38.

18. Following an assessment, the UDI upheld its previous decision. The UDI stated that I.M.'s own income could not be included in any determination of whether A.O. was exercising rights under EEA law in Norway. On 2 March 2023, the UDI referred the case to the Norwegian Immigration Appeals Board ('Utlendingsnemnda' – ("**UNE**").

19. Considering that resolution of the appeal required an interpretation of EEA law, the UNE decided to refer the following questions to the EFTA Court for an advisory opinion:

> "*a) To what extent can a third-country national's income/resources form part of the assessment of whether the EEA national has "sufficient resources" for himself or herself and his or her family members: see Article 7(1)(b) of Directive 2004/38/EC?*
>
> *b) If the answer to question a) entails that the third-country national's resources cannot form the entire basis in order for the EEA national to have "sufficient resources", is it then required that the EEA national make an "own contribution" on a continuous basis in order for the requirement of "sufficient resources" to be fulfilled, or can the EEA national's contribution be limited to a shorter period, for example that the EEA national has gainful employment for one year, subsequently to which the parties rely on the third-country national's income during the following four years?*"

3. THE PRELIMINARY REFERENCE

3.1. Preliminary observation

3.1.1. Admissibility

20. The Commission recalls that, pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), the right to refer questions on the interpretation of the EEA Agreement to the EFTA Court is referred to "*any court or tribunal*" in an EFTA State.

21. In accordance with settled case-law, the notion of a "*court of tribunal*" within the meaning of Article 34 SCA is an autonomous notion of EEA law[4]. When assessing whether a referring body qualifies as a court or tribunal within the meaning of Article 34 SCA, the Court takes account of a number of factors. These include, in particular, whether the referring body is established by law, has a permanent existence, exercises binding jurisdiction, applies rules of law, is independent, and, as the case may be, whether its procedure is inter partes and similar to a court procedure[5].

22. In the present case, the request for an advisory opinion was made by the Norwegian Immigration Appeals Board, UNE. According to the request for an advisory opinion, the UNE is a politically independent administrative body that operates from within the Norwegian Ministry of Justice and Public Security that deals with complaints lodged under the Immigration Act (utlendingsloven) and the Citizenship Act (statsborgerloven). It is further specified that the Board deals with complaints against any decisions under the Immigration Act and Citizenship Act taken by the Directorate of Immigration (Utlendingsdirektoratet – UDI), which were previously dealt with by the Ministry of Justice.

23. While the Commission notes that the concept of "*court or tribunal*" within the meaning of Article 34 SCA is not subject to a strict interpretation under EEA law[6],

---

[4] Case E-8/19, *Scanteam AS*, judgment of 16 July 2020, paragraph 41.

[5] Joined Cases E-3/13 and E-20/13, *Fred. Olsen and Others*, [2014] EFTA Ct. Rep. 400, paragraph 60 and case law cited.

[6] Case E-8/19, *Scanteam AS*, judgment of 16 July 2020, paragraph 41.

the Commission is not in a position to assess the provisions of Norwegian law governing the establishment and operation of the UNE against the requirements of the case-law, and in particular, the criterion of independence. In these conditions, the Commission provides observations on the questions referred for the event that that the Court determines that the UNE constitutes such a court or tribunal and that the reference is ruled admissible.

3.2. Question One

3.2.1. Introduction

24. The Commission notes that the first question referred by the UNE appears to be premised on the view that the determination of whether the applicants were lawfully resident in Norway, for the purposes of acquiring permanent residence, is to be assessed exclusively by reference to the requirements of Article 7(1)(b) of Directive 2004/38, which applies to economically inactive mobile EEA nationals.

25. However, it is apparent that A.O. has in fact worked for a period of approximately 15 months in Norway between June 2016 and September 2017. Given the duration of such work, which exceeds 12 months, A.O. could conceivably have retained her worker status on the basis of Article 7(3)(b) of Directive 2004/38.

26. In addition, the Commission recalls that the Court of Justice has clarified that Article 7(3) of Directive 2004/38 does not regulate the right of retention of worker status exhaustively[7]. Even where a mobile EEA national would not be able to benefit from any of the specific provisions referred to in Article 7(3), she can retain 'worker' status directly under primary law establishing the right to free movement of workers, where economic activity has been interrupted on grounds linked to maternity[8].

27. In order to provide as complete and useful a reply as possible, the Commission proposes to consider the extent to which an EEA national in the position of A.O. could be considered to have been resident as a 'worker' in accordance with Article 7(1)(a) of Directive 2004/38 for periods during which she was not economically active in Norway.

---

[7] Case C-507/12, *Saint Prix*, EU:C:2014:2007, paragraphs 30 to 38.

[8] Case C-507/12, *Saint Prix*, EU:C:2014:2007.

