Brussels, 3 December 2024
Case No: 92929
Document No: 1492742

ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by the

THE EFTA SURVEILLANCE AUTHORITY

represented by
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acting as Agents,

IN CASE E-23/24

AO and IM

in which the Immigration Appeals Board (*Utlendingsnemnda)* requests 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 concerning the interpretation of Article 7(1)(b) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

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1 INTRODUCTION AND THE FACTS OF THE CASE

1. The present written observations were prepared with support from Ciarán Burke, Legal Officer of the Authority's Internal Market Affairs Directorate.

2. The present request for an advisory opinion ("**the Request**") concerns the extent to which a third-country national's income and/or other resources can be considered when assessing whether an EEA national has "*sufficient resources*" for themselves and their family members within the meaning of Article 7(1)(b) 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/EC**" or "**the Directive**").

3. Based on the information provided in the Request, upon which the following introduction of facts is based,[1] *AO*, a Polish national, and *IM*, an Egyptian national, are a married couple and the parents of a child born in 2018. Both *IM's* and *AO's* applications for a permanent residence certificate in Norway were rejected by the Directorate of Immigration (*Utlendingsdirektoratet*),[2] and both cases are now pending before the Immigration Appeals Board (*Utlendingsnemnda, "UNE")*.

4. The factual background to the pending cases is that *AO* arrived in Norway on 2 May 2016. She registered as a jobseeker on 7 June 2016 and as a worker on 11 August 2016. On 7 June 2016, she received a registration certificate as an EEA national. According to the Request, public records indicate that *AO* earned 247,191 NOK in employment income between June 2016 and September 2017. She had no income from October 2017 to October 2018, received 105,560 NOK in unemployment benefits from October 2018 to August 2019, and had no income from August 2019 to February 2022.

5. On 10 November 2022, *AO* submitted an application for a permanent residence certificate as an EEA national. The Directorate rejected her application on 3 January 2024, citing her lack of income during two specific periods: from September 2017 to October 2018, and from August 2019 until the date of the decision, whilst she received unemployment benefits from October 2018 to August 2019. The

[1] The Request, paragraphs 11-30.

[2] According to paragraph 12 of the Request, *IM's* application was rejected by the Directorate of Immigration on 14 November 2022, and *AO's* application was rejected by the same body in January 2024.

Directorate found *AO* not to have met the requirement of five years of continuous lawful residence in Norway by the time of the decision. Furthermore, the Directorate considered that *IM's* income was irrelevant in determining whether *AO*, in the periods where she was not a worker or a jobseeker, had sufficient resources for herself and her family within the meaning of Article 7 of the Directive.

6. *AO* appealed the decision on 15 January 2024. *AO* explained that she was a worker from June 2016 to July 2017, but that she subsequently was unemployed due to her pregnancy (with no employment income from October 2017),[3] and that she did not apply for "*sickness benefits*" in that regard. *AO* also noted that her spouse, *IM*, had a steady income, and she regularly received financial support from him. Despite these explanations, the Directorate found no reason to reverse its decision and referred the case to the Immigration Appeals Board on 25 January 2024.

7. Turning to *IM,* he applied for a residence card in Norway on 14 October 2016 as a family member of an EEA national based on his marriage with *AO.* His application was granted on 30 November 2016. On 13 January 2022, *IM* applied for a permanent residence card, and his application was rejected by the Directorate of Immigration on 14 November 2022.

8. The Directorate noted that *IM's* spouse, *AO*, had no income during the periods mentioned above and was receiving unemployment benefits from October 2018 to August 2019. The Directorate concluded that, based on these facts, it was not sufficiently documented that *AO* had exercised lawful residence in Norway pursuant to EEA law during those periods. Consequently, *IM* was found not to have had five years of continuous lawful residence in Norway at the time of the decision.

9. *IM* appealed the decision on 28 November 2022, arguing that *AO* should be considered a worker from June 2016 to July 2017 and that her subsequent unemployment was due to her pregnancy. *IM* further argued that his substantial income meant that he and *AO* had sufficient financial resources, making *AO's* continuous employment unnecessary. In that context, ESA notes that according to the Request, public records confirm that *IM* has been in full-time employment since July 2017, with an income of NOK 317,329 in 2017, NOK 520,636 in 2018, NOK 537,717 in 2019, NOK 568,761 in 2020, NOK 627,278 in 2021, NOK 766,195 in

[3] See paragraph 14 of the Request.

2022, and NOK 800,727 in 2023.On 2 March 2023, the Directorate of Immigration referred *IM's* case to the Immigration Appeals Board.

2 RELEVANT LAW

2.1 EEA LAW

10. Article 34 of the Agreement between the EFTA States on the establishment of a surveillance authority and a court of justice ("**SCA**")[4] provides:

> "*The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.*
>
> *Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.*
>
> *An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law*."

11. Article 3 of the Agreement on the European Economic Area ("**the EEA Agreement**" or "**EEA**") provides:

> "*The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*
>
> *They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.*
>
> *Moreover, they shall facilitate cooperation within the framework of this Agreement*."

12. Article 28 EEA provides:

> "*1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.*
>
> *3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
>
> *(a) to accept offers of employment actually made;*
>
> *(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;*
>
> *(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.*
>
> *4. The provisions of this Article shall not apply to employment in the public service.*

[4] OJ L 344, 31.1.1994, p. 3.

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

13. Directive 2004/38/EC[5] was incorporated into the EEA Agreement by Decision No 158/2007 of the EEA Joint Committee of 7 December 2007, which entered into force on 1 March 2009.[6] Article 7 of the Directive is titled "*Right of residence for more than three months"*, and provides in relevant parts:

> "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*
>
> *– 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 1 (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."*

[5] OJ L 158, 30.4.2004, p. 77.
[6] OJ L 124, 8.5.2008, p. 20.

