ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 29.11.2024

Written observations by the Kingdom of Norway

represented by Helge Røstum, advocate at the Office of the Attorney General for Civil Affairs, and Oscar Nordén, Adviser at the Norwegian Ministry of Foreign Affairs, submitted pursuant to Article 20 of the Statute and Article 90(1) of the Rules of Procedure of the EFTA Court, in

Case E-23/24 – *AO & IM*

in which the Immigration Appeals Board (Utlendingsnemnda, hereinafter UNE) has requested the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

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1 INTRODUCTION

(1) The request for an advisory opinion concerns 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 Union and their family members to move and reside freely within the territory of the Member States (the Directive).

(2) The referring body is UNE. UNE is an independent administrative body subordinate to the Ministry of Justice and Public Security (Justis- og beredskapsdepartementet). It is the appeal body for decisions made by the Norwegian Directorate for Immigration (Utlendingsdirektoratet, hereinafter UDI).

(3) The case before UNE concerns UDI's decision to reject AO's and IM's applications for permanent residence documents, cf. Section 115 and 116, cf. 119 of the Immigration Act, respectively.

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(4) The right under Article 16 of permanent residence for EEA nationals depends on whether the EEA national has "*resided legally for a continuous period of five years in the host Member State*", cf. Article 16(1). According to Article 16(2), that right shall also apply to family members of the EEA national who are not nationals of an EEA state and "*have legally resided with the Union citizen in the host Member State for a continuous period of five years*".

(5) Whether the EEA national has resided legally in the host State, essentially depends on whether the EEA national has satisfied the requirements in Article 7(1) of the Directive, which provides alternative grounds for the right of residence in the territory of another EEA state for more than three months. If so, it follows from Article 7(2) that the right of residence extends to third country nationals who are family members of the EEA national.

(6) The case at hand concerns the interpretation of the requirement in Article 7(1)b), that the EEA national must "[…] *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* […]"

2 THE FACTS OF THE CASE AND THE QUESTIONS REFERRED

(7) The facts of the case are set out in detail in paragraph 11 to 30 of the request. As concerns the interpretation of Article 7(1)b), the key facts are as follows:

(8) AO is a national of Poland who moved to Norway in May 2016. She is married to IM, who is a national of Egypt. IM was granted a residence card as a family member of an EEA national in November 2016 on the basis of his marriage with AO. The parties have a child together who was born in 2018.

(9) AO registered as a job seeker in Norway in June 2016. From June 2016 to September 2017, she worked and had income. Since September 2017 she has not had any employment or income. From October 2018 to August 2019, she received unemployment benefits from the Norwegian Labour and Welfare Administration (NAV). AO has not submitted documentation showing that she has had other sources of income or resources that have enabled her to provide for herself and her family members.

(10) IM's tax returns and other public documentation show that he has been in full-time employment since July 2017 and up to the present date. His income in this period ranges between 317 000 NOK in 2017 to 800 727 NOK in 2023, see paragraph 17 of the request.

(11) AO and IM applied for permanent residence documents in 2022. UDI rejected their applications on the grounds that neither AO nor IM had resided lawfully for a continuous period of five years in the realm, cf. Section 115 and 116 of the Immigration Act, respectively.

(12) In its rejection, UDI referred to AO only having income the first year of her stay in Norway, that she received unemployment benefits for a period of 10 months and that it was the third country national, IM, that provided all the resources for the family the subsequent years by his work in Norway. UDI's view was that the resources had to be provided by the EEA

national herself, and that IM's income could not be included in any determination of whether AO had sufficient resources.

(13) As concerned IM's application, UDI referred to the fact that the EEA national, AO, did not have sufficient resources. According to UDI, IM's income, as a third country national, had no relevance for the fulfillment of the requirement of sufficient resources.

(14) In their appeal to UNE, AO and IM argue that the income of IM must be taken into account when determining whether the requirement of sufficient resources is fulfilled. In paragraph 54 of the request, UNE refers to the parties' appeal, in which they have stated that AO has access to sufficient and necessary resources through IM's income, and that they have not been a burden on the social assistance system of the host State.