28. The Commission further recalls that the basis for legal residence can change over time, so that an EEA national can cumulate several periods of legal residence under different bases of legal residence, possibly up to a continuous period of five years within the meaning of Article 16(1) of Directive 2004/38.

3.2.2. On the possible application of Article 7(1)(a) of Directive 2004/38 to an EEA worker who has ceased an economic activity on grounds linked to maternity

29. The Commission observes that, pursuant to Article 7(3)(b) of Directive 2004/38, a mobile EEA national may retain their status as a worker indefinitely, where they are recorded in involuntary employment after having worked over a year. As noted above, it would appear from the reference for an advisory opinion, that A.O. has met this last requirement since she was economically active in Norway for a 15 month period[9].

30. Certainly, the right to retain worker status under Article 7(3)(b) is subject to certain additional conditions. An EEA national is required to be recorded in a situation of involuntary employment and to have registered as a jobseeker with an employment office in the host State.

31. It appears from the reference for an advisory opinion that, in the view of the UNE, A.O. may not have retained worker status because she had chosen to terminate the employment relationship. In addition, it is claimed that she had not availed herself of welfare schemes relating to sickness and childbirth that would have enabled her to retain her employment and status as a worker[10].

32. The Commission considers that such justifications cannot, in and of themselves, constitute a valid basis for finding that a person in the situation of A.O. would have lost her worker status.

33. In the first instance, as noted above, the Commission recalls that the Court of Justice has had an opportunity to consider situations on the right of an EEA national to retain worker status in circumstances where the worker has given up employment, or given up seeking employment, for reasons linked to maternity

[9] Request for an advisory opinion, paragraph 14.

[10] Request for an advisory opinion, paragraph 49.

(including in contexts where a person has not worked for the periods required to benefit Article 7(3)(b) of Directive 2004/38 and where none of the provisions laid down in Article 7(3) were considered relevant).

34. In its judgment in *Saint Prix*, the Court of Justice ruled that the fact that a worker interrupts economic activity for a certain time because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth, does not necessarily entail severance with the labour market or economic ties and the loss of a person's status as economically active[11].

35. In the Commission's submission, it would not follow from the fact that A.O. has considered it necessary to terminate her work on grounds related to her pregnancy[12], that her unemployment was not 'involuntary' within the meaning of Article 7(3)(b) of Directive 2004/38. It would then be for the competent authorities to further verify whether the requirement to be registered as a job-seeker with the relevant employment office was also fulfilled.

36. Moreover, even if the Court were to consider that the situation of A.O. did not in any event fall to be examined under Article 7(3)(b) of Directive 2004/38, but rather directly on the basis of primary law alone, it would still not follow that A.O. would have lost her status as a worker under EEA law. The case-law makes it clear that in situations linked to maternity, worker status may be retained directly under primary law, notably, the right of free movement of workers, which in the EEA legal order is enshrined in Article 28(1) of the EEA Agreement.

37. Furthermore, the Commission submits that Directive 2004/38 neither makes nor allows the right of retention of worker status to be made subject to an additional condition of a worker availing herself of welfare scheme relating to sickness and childbirth. Thus, the Commission contests that the fact that a worker did not seek such benefits could validly be invoked as a ground to consider that she would have lost her worker status.

---

[11] Case C-507/12, *Saint Prix*, EU:C:2014:2007.

[12] See the request for an advisory opinion paragraphs 20 and 48.

38. Of course, the Commission recalls that the Court of Justice has clarified that where a worker ceases an economic activity on grounds related to maternity, the retention of worker status is subject to the condition that the worker, re-engages with the economic life of the host State, within a reasonable period after the birth of her child[13].

3.2.3. On the existence of sufficient resources

39. If, in the event of an assessment of the facts based on the case-law set out in Section 3.2.2 above, it is concluded that A.O. has at a certain point during her residence in Norway, lost her 'worker' status, the question arises whether she may be considered to have been lawfully resident in accordance with the requirements of Article 7(1)(b) of Directive 2004/38. Such lawful residence is subject to the requirement to possess "sufficient resources".

40. In this context, the UNE seeks guidance on whether A.O. may be considered to have complied with the requirement to possess sufficient resources in circumstances where the resources she had were not generated through her own economic activity, but exclusively through the work of her third-country national spouse.

41. In the Commission's submission the case-law of the Court of Justice is both consistent and clear: the resources referred to in Article 7(1)(b) of Directive 2004/38 do not have to be personal to the Union citizen who is exercising free movement rights; the requirement can also be satisfied where such resources are placed at his or her disposal, including by a third country national family member[14]. Thus the fact that resources available to a Union citizen for the purposes of Article 7(1)(b) of Directive 2004/38 derive from a third country national does not prevent the condition of sufficient resources in that provision from being regarded as fulfilled[15].