14. Article 16 of the Directive lays down a general rule to the effect that "*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*", and reads:

> *"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."*

2.2 NATIONAL LAW

15. Directive 2004/38/EC was implemented in Norway's national legal order through the Norwegian Immigration Act (*Utlendingsloven)* (the "**Immigration Act**").[7]

16. Chapter 13 of the Immigration Act regulates the right of access and residence for foreigners encompassed the EEA Agreement. Section 112 of the Act is titled "*Right of residence for more than three months for EEA nationals*" and Section 114 is titled "*Right of residence for more than three months for family members and other foreign nationals who are not EEA nationals*". They provide in relevant parts:

> *112. "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. possesses sufficient funds to provide for himself or herself and any accompanying family members, and is covered by a health insurance policy that covers all risks during the stay, or*
>
> *d. is enrolled at an approved educational institution. The condition applies that the primary purpose of the stay is education, including vocational education, that the person in question is covered by a health insurance policy that covers all risks during the stay, and that a statement is issued that confirms that the person in question possesses sufficient funds to provide means of subsistence for himself or herself and any accompanying family members.*

[7] Lov om utlendingers adgang til riket og deres opphold her (utlendingsloven), LOV-2008-05-15-35. An English translation of the act is accessible here: https://lovdata.no/dokument/NLE/lov/2008-05-15-35.

A foreign national who resides in the realm in accordance with the first paragraph, (a), but who ceases to be employed or self-employed nevertheless retains status as an employee or a self-employed person if the person

is temporarily incapable of work as a result of illness or accident,

provides documentary evidence of involuntary unemployment after having had paid work for more than one year, and has registered as a jobseeker with the Norwegian Labour and Welfare Service,

documents to be involuntarily unemployed following the expiry of a fixed-term employment contract of less than one year's duration or the person has involuntarily lost the job during the course of the first 12 months, and has registered as a jobseeker with the Norwegian Labour and Welfare Service, or

commences a course of vocational education. Unless the person in question is involuntarily unemployed, the status as an employee or a self-employed person under the first paragraph, (a), will only be retained as long as the course of vocational education is related to the person's previous work.

In cases as mentioned in the second paragraph, (c), status under the first paragraph, (a), lapses after six months.

[…]"

114. "The provisions of section 113, first and second paragraphs, apply correspondingly to foreign nationals who are not EEA nationals 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).

A foreign national as mentioned in section 110, fourth paragraph, has a right of residence for more than three months provided that this occurs as part of the provision of a service or is necessary for the establishment of a business in the realm. The King may issue regulations containing further provisions.

[…]

In the event of divorce or cessation of cohabitation, the EEA national's family members who are not EEA nationals retain the right of residence for as long as they themselves fulfil the conditions in section 112, first paragraph, (a), (b) or (c), or are a family member of a person who fulfils the conditions in section 112, first paragraph, (a), (b) or (c), provided that

at the time of separation, the marriage had lasted three years, including one year in the realm,

parental responsibility for children of the EEA national has been transferred to the spouse who is not an EEA national under an agreement or judgment,

the spouse who is not an EEA national, or any children, have been exposed to violence or other serious abuse in the marriage, or

the spouse who is not an EEA national exercises visitation with children in the realm under an agreement or judgment.

[…]"

17. Section 115 of the Immigration Act is titled "*Right of permanent residence for EEA nationals*" and provides in relevant parts:

> *"An EEA national who has had continuous lawful residence in the realm under sections 112 and 113 for five years is granted a permanent right of residence. Temporary residence outside the realm is permitted in certain circumstances without the requirement for continuous residence being affected. The right of permanent residence exists independently of whether or not the conditions for residence in sections 112 and 113 are fulfilled. The right of permanent residence lapses if the holder resides outside the realm for more than two consecutive years.*
>
> *[…]*
>
> *An EEA national who is a family member and lives with a person as mentioned in the second paragraph is granted a permanent right of residence at the time that the permanent right of residence under the second paragraph arises.*
>
> *[…]"*

18. Section 116 of the Immigration Act is titled "*Right of permanent residence for family members who are not EEA nationals*" and provides in relevant parts:

> "*A family member who is not an EEA national, and who under section 114, first paragraph, has lived with an EEA national and has had continuous lawful residence in the realm for five years, is granted a permanent right of residence. The same applies to a family member who is not an EEA national and who under section 114, third paragraph, first sentence, or fourth paragraph has had continuous lawful residence in the realm for five years. Temporary residence outside the realm is permitted in certain circumstances without the requirement for continuous residence being affected. The permanent right of residence exists independently of whether the conditions for residence in section 114 are fulfilled. The permanent right of residence lapses if the holder resides outside the realm for more than two consecutive years.*
>
> *A permanent right of residence under section 115, fourth and fifth paragraphs, applies correspondingly to family members who are not EEA nationals.*
> *[…]"*

19. Chapter 7 of the Immigration Act includes the general rules on the right of residence in Norway. Decisions on temporary and permanent right of residence are made by the Directorate of Immigration, cf. Section 65(1) of the Immigration Act.

20. Furthermore, the organisation of the immigration authorities is regulated in Chapter 10 of the Immigration Act. While the Directorate of Immigration makes decisions on the right of residence pursuant to Chapter 13 of the Immigration Act, such decisions can be appealed to the Immigration Appeals Board, pursuant to Section 76 which provides, in relevant parts:

> *"Decisions pursuant to the Act made by the Directorate of Immigration can be appealed to the Immigration Appeals Board.*
>
> *The Ministry's authority to issue instructions does not provide for the opportunity to instruct on the decision in an individual case. Moreover, the Ministry cannot instruct the Immigration Appeals Board on the interpretation of the law or the exercise of discretion in cases except for cases regarding contribution pursuant to Section 90a. The Ministry may instruct on the prioritisation of cases.*

The Ministry can decide that a decision made by the Directorate of Immigration in favour of the foreigner shall be reviewed by the Immigration Appeals Board. That Decision shall be made in writing and with reasoning, at the latest four months after the original decision was made. Chapter IV and VI of the Administration Act on case preparation, decisions, and complaint does not apply for such decisions.
[…].”