(15) On that background UNE has decided to refer the following questions on the interpretation of the Directive to the EFTA Court:

> *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?*
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> *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 ADMISSIBILITY

(16) According to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), it is only a body that meet the requirement of a «court or tribunal» that may request the EFTA Court to give an advisory opinion on a question of EEA law. The purpose of Article 34 SCA is to establish a system of cooperation between the EFTA Court and national courts, as a means of ensuring a homogenous interpretation of EEA law.[1]

(17) UNE is not classified as a court or tribunal under *national* law. It is an administrative appeal board that determines complaints over decisions made by UDI. UNE's decisions are binding and can be brought before the ordinary courts for review. UNE decides between 5000 and 6000 cases each year, of which a significant part concerns EEA law. It is therefore important to clarify whether it falls under the concept of court or tribunal in Article 34 SCA, even if it is not defined as a court or tribunal under national law.

[1] Case E-8/19 *Scanteam*, para. 41

(18) Although the EFTA Court has dealt with requests from administrative appeal bodies in its previous case law, it has not dealt with a request from UNE nor taken a position on whether an appeal body with the specific characteristics of UNE is to be considered a court or a tribunal within the meaning of Article 34 SCA. On that background, and in the light of recent case law of the CJEU, the Government finds it pertinent to highlight some of the specific characteristics of UNE in order to give the EFTA Court a comprehensive basis for its assessment of whether UNE meets the requirements of Article 34 SCA.

(19) Before examining those characteristics, the Government recalls that when assessing whether a referring body qualifies as a court or a 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.[2]

(20) Further, as concerns the concept of a court or tribunal, there are no relevant differences as to the wording, scope and purpose from the similar concept used in Article 267 TFEU, concerning the preliminary reference procedure in the EU. The EFTA Court has recognised that the principle of homogeneity, as a matter of principle, also applies to the procedural branch of EEA law.[3]

(21) However, the EFTA Court has stated that even though the principle of homogeneity applies in principle, that does not mean that it is required by Article 3 SCA to follow the interpretation of the CJEU when interpreting the main part of the SCA.[4] Indeed, the EFTA Court has followed a more liberal and less restrictive approach than the CJEU. This includes its approach to the criterion of independence.

(22) In its interpretation of Article 34 SCA, the EFTA Court has further held that the concept of a court or tribunal under that provision must pay due regard to the specific constitutional and legal traditions of the EFTA States.[5] In that regard, the EFTA Court has stated that it must take account of the important role played by administrative appeal boards in the EFTA States, also in the application of EEA law.[6]

(23) As concerns the criterion of independence, the Government notes that the EFTA Court has underlined that the assessment of whether a referring body qualifies as an independent court or tribunal under Article 34 must be based on an overall examination of the factors characterising that body. The rules relating to the referring body must, according to the

[2] *Scanteam* para 42 and C-274/14 *Banco Santander* para 51.
[3] *Scanteam*, para. 45
[4] Ibid, para. 45
[5] Case E-5/16 Municipality of Oslo, para 35 and *Scanteam*, para 46
[6] *Scanteam*, para. 46. However, the EFTA Court did not explain or elaborate any further on how the role of administrative appeals board is different or more important in the EFTA States than in the EU. That assertion has met some criticism in Arnesen, Hammersvik et al «Oversikt over EØS-retten» (2022) page 507.

EFTA Court, be considered as a whole in order to determine if that body fulfils the necessary prerequisites to be considered independent.[7]

(24) The criterion of independence implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision.[8] As such, the criterion has two aspects. First, an *external* aspect which requires that the body concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, being thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.

(25) In *Banco Santander*, the CJEU underlined the fundamental importance of the principle of irremovability for the concept of independence, and that it entailed that:

> *[…] dismissals of members of that body should be determined by specific rules, by means of express legislative provisions offering safeguards that go beyond those provided for by the general rules of administrative law and employment law which apply in the event of an unlawful dismissal […]* [9]

(26) Second, the criterion of independence has an *internal* aspect which is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.[10]

(27) It is no doubt that UNE meets some of the criteria set out in para 19 and the abovementioned case law. UNE is established by law, it is permanent, and its jurisdiction is binding.[11]

(28) However, there are other criteria that UNE may not fully meet, which the EFTA Court should take into account in its overall examination of the factors characterising that body.