---

[13] Case C-507/12, *Saint Prix*, EU:C:2014:2007.

[14] See Case C-218/14, *Singh and others*, EU:C:2015:476, paragraphs 71-76 and Case C-93/18, *Bajratari*, EU:C:2019:809, paragraphs 30-31. See also Case C-86/12, *Alokpa and Moudoulou*, EU:C:2013:645, paragraph 27 and Case C-165/14, *Rendón Marín*, EU:C:2016:675, paragraph 48.

[15] Case C-218/14, *Singh and others*, EU:C:2015:476, paragraph 76; Case C-93/18, *Bajratari*, EU:C:2019:809, paragraph 48.

42. Indeed, the Court of Justice has repeatedly underlined that Article 7(1)(b) of Directive 2004/38 lays down no requirement whatsoever as to the origin of a Union citizen's resources and that such resources may be provided *inter alia* by a third-country national[16].

43. The Commission recalls that the Court reached this conclusion on the basis that the "sufficient resource" requirement was laid down by the Union legislature with a view to ensuring that EEA nationals exercising free movement rights do not become an excessive burden on the social assistance system of the host Member State during the period of residence in that State[17]. The Court reasoned that the introduction of a requirement as to the origin of the resources which is not necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States, would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and residence guaranteed by Article 21 TFEU[18].

44. Similarly, the Court of Justice has concluded that the fact that the comprehensive sickness insurance is made available to the EEA natinoal by a third country family member or otherwise without a payment by such Union citizen, does not preclude the relevant requirement in Article 7(1)(b) from being regarded as fulfilled[19].

45. Indeed, it would, in the Commission's submission, be quite arbitrary to interpret Directive 2004/38 as imposing a general requirement that in a family unit composed of an EEA national and a third country national, it must always be the EEA national, who works. There may be a range of circumstances, including, but without limitation, the birth of a child and the need to ensure child care, that may warrant that only one or other parent engages in an economic activity. The Commission considers that in such circumstances, it would be unwarranted and disproportionate if the decision on which parent must work could be imposed by reference to his or her nationality. Particularly, since such a requirement would

---

[16] See Case C-218/14, *Singh and others*, EU:C:2015:476, paragraph 74 and Case C-93/18, *Bajratari*, EU:C:2019:809, paragraph 30. See also, Case C-86/12, *Alokpa and Moudoulou*, EU:C:2013:645, paragraph 27 and Case C-165/14, *Rendón Marín*, EU:C:2016:675, paragraph 48.

[17] Case C-218/14, *Singh and others*, EU:C:2015:476, paragraph 75.

[18] Case C-218/14, *Singh and others*, EU:C:2015:476, paragraph 75.

[19] Case C-247/20, *V.I.*, EU:C:2022:177, paragraphs 67-69.

bear no relationship to the justification for the sufficient resources requirement which is anchored in the objective of protecting the finances of the host Member State.

46. The Commission notes the observation made by the UNE according to which an interpretation according to which an EEA national could depend entirely on the income of their third country national spouse to establish sufficient resources would appear contrary to the objective of EEA rules, since it would result in the third country national, rather than an EEA national, exercising the right to work under EEA Law[20]. However, the Commission recalls that Directive 2004/38 expressly provides for the entitlement of mobile EEA nationals to reside in another EEA State without exercising an economic activity, once the conditions laid down in the Directive are satisfied. Requiring that in a family composed of EEA nationals and third country nationals, it must always be the EEA national who works would negate that entitlement[21].

47. The Commission therefore considers that, for the purposes of assessing whether a mobile EEA national possesses sufficient resources within the meaning of Article 7(1)(b) of Directive 2004/38, account must be taken of all resources available to that EEA national, regardless of their origin and whether they were provided in whole or in part by a third country national family member of that EEA national.

3.3. Question 2

48. In the light of the reply to the first question, the Commission considers that it is not necessary to reply to the second question.

---

[20] Request for an advisory opinion paragraph 64.

[21] The Commission would recall that at any rate, family members of an EEA citizen exercising free movement rights on any legal basis under Directive 2004/38, have a right of work in the host State under Article 23 of that Directive, whatever their nationality.

4. CONCLUSION

49. The Commission considers that the questions referred to the EFTA Court for an advisory opinion by the Utleningsnemnda (UNE) should be answered as follows:

For the purposes of assessing whether a mobile EEA national possesses sufficient resources within the meaning of Article 7(1)(b) of Directive 2004/38, account must be taken of all resources available to that EEA national, regardless of their origin and whether they were provided in whole or in part by a third country national family member of that EEA national

Elisabetta MONTAGUTI Jonathan TOMKIN

Agents for the Commission