21. In Section 77 of the Immigration Act, the following is provided, in relevant parts, on the independence and composition of the Immigration Appeals Board:

> *“The Immigration Appeals Board decides as an independent body in those cases which is put before it pursuant to Section 76 first and third paragraph.*
>
> *The Immigration Appeals Board is led by a director which must satisfy the requirements of judges. The director is appointed on a fixed term by the King in Council for six years. Re-appointments can occur for one additional term.*
>
> *The Immigration Appeals Board shall have leaders that must satisfy the requirements of judges. They are appointed by the King in Council.*
>
> *The Immigration Appeals Board shall have members appointed by the Ministry by proposals from the public administrators, Norges Juristforbund, Samfunnsviterne and humanitarian organisations. The members are appointed for four years. The appointment is voluntary and, thus, each individual must accept the appointment. The members shall appear independent and without connection to that actor which proposed the appointment. Re-appointments can occur for one additional term. […].*
>
> *[…]*
>
> *Employees of the Ministries, practicing lawyers and authorised assistant lawyers cannot be members of the Board.*
>
> *The Ministry may dismiss a member of the Board of its appointment if the member*
> *a. does not satisfy the conditions of electability in the fifth paragraph*
> *b. has not adhered to its duty of confidentiality*
> *c. grossly has neglected other duties of the appointment*
> d. *requests it*.
>
> *[…]*”

22. Moreover. Section 16-2(2) of the Immigration Regulation (*Utlendingsforskriften)*[8] clarifies that the Director of the Immigration Appeals Board “*can provide general guidelines on the processing of individual cases, exercise of discretion etc. but cannot instruct in an individual case.”*

23. Challenges to decisions made by the Immigration Appeals Board are regulated in Section 79 of the Immigration Act, which provides in relevant parts:

[8] Forskrift om utlendingers adgang til riket og deres opphold her (utlendingsforskriften), FOR-2009-10-15-1286).

> *"By legal proceedings against the State on the lawfulness of a decision by the Immigration Appeals Board pursuant to this Act and claims for damages caused by such decisions, the Immigration Appeals Board acts on behalf of the State […].*
>
> *When the Immigration Appeals Board has decided in favour of the foreigner pursuant to this Act, the Ministry can initiate legal proceedings to challenge the validity of the decision. Legal proceedings must be initiated by four months after the decision was made. Legal action is taken against the foreigner. Mediation in the Conciliation Board shall not occur.*
>
> *Legal proceedings against the State regarding the validity of decisions made by the Immigration Appeals Board, or a claim for damages caused by such decisions, shall be brought before Oslo District Court. […].*"

24. An exception to the main rule of the Ministry not being competent to instruct in an individual case, as stated in Section 76 of the Immigration Act, is provided in Section 128, which provides in relevant parts:

> *"1. The Ministry may, irrespective of the limitations provided by Section 76, second paragraph, instruct on the form of procedure and on all procedural decisions in individual cases that may affect fundamental national interest or foreign policy considerations. […].*
>
> *2. The Ministry may in all cases instruct subordinate agencies to grant a residence permit in Norway or make another decision in favour of a foreign national where the case has a bearing on fundamental national interests or foreign policy considerations. […]"*

25. Moreover, it follows from Section 129 of the Immigration Act, that the Ministry will be the appellate body in cases where fundamental national interest or foreign policy considerations have been decisive. The provision reads, in relevant parts:

> *"The Ministry is the appellate body in cases that are not decided by the Ministry in the first instance, and where fundamental national interest or foreign policy considerations wholly or partly have been decisive for the outcome of the matter."*

3 THE QUESTIONS REFERRED

26. The referring court has asked the Court the following questions:

> *"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?"*

4 LEGAL ANALYSIS

4.1 Preliminary Remarks

27. The referring court's two questions primarily concern the extent to which a third-country national's income and/or other resources may be considered in determining whether an EEA national meets the requirement of having sufficient resources for himself or herself and their family members under Article 7(1)(b) of Directive 2004/38/EC.

28. Although not raised as a separate question, the Request raises the consideration of whether the Immigration Appeals Board qualifies as a "*court or tribunal*" for the purposes of Article 34(2) SCA. Hence, before addressing the questions of the Request, ESA will address the admissibility of the Request.

4.2 Admissibility

29. ESA recalls that the Court has established that the term "*court or tribunal*" in Article 34 SCA must be interpreted autonomously, meaning its classification under national law is not decisive.[9]

30. According to settled case-law, the distinction between judicial and administrative functions does not require a strict application as long as the referring body possesses the characteristics mentioned below.[10] Furthermore, and in the context of the present case, ESA notes that the Court has, in numerous instances, accepted requests from various appeals bodies.[11] It has, for instance, stated that "*an interpretation that would render administrative appeal boards ineligible to request an advisory opinion would undermine the objective of Article 34 SCA, which is to*

[9] Judgment of the EFTA Court of 16 December 1994 in Case E-1/94 *Restamark,* [1994-1995] EFTA Ct. Rep. 15, paragraph 24.

[10] Judgments of the EFTA Court of 27 January 2010 in Case E-4/09 *Inconsult,* [2009-2010] EFTA Ct. Rep. 86, paragraphs 22-24, of 15 December 2011 in Case E-1/11 *Dr. A,* [2011] EFTA Ct. Rep. 484, paragraphs 32-42, of 9 July 2014 in joined Cases E-3/13 and E-20/13 *Olsen and Others*, [2014] EFTA Ct. Rep. 400, paragraphs 58-72, of 6 April 2017 in Case E-5/16 *Municipality of Oslo,* [2017] EFTA Ct. Rep. 52, paragraphs 35-43, and of 16 July 2020 in Case E-8/19 *Scanteam*, paragraphs 40-54.