(29) As concerns the *external* aspect of the criterion of independence, it follows from Section 76(2) of the Immigration Act that UNE cannot be instructed in individual cases, on matters of interpretation of law or the exercise of its discretion. However, the Government may issue instructions regarding UNE's prioritisation of the cases before it. Also, in certain cases that may involve fundamental national interests or foreign policy considerations, the Government may go further and instruct UNE regarding the case handling or its procedural decisions.[12] Both the latter and the former demonstrates that the independence of UNE is not fully

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[7] *Scanteam*, para 50
[8] Ibid, para. 48.
[9] *Banco Santander*, para 59 and 60.
[10] Ibid para 61 and *Scanteam* para 49.
[11] See Section 76 and 77 of the Immigration Act.
[12] See Chapter 14 of the Immigration Act, Section 128.

comparable to that of the ordinary courts, where such instructions are not permissible nor compatible with its independence from the authorities.

(30) Furthermore, the rules on protection of the members of UNE and the safeguards against dismissal and external pressure are not the same as those granted to ordinary judges under national law. The board chair of UNE is appointed by the King in Council of State, while the ordinary members are appointed by the Ministry of Justice and Public Security. Section 77 of the Immigration Act sets out specific rules on the dismissal of the board members of UNE, entailing that the Ministry may dismiss a board member, inter alia, where the Ministry considers that the member is personally unsuited. Dismissal of a board chair is regulated by the ordinary rules of administrative and employment law, including the Civil Service Act. Thus, neither the board members nor board chairs of UNE enjoy the same guarantees against dismissal as judges, who may only be dismissed following a trial and by an order of the court.[13] Although this was not decisive in the *Municipality of Oslo* case, the difference between the rules concerning dismissal of judges and members of UNE are still relevant to the overall assessment of external independence.

(31) As concerns the *internal* aspect of the criterion of independence, the Government refers to the CJEU's cases *Teleklagenævnet*[14] and *MT Højgaard*[15]. Read in context, those cases indicate that if the referring body would have status as a defendant in the event of an appeal against its decisions before the ordinary courts, the body does not act as a third party in relation to the parties before it, and thus it does not meet the criterion of independence. Although the EFTA Court in *Scanteam* did not find that specific factor decisive for the conclusion of whether the referring body was to be considered independent[16], it is nevertheless a relevant factor in an overall examination of whether the body meets the requirement of independence.

(32) Finally, the Government draws attention to the fact that the procedure before UNE is not an *inter partes* process in the same way as the procedures before the ordinary courts. UDI does not have the status of a party in the appeal case before UNE. For that reason, it does not participate in the proceedings before UNE (or for that sake, in the proceedings before the EFTA Court). That element clearly distinguishes the present case from the situation in *Scanteam*, where there was an *inter partes* process in the sense that both parties (Utenriksdepartementet and Scanteam) appeared before KOFA, ensuring a contradictory process. Although the EFTA Court has stated that the requirement of an *inter partes* process is not an absolute criterion, it is nevertheless relevant in an overall examination.

4 QUESTIONS A AND B

(33) The two questions, that can be answered together, essentially ask for a clarification as to what extent resources from a third country national, who is a family member of the EEA

[13] See the Courts of Justice Act of 13 August 1915, no 5, § 55.
[14] C-222/13 *Teleklagenævnet*, para 29-32.
[15] C-396/14 *Mt Høygaard*, para 25.
[16] Scanteam, para. 53.

national, can be taken into account when determining whether the requirement of sufficient resources in Article 7(1)b) of the Directive is satisfied, cf. Article 7(2).

(34) At the outset, the Government notes that the wording of Article 7(1)b) is not entirely clear. Some aspects of the wording may indicate that it is the EEA national who is personally required to have the necessary resources, cf. that both Article 7(1) and (2) state that the right of residence requires that the EEA national satisfies the conditions in the provision. If the necessary resources are provided for by the third country national, either in part or in their entirety, one may argue that it is not the EEA national that satisfies the conditions, but the third country national.

(35) However, the wording can also be understood as meaning that the decisive factor is not the origin of the resources, but whether the EEA national have available the necessary resources to take care of themself and their family members, so as to not become a burden on the social assistance system of the host State.