[11] Such appeals bodies include the Appeals Board of the Financial Markets Authority in Case E-9/17 *Edmund Falkenhahn AG v. the Financial Market Authority*, [2018] EFTA Ct. Rep. 153, the Appeals Committee at the Finnish Board of Customs in Case E-1/94 *Restamark*, paragraphs 24-31, the Norwegian Board of Appeal for Industrial Property Rights in Case E-5/16 *Municipality of Oslo*, paragraphs 35-43, the Market Council in Norway in Case E-4/04 *Pedicel AS*, [2005] EFTA Ct. Rep. 1, paragraphs 22-24, the Norwegian Appeal Board for Health Personnel in Case E-1/11, *Dr. A*, paragraphs 41-42, and the Norwegian Complaints Board for Public Procurement in Case E-8/19 *Scanteam*, paragraphs 40-54.

establish a system of cooperation as a means of ensuring a homogeneous interpretation of EEA law".[12]

31. In determining whether a referring body qualifies as a court or tribunal under Article 34 SCA, the Court has considered a number of factors,[13] "*in particular whether the referring body is established by law, has a permanent existence, exercises binding jurisdiction, applies the rule of law and is independent, and, as the case may be, whether its procedure is inter partes and similar to a court procedure*".[14]

32. ESA submits that of these factors, it is primarily the aspect of *independence* that raises potential questions in the present case. In Case E-8/19 *Scanteam,* the Court observed that the concept of independence is based on an overall examination of the body and requires that it acts as a third party in relation to the authority issuing the contested decision.[15] As such, independence has both external and internal dimensions. Externally, the body must be safeguarded from outside influence or pressure that could compromise its impartial judgment. Internally, impartiality must be ensured, fostering a level playing field for the parties to the proceedings and their respective interests in relation to the subject matter of those proceedings. To uphold independence and impartiality, the Court further clarified that there must be rules governing the body's composition, member appointments, terms, and grounds for recusal or dismissal, ensuring confidence in the body's resistance to external influence and neutrality in relation to the interests before it.[16]

33. As regards the present case, ESA observes that pursuant to Section 76(2) of the Immigration Act, the Ministry may instruct the Immigration Appeals Board on the prioritisation of cases but cannot issue instructions regarding individual cases. According to the same provision, the Ministry also lacks the authority to instruct the Immigration Appeals Board on matters of legal interpretation or discretionary judgment. Similarly, pursuant to Section 16-2(2) of the Immigration Regulation, the director of the Immigration Appeals Board cannot instruct its members in individual

[12] Case E-8/19 *Scanteam,* paragraph 46. See also judgment of the EFTA Court of 10 November 2014 in Case E-9/14 *Otto Kaufmann* [2014] EFTA Ct. Rep. 1048, paragraph 28.
[13] Case E-5/16, *Municipality of Oslo*, paragraph 39: "*The rules relating to the referring body must be considered as a whole in order to determine if that body fulfils the necessary prerequisites to be considered independent*."
[14] Case E-5/16 *Municipality of Oslo*, paragraph 38 and joined Cases E-3/13 and E-20/13, *Olsen and Others*, paragraph 60 and case law cited.
[15] The Court, however, noted in paragraph 43 of its judgment in Case E-8/19, *Scanteam* that the *inter partes* requirement is not an absolute criterion
[16] Case E-8/19 *Scanteam,* paragraphs 48-50.

cases, but may provide general guidelines concerning the processing of cases and the exercise of discretion.

34. ESA further notes that pursuant to Section 128(1) of the Immigration Act, the Ministry may, independently of the limitations specified in Section 76(2), issue instructions concerning the form of procedure and on all procedural decisions in individual cases that may involve *fundamental national interests or foreign policy considerations*.[17] Furthermore, according to Section 128(2), the Ministry may, in all cases before subordinate agencies, instruct such agencies to grant a residence permit in Norway or to make another decision in favour of a foreign national where the case has a bearing on *fundamental national interests or foreign policy considerations*. ESA acknowledges having limited information concerning how the terms "*fundamental national interests or foreign policy considerations*" have been interpreted and highlights that this is for the Norwegian Government to clarify.[18]

35. ESA emphasises, however, that pursuant to Section 129 of the Immigration Act, it is the Ministry, and not the Immigration Appeals Board, that acts as the appellate body in cases where fundamental national interests or foreign policy considerations have been wholly or partly decisive for the outcome of the case. Pending verification by the Norwegian Government, this structure indicates that such cases typically do not fall within the Immigration Appeal Board's jurisdiction.[19]

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[17] See preparatory works with the Act (Prop. 141 L (2012-2013) p. 52) for examples of what kind of decisions the competence can apply to: "*For example, it may be relevant to issue instructions that an immigrant passport should be issued or that no decision on rejection or expulsion should be made*" (English Translation). The official Norwegian version provides: "*Det kan for eksempel være aktuelt å instruere om at det skal utstedes utlendingspass eller at det ikke skal treffes vedtak om bortvisning eller utvisning."*

[18] ESA however notes that according to page 3 of the Ministry's instructions from 2023 on handling cases that may affect fundamental national interests or foreign policy considerations under Chapter 14 of the Immigration Act, GI-03/2023, the term "*fundamental national interests*" is understood so that it includes topics such as espionage, sabotage, subversive activities, or terrorism. The term "*foreign policy considerations*" is, however, according to the instructions, broad. The instructions note that currently, there is no relevant case law on the interpretation of "*foreign policy considerations*". The instructions are accessible here: Revidert instruks UNE.

[19] ESA notes that according to Section 19A-7 of the Immigration Regulation, it is the Ministry itself that eventually decides whether the case should be handled by the Immigration Appeals Board. Page 5 of the instructions from the Ministry referred to in footnote 18 provides that in cases where the Appeals Board considers that the matter may affect fundamental national interests or foreign policy considerations, the Appeals Board must submit the case to the Ministry, as outlined in point 6 of the instructions. If the Ministry decides not to intervene as an appeal body under the rules in Chapter 14 of the Immigration Act, the Ministry will return the case to the Appeals Board for processing and resolution. Furthermore, it is explicitly stated in Section 19A-7, second paragraph of the Immigration Regulation that the Ministry may decide to intervene in a case as the appellate body. According to page 5 of the same instructions, the Ministry may also decide to withdraw the case from the Appeals Board by deciding that it should be sent back to the Directorate of Immigration for

36. Additionally, specific laws govern the composition of the Appeals Board, including the appointment of members, their term lengths, and the grounds for recusal or dismissal. Section 77 of the Immigration Act designates the Appeals Board as an "*independent body*" led by a director who meets judicial qualifications. The director is appointed by the Government for a six-year term, with the possibility of one reappointment. Board members are appointed by the government based on recommendations from public administrators and the organisations specified in Section 77(4). According to that provision, board members are required to act independently. Furthermore, the reasons for recusing or dismissing board members are outlined in Section 77(7) of the Immigration Act, and members are protected from unlawful dismissal.[20]

37. Lastly, ESA notes that the Appeals Board may have the status of a defendant under Section 79 of the Immigration Act if an appeal regarding the validity of its decision is brought before ordinary courts. However, formal designation as a party for procedural purposes, due to the structure of legal remedies at the national level, cannot be decisive for the conclusion of whether a referring body is to be considered independent.[21]

38. Based on the above, ESA submits that under the laws governing the procedure of the Immigration Appeals Board, the Board, in those cases that come before it, appears to be safeguarded from outside influence or pressure that could compromise its impartial judgment in its legal interpretation and decision-making in individual cases.[22] ESA understands that the rules governing the Board's composition are intended to maintain confidence in the Board's impartiality, protect it from external influence, and ensure its neutrality in deciding individual cases.[23]

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a first-instance procedure. This follows from the Ministry's competence to instruct on procedural matters under Section 128(1) of the Immigration Act. The Ministry can, in those cases, act as an appellate body, cf. Section 129 of the Act.

[20] See, to that effect, Case E-5/16 *Municipality of Oslo,* paragraph 40. See also, for comparison, judgment of the CJEU of 9 October 2014 in Case C-222/13 *TDC A/S*, EU:C:2014:2265, where the Court concluded that it did not appear that the dismissal of members of the administrative body in question in that case was subject to specific guarantees which would dispel any reasonable doubt as to the independence of that body.

[21] Case E-8/19 *Scanteam,* paragraph 53.

[22] For comparison see e.g. Case E-1/94 *Restamark*, paragraph 29: "*The Tullilautakunta appears to be closely linked to the central customs administration. However, **on balance**, the independence granted and assumed to be practiced by the Tullilautakunta and the elements characteristic of judicial procedures prescribed for it lead to the conclusion that this body is, in fact and law, independent and impartial"* (emphasis added).

[23] By further comparison, in case Rt-2012-1985, the Norwegian Supreme Court held in Grand Chamber that "*It is not contested that the processing of cases by Utlendingsnemnda [the*

Therefore, ESA submits that the Immigration Appeals Board constitutes a court or tribunal within the meaning of Article 34 SCA under the Court´s interpretation of that provision.

4.3 The Status of a Worker

39. The Request states that *AO* has not been a worker continuously for five years in Norway and that it has not been documented that *AO* retained her status as a worker through involuntary unemployment following the expiry of her employment contract in July 2017. More specifically, the Request states that since *AO* was not employed during certain periods due to her pregnancy, she did not retain her status as a worker, as "*AO* [did] *not avail herself of welfare schemes relating to sickness and childbirth that would have enabled her to retain her employment and status as a worker"*.[24]

40. In this regard, ESA considers it appropriate to highlight that Article 7(3) of the Directive provides that, for the purposes of Article 7(1)(a), EEA nationals who are no longer workers or self-employed are, nevertheless, to retain the status of a worker or self-employed person in specific cases, namely where they, in certain situations, are in involuntary unemployment or are temporarily unable to work as the result of an illness or accident.

41. The CJEU held in Case C-507/12 *Saint Prix* that Article 7(3) of the Directive does not exhaustively list the circumstances in which a migrant worker who is no longer in an employment relationship may continue to benefit from the status of a worker.[25] The Court determined that the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth, which require a woman to give up work temporarily*,* cannot, *a fortiori*, result in that woman losing her status as a worker.[26] More specifically, the Court held that *"[t]he fact that a mother is not actually available on the employment market of the host Member State for a few months does not mean that she has ceased to belong to that market during that period,*

Immigration Appeals Board] satisfies the right to an effective remedy before a national authority, in the way these requirements are drawn up in the case law of the ECtHR. Utlendingsnemnda is considered a court pursuant to the system of ECHR (…)". In this regard, it should, however, be noted that Chapter 14 of the Immigration Act entered into force on 1 January 2014 while the judgement from the Supreme Court is dated 21 December 2012.

[24] The Request, paragraphs 47-49.

[25] Judgment of the CJEU of 19 June 2014 in Case C-507/12 *Saint Prix*, EU:C:2014:2007, paragraph 38.