(36) The CJEU has in several judgments confirmed that it is the latter interpretation that is the correct understanding of the wording. In *Zhu and Chen*[17], *Alokpa*[18] and *Rendon Marin*[19] the CJEU found that the expression "*have*" in the wording meant that it suffices that the necessary resources are available to the EEA national. According to the CJEU, the provision lays down "*no requirements whatsoever as to the origin*" of the resources.[20]

(37) In all those cases the EEA national was a child that was dependent on a parent who was a third country national, and where all the resources were provided by the latter. One could therefore argue that the CJEU's interpretation of Article 7 in those cases is limited to that particular context.

(38) However, the CJEU has adopted the same understanding of the interpretation of the provision in a case where the EEA national was the spouse of a third country national. In *Singh*[21], the referring court asked the CJEU to clarify whether the requirement of sufficient resources could be met in a situation where the resources were "partly" based on resources from a third country national who was married to the EEA national.

(39) The CJEU referred to its previous interpretation of Article 7(1)b) in *Zhu and Chen*, *Alokpa* and *Rendon Marin*. It stated that an interpretation of the provision entailing that the EEA national must provide the necessary resources himself, without being able to rely on the resources of a family member, would add to that condition a requirement which is not necessary to meet the objective of protecting the public finances of the host Member States.[22]

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[17] Case C-200/02 *Zhu and Chen*, para. 32.
[18] Case C-86/12 *Alokpa*
[19] Case C-165/14 *Rendon Marin*
[20] See for instance *Alokpa,* para. 27
[21] Case C-218/14 *Singh*
[22] Ibid., para 75

(40) The CJEU concluded that Article 7(1)b) must be interpreted as meaning that an EEA national has sufficient resources within the meaning of that provision, even where those resources derive "*in part*" from those of their spouse who is a third country national.[23]

(41) The CJEU did not explicitly clarify in *Singh* whether the requirement of sufficient resources could be met if all the resources come from sources other than the EEA national themselves. However, the Government asserts that *Singh* cannot reasonably be interpreted to mean that the CJEU only accepted situations where parts of the resources are provided by others, rather than the entirety.

(42) First, the wording in the concluding parts of the judgment in *Singh* must be understood in the context of the question that was posed. The CJEU was only asked to clarify whether the condition could be met in a particular situation where parts of the resources came from a third country national. Thus, it was not necessary for the CJEU to go further and answer a question that was not posed.

(43) Second, the general reasoning underlying the CJEU's interpretation of Article 7(1)b) in *Singh*, and the previous cases concerning EEA nationals that were children, shows that the origin of the resources is not relevant. The determinative factor is whether the resources are available to the EEA national. If that is the case, the objective of not burdening the social assistance system of the host State will also be attained. That rationale must necessarily mean that the condition could be fulfilled even where *all* the resources are provided by others than the EEA nationals themselves, including a family member who is a third country national.

(44) For that reason, the Government concludes that the requirement of sufficient resources may be fulfilled, even where the resources are provided in their entirety by others than the EEA nationals themselves, including a family member who is a third country national. Therefore, it is not a condition that the EEA national makes an own contribution on a continuous basis in order for the requirement in Article 7(1)b) to be fulfilled.

(45) That said, the Government will emphasise that both the wording and the purpose of the provision require that the resources are actually available to the EEA national. The EEA national must "*have*" the resources in question at its disposal. Therefore, it is not enough to refer to the prospect of an income in the future, as long as those resources are not actually available and accessible to the EEA national personally. Whether or not that is the case, must be based on a concrete assessment of the factual circumstances of the case.

5 ANSWER TO THE QUESTIONS

(46) Based on the foregoing paragraphs, the Government respectfully submits that the questions posed by the referring body should be answered jointly as follows:

> *Article 7(1)b) of Directive 2004/38 must be interpreted as meaning that the requirement of sufficient resources can be met even in a situation where all the*

[23] Ibid, para. 77

resources are provided by individuals other than the EEA national themselves, including a family member who is a third country national. It is not a condition that the EEA national makes an own personal contribution on a continuous basis in order for that requirement to be fulfilled.

However, to meet the requirement in Article 7(1)(b), the resources must be available and accessible to the EEA national, ensuring that they and their family members have sufficient resources to avoid becoming a burden on the social assistance system of the host state during their period of residence.

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