[26] Case C-507/12 *Saint Prix*, paragraph 46.

provided she returns to work and finds another job within a ***reasonable period*** *after confinement*" (emphasis added).[27] The Court went on to conclude that in order to determine whether the period that has elapsed between childbirth and starting work again may be regarded as *reasonable,*[28] the national court concerned should take account of all specific circumstances of the case and the applicable national rules on the duration of maternity leave in accordance with Article 8 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.[29]

42. In the present case and based on the facts presented in the Request, it appears as though *AO* was a worker from May 2016 until August 2017.[30] Then, it appears that she ceased working due to pregnancy until October 2018, from which time she received unemployment benefits until August 2019. After that, the Request states that *AO* has received no income.[31] The Request is unclear as to whether *AO* was registered as a job-seeker[32] in the period she was unemployed.[33] It is for the referring court to assess whether the conditions of Article 7(3), cf. 16(3) of the Directive are fulfilled.

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[27] Case C-507/12 *Saint Prix*, paragraph 41.

[28] It should also be noted that the Court clarified in paragraph 45 of the judgment that EU law guarantees special protection for women in connection with maternity. In that regard, the Court noted that Article 16(3) of Directive 2004/38 provides, for the purpose of calculating the continuous period of five years of residence in the host Member State allowing Union citizens to acquire the right of permanent residence in that territory, that the continuity of that residence is not affected, inter alia, by an absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth.

[29] Case C-507/12 *Saint Prix*, paragraph 42. The cited Directive 92/85/EEC (OJ L 348, 28.11.1992, p. 1) was incorporated into the EEA Agreement by a Decision of the Joint EEA Committee No 7/94 of 21 March 1994 (OJ L 160, 28.6.1994, p. 1).

[30] The Request, paragraph 14. There, it is stated that *AO* received employment income from June 2016 to September 2017, indicating employment from May 2016 until August 2017. However, the Request also states in paragraph 48 that *AO* was a worker from June 2016 to July 2017.

[31] Paragraph 14 of the Request states that AO received no income from August 2019 to February 2022 but also states that from October 2018 to August 2019, she received unemployment benefits from NAV, indicating that her period of no income commenced in September 2019.

[32] Judgment of the EFTA Court of 13 May 2020 in Case E-4/19 *Campbell*, paragraph 50, where the Court noted that any EEA national who exercises the right of freedom of movement to seek employment or has been employed in an EEA State other than that of residence, falls within the scope of Article 28 EEA. See also judgment of the CJEU of 13 December 2012 in Case C-379/11 *Caves Krier Frères*, EU:C:2012:798, paragraph 26 and case-law cited. Further, it must be pointed out that freedom of movement for workers entails the right for nationals of EEA States to move freely within the territory of other EEA States and to stay there for the purposes of seeking employment (see, e.g. judgment of the CJEU of 17 December 2020 in Case C-710/19 *G.M.A.,* EU:C:2020:1037, paragraph 26 and case law cited).

[33] Paragraph 13 of the Request states that *AO* registered as a job-seeker on 7 June 2016 and as a worker on 11 August 2016. Paragraph 48 of the Request states that *AO* "*has been registered with NAV as a job-seeker*", without further explanations.

4.4 Sufficient Resources

4.4.1 General remarks on residence

43. ESA recalls that in order to acquire the right of permanent residence within the meaning of Article 16(1) of Directive 2004/38/EC, the EEA national must have resided legally for a continuous period of five years in the host EEA State. The concept of legal residence implied by the terms '*have resided legally'* in Article 16(1) is to be construed as meaning a period of residence which complies with the conditions laid down in the Directive, in particular those set out in Article 7(1). Consequently, a period of residence which does not satisfy the conditions laid down in Article 7(1) cannot be regarded as a "*legal period of residence*" within the meaning of Article 16(1) of the Directive.[34]

44. Article 7(1)(b) of the Directive establishes a right of residence for EEA nationals on the territory of another EEA State for more than three months, provided that the EEA nationals have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host State during the period of residence and have comprehensive sickness insurance coverage in the host State.[35]

45. In a number of cases in which the CJEU has ruled on the extent to which a third-country national's income and/or other resources may be considered under Article 7(1)(b), it has relied on that provision in combination with Article 21 TFEU.[36]

46. Article 21 TFEU has no direct equivalent in the EEA Agreement. However, it is settled case law that the absence of an Article 21 TFEU equivalent in the EEA Agreement is not determinative for the rights of EEA nationals under EEA law, who, in the cases of *Gunnarsson,*[37] *Jabbi,*[38] *Campbell*,[39] and *MH*[40] could instead base their rights on Article 7(1)(b) of the Directive. In that context, ESA reiterates that the

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[34] Judgment of the Grand Chamber of the CJEU of 21 December 2011 in joined cases C-424/10 and C-425/10 *Ziolkowski and Szeja*, EU:C:2011:866, paragraphs 46-47.
[35] Judgment of the EFTA Court of 26 July 2016 in Case E-28/15 *Jabbi,* [2016] EFTA Ct. Rep. 575, paragraph 72.
[36] See e.g., judgment of the CJEU of 10 October 2013 in Case C-86/12 *Alokpa and Others*, EU:C:2013:645, paragraph 29 and of 30 June 2016 in Case C-115/15 *NA,* EU:C:2016:487, paragraphs 75–80.
[37] Judgment of the EFTA Court of 27 June 2014 in Case E-26/13 *Gunnarsson* [2014] EFTA Ct. Rep. 254, paragraph 82.
[38] Case E-28/15 *Jabbi*, paragraph 68-72.
[39] Case E-4/19 *Campbell*, paragraph 57.
[40] Judgement of the EFTA Court of 2 July 2024 in Case E-6/23 *Criminal Proceedings against MH,* paragraph 47.

aim of the EEA Agreement, per Article 1(1) thereof, is to create a homogenous EEA, and in order to attain that objective, the EEA Agreement shall entail, *inter alia*, pursuant to Article 1(2)(b), "*the free movement of persons*".[41]

47. ESA further highlights that the Court has concluded that Article 7(1)(b) of the Directive not only confers rights to economically active EEA nationals, but also inactive.[42] In light of the fact that there is no equivalent to Article 21 TFEU in the EEA, the Directive must be interpreted differently in order to ensure the same result in the EEA and realise the Directive's objective, which is, above all, to facilitate and strengthen the exercise of the primary right to move and reside freely within the EEA, provided that the conditions of Article 7(1)(b) of the Directive are fulfilled.[43]

4.4.2 Can resources of a third-country national be considered when assessing the requirement of "sufficient resources" under Article 7(1)(b)?

48. The referring court's first question, in essence, concerns the extent to which the income and/or other resources of a spouse who is not a national of an EEA State are to be taken into account in determining whether the EEA national has at his/her disposal sufficient resources within the meaning of Article 7(1)(b) of Directive 2004/38/EC.

49. At the outset, ESA reiterates that the notion of "*sufficient resources*" must be interpreted in light of the overarching objective of the Directive, which is to facilitate free movement, provided that the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host EEA State.[44] In light of the Directive's objective, ESA submits that according to case law the conditions laid down in Article 7(1)(b) of the Directive must be construed narrowly and in compliance with the limits imposed by EEA law and the principle of

[41] Case E-28/15 *Jabbi*, paragraph 59. See also Case E-4/19 *Campbell,* paragraph 64, where the Court highlighted that residence "*is a direct corollary to the exercise to free movement".*
[42] Case E-26/13 *Gunnarsson*, paragraphs 19, 71 and 82. This approach was confirmed in Cases E-28/15, *Jabbi,* paragraphs 78-79 and E-4/19 *Campbell,* paragraph 59.
[43] Case E-4/19 *Campbell,* paragraph 57.
[44] Judgment of the CJEU of 19 October 2004 in Case C-200/02 *Zhu and Chen*, EU:C:2004:639, paragraph 30-31 concerning the interpretation of Article 1(1) of Directive 90/364/EEC where the CJEU clarified that "*According to the very terms of Article 1(1) of Directive 90/364, it is sufficient for the nationals of Member States to "have" the necessary resources, and that provision lays down no requirement whatsoever as to their origin. The correctness of that interpretation is reinforced by the fact that provisions laying down a fundamental principle such as that of the free movement of persons must be interpreted broadly*".

proportionality.[45] Hence, ESA submits that the conditions expressly outlined in Article 7(1)(b) should not be construed as permitting the imposition of additional requirements beyond those stipulated in the provision.

50. ESA notes that Article 7(1)(b) of the Directive stipulates that the EEA national concerned is to have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host EEA State during their period of residence.[46] The provision does not impose additional requirements, particularly concerning the origin of those resources.[47]

51. It is settled case-law that the "*sufficient resources*" criterion must be interpreted as "*meaning that it suffices that such resources are available to the* [EEA national], *and that that provision lays down no requirement whatsoever as to their origin, since they could be provided, inter alia, by a national of a* [non-EEA state] *[…]*.[48]

52. Furthermore, case-law recognises that the condition can, *inter alia*, be "[…] *met where the financial resources are provided by a member of the family of the* [EEA national]."[49] As stated above, the nationality of the providing family member is not of relevance.[50] On that note, ESA submits that, for the purposes of Article 7(1)(b) of the Directive, a refusal to consider resources on account of them originating from a third-country national would undermine the effectiveness of EEA nationals' primary and individual right to move and reside freely within the EEA[51] and potentially the preservation of the unity of their family life.[52]

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[45] Judgment of the CJEU of 19 September 2013 in Case C-140/12 *Brey,* EU:C:2013:565, paragraph 70.

[46] In this context, ESA highlights that the mere fact that a national of another EEA State receives social assistance should not be considered sufficient in itself to show that he or she constitutes an *unreasonable* burden for the social assistance system of the host EEA State. To that effect, see e.g. Case C-140/12 *Brey*, paragraph 75.

[47] Judgment of the CJEU 2 October 2019 in Case C-93/18 *Ermira Bajratari*, EU:C:2019:809, paragraph 34.

[48] Case C-86/12 *Alokpa and Others*, paragraph 27. See also Case C-200/02 *Zhu and Chen*, paragraph 30 concerning the interpretation of Article 1(1) of Directive 90/364/EEC.

[49] Judgment of the CJEU of 23 March 2006 in Case C-408/03 *Commission v Belgium*, EU:C:2006:192, paragraph 42. See also judgment of the CJEU of 27 February 2020 in Case C-836/18 *RH*, EU:C:2020:119, paragraph 31 and case-law cited.

[50] See e.g. Case C-836/18 *RH*, paragraph 31 and Cases C-200/02 *Chen,* paragraph 30, C-86/12 *Alokpa*, paragraph 27, C-115/15 *NA*, paragraphs 77-78 and C-93/18 *Ermira Bajratari*, paragraph 53.

[51] Case E-4/19 *Campbell*, paragraph 57.

[52] Case E-28/15 *Jabbi*, paragraph 50. See also paragraph 81 of that judgment, according to which the interpretation of Article 7 of the Directive must take account of the right to respect for private and family life, as laid down in Article 8 of the European Convention on Human Rights. See also judgment of the EFTA Court of 21 March 2024 in Case E-5/23 *Criminal Proceedings against LDL*, paragraph 58, where the Court held that "*any interpretation of the Directive must be exercised in the light of and in line with fundamental rights and freedoms that form part of the general principles of EEA law.*

53. As pointed out in the Request, some of the CJEU's case-law concerning the extent to which a third-country national's resources may be considered under Article 7(1)(b) concerns children.[53] On that note, ESA underlines that the CJEU's case law on the irrelevance of the source of the resources has been unequivocal, and the Court has extended this interpretation to cases that do not involve children. For example, in Case C-836/18 *RH*, the Court found that "*the requirement concerning the sufficiency of resources, set out in Article 7 of Directive 2004/38, must be interpreted as meaning that, although the Union citizen must have sufficient resources,* ***there is not the slightest requirement under EU law concerning their source****, since they may be provided, in particular, by a member of that citizen's family*" (emphasis added).[54]

4.4.3 Must resources of a third-country national only be considered "in part"?

54. The judgment of the CJEU in Case C-218/14 *Singh* is cited in the Request.[55] In that Judgment, the CJEU ruled that *"Article 7(1)(b) of Directive 2004/38 must be interpreted as meaning that a Union citizen has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host Member State during his period of residence even where those resources derive* ***in part*** *from those of the spouse who is a third-country national"* (emphasis added).[56]

55. The referring court seems to interpret the phrase "*in part*" to mean that the EEA national must contribute some portion of the resources personally, suggesting that resources cannot rely exclusively on those of a third-country spouse.[57] ESA, however, notes that the CJEU's language in Case C-218/14 *Singh* was specifically framed to address a question referred to the Court concerning whether the resources requirement could be satisfied "*even where those resources derive* ***in part*** *from those of the spouse who is a third-country national*" (emphasis added).[58]

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[53] The Request, paragraph 58.
[54] Case C-836/18 *RH*, paragraph 31. The case concerned the interpretation of Article 20 TFEU, but paragraph 31 of the judgment refers to the interpretation of Article 7 of the Directive in general and, hence, it is relevant to the present case. See also Case C-218/14 *Singh,* EU:C:2015:476, which concerned the relevance of the resources deriving in part from those of a spouse of third-country nationality.
[55] The Request, paragraphs 56-57.
[56] Case C-218/14 *Singh*, paragraph 77.
[57] The Request, paragraph 57.
[58] Case C-218/14 *Singh*, paragraph 71.

ESA thus submits that the phrase "*in part*" cannot be interpreted as requiring the EEA national to contribute a part of the resources personally.

56. It clearly follows from Case C-218/14 *Singh* that requiring an EEA national to possess such resources personally, rather than drawing on those of a family member, including a third-country national, would impose an additional condition not stated in Directive 2004/38. Such an interpretation would, according to the CJEU, exceed what is necessary to safeguard the social assistance system of the host State and would constitute a disproportionate restriction on the fundamental right to freedom of movement and residence as guaranteed, in that case, by Article 21 TFEU.[59] ESA submits that EEA nationals must be granted the same rights under EEA law.[60]

57. Based on the above, ESA submits that the condition of having "*sufficient resources*" can be satisfied irrespective of the origin of those resources since they may be provided, *inter alia*, by a member of that EEA national's family.

4.4.4 Proportionality and a case-by-case assessment

58. ESA submits that since the right of freedom of movement is one of the fundamental rights guaranteed in the EEA, the conditions laid down in Article 7(1)(b) of the Directive must be construed in compliance with the limits imposed by EEA law, including the principle of proportionality.[61] Compliance with that principle means that the national measures taken in applying the conditions and limitations laid down in Article 7(1)(b) must be appropriate and necessary to attain the objective pursued.[62]

59. ESA notes that, in order to protect the legitimate interests of the host EEA State, Directive 2004/38 contains provisions allowing that State to act in the event of an actual loss of financial resources to prevent the holder of the residence permit from becoming a burden on the public finances of that EEA State. Under Article 14(2) of the Directive, the right of EEA nationals and their family members to reside in the host EEA State for more than three months on the basis of Article 7 of the Directive

[59] Case C-218/14 *Singh*, paragraphs 74-75.
[60] With reference to Case E-26/13 *Gunnarsson,* paragraph 82; Case E-28/15 *Jabbi*; Case E-4/19 *Campbell*, paragraph 57; Case E-6/23 *Criminal Proceedings against MH*, paragraph 47.
[61] Case C-93/18 *Ermira Bajratari*, paragraph 35.
[62] Case C-93/18 *Ermira Bajratari,* paragraph 36 and case law cited.

continues only as long as those nationals and family members meet the conditions of Article 7.[63]

60. ESA observes that an interpretation of the condition of sufficient resources in Article 7(1)(b) of the Directive, to the effect that an EEA national can never rely, for the purposes of that provision, on income and/or other resources from a spouse of third-country national, would introduce, in addition to that condition, a *presumptive exclusion* relating to the origin of the resources. ESA submits that this would constitute a disproportionate interference with the exercise of the EEA national's rights of free movement and residence, in so far as that requirement is not necessary to achieve the objective pursued.[64]

61. ESA submits that a national measure allowing authorities in a host EEA State to deny an EEA national and his or her family members the right of residence on the sole grounds that the EEA national's resources derive from a third-country national goes beyond what is necessary to achieve the objectives of Article 7(1)(b) of the Directive and would be disproportionate.[65]

5 CONCLUSION

Accordingly, the Authority respectfully requests the Court to answer the questions referred as follows:

> The requirement concerning the sufficiency of resources, set out in Article 7 (1)(b) of Directive 2004/38/EC, must be interpreted as meaning that, although EEA nationals must have sufficient resources available to them, there is no requirement under EEA law as to the origin of those resources. They may be provided, in full or in part by, *inter alia*, a third-country national.
>
> Since the first question has been answered in the affirmative, it is not necessary to address the second question referred.

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[63] When carrying out an assessment under Article 14 of the Directive, the authorities in the host EEA State must carry out a proportionality test. To that effect, see e.g., Case C-140/12 *Brey*, paragraph 72, the CJEU emphasised that "[*b]y making the right of residence for a period of longer than three months conditional upon the person concerned not becoming an "unreasonable" burden on the social assistance "system" of the host Member State, Article 7(1)(b) of Directive 2004/38, interpreted in the light of recital 10 to that directive, means that the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole*."

[64] For comparison, see Case C-93/18 *Ermira Bajratari*, paragraph 42.

[65] See e.g. judgment of the CJEU of 3 October 2019 in Case C-302/18 *X*, EU:C:2019:830, paragraph 33 and case-law cited.

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