JUDGMENT OF THE COURT

13 May 2020

(*Freedom of movement of workers – Directive 2004/38/EC – Right of residence – Derived rights for third-country nationals)*

In Case E-4/19,

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

Campbell

and

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

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

THE COURT,

composed of: Páll Hreinsson, President, Per Christiansen, and Bernd Hammermann (Judge-Rapporteur), Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

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

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

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

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

having regard to the Report for the Hearing,

having heard the oral argument of Ms Campbell, represented by Anne-Marie Berg; the Norwegian Government, represented by Ketil Bøe Moen, Advocate, acting as Agent; ESA, represented by Ewa Gromnicka and Erlend Møinichen Leonhardsen; and the Commission, represented by Albine Azema and Michael Wilderspin; at the hearing on 26 November 2019,

gives the following

Judgment

I Legal background

EEA law

1 Article 28 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

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.

…

2 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77), as corrected by OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34, ("the Directive") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 158/2007 (OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17; "Decision No 158/2007"), which adapted and added it at point 3 of Annex VIII, and points 1 and 2 of Annex V. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway, and fulfilled on 1 September 2008. The decision entered into force on 1 March 2009.

3 Article 1 of Decision No 158/2007 reads:

Annex VIII to the Agreement shall be amended as follows:

1) The text of point 3 (Council Directive 73/148/EEC) shall be replaced by the following:

'…

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

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

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

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

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

...

4 Together with the Decision of the EEA Joint Committee, the Contracting Parties adopted a Joint Declaration by the Contracting Parties to Decision No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement ("Joint Declaration"). This reads:

The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.

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

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking

into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

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

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

6 Article 2 of the Directive, headed “Definitions”, at point 2 reads:

For the purposes of this Directive:

…

2) "Family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

7 Article 3 of the Directive, headed “Beneficiaries”, as adapted reads:

1. This Directive shall apply to all nationals of EC Member States and EFTA States who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the national of EC Member States and EFTA States having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the national of EC Member States and EFTA States;

(b) the partner with whom the national of EC Member States and EFTA States has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

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

9 Article 6 of the Directive, headed "Right of residence for up to three months", as adapted reads:

1. Nationals of EC Member States and EFTA States shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the national of an EC Member State or EFTA State.

10 Article 7 of the Directive, headed "Right of residence for more than three months", as adapted reads:

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

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

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

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice,

for the principal purpose of following a course of study, including vocational training; and

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

(d) are family members accompanying or joining a national of an EC Member State or EFTA State who satisfies the conditions referred to in points (a), (b) or (c).

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

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

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

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

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

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

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

11 Article 35 of the Directive, headed “Abuse of rights”, reads:

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

National law and practice

12 The Act of 15 May 2008 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm (“Norwegian Immigration Act” – *Lov om utlendingers adgang til riket og deres opphold her*), Chapter 2 “Visa, entry and exit control and rejection, etc.”, Section 17, first paragraph reads:

A foreign national may be rejected

(d) when the foreign national lacks the necessary permission under the Act,

13 Chapter 13, “Special provisions for foreign nationals who come under the Agreement on the European Economic Area (the EEA Agreement) and the Convention establishing the European Free Trade Association (the EFTA Convention),” Section 110, paragraph 2, of the Norwegian Immigration Act reads:

…

Family members of a Norwegian national are subject to the provisions of this chapter if they accompany or are reunited with a Norwegian national who returns to the realm after having exercised the right to free movement under the EEA Agreement or the EFTA Convention in another EEA country or EFTA country.

14 Chapter 13, Section 112 of the Norwegian Immigration Act reads:

An EEA national has a right of residence for more than three months as long as the person in question:

(a) is employed or self-employed,

(b) is to provide services,

(c) is self-supporting and can provide for any accompanying family member and is covered by a health insurance policy that covers all risks during the stay, or

(d) is enrolled at an approved educational institution. This is subject to the primary purpose of the stay being education, including vocational education, and to the person in question being covered by a health insurance policy that covers all risks

during the stay and making a statement that the person in question is self-supporting and can provide for any accompanying family member.

15 Chapter 13, Section 113, paragraphs 1 and 2, of the Norwegian Immigration Act reads:

An EEA national who is a family member and who accompanies or is reunited with an EEA national who has a right of residence under section 112, first paragraph, (a), (b) or (c), has a right to reside in the realm for as long as the EEA national's right of residence lasts.

An EEA national who is a spouse, cohabitant or dependent child under the age of 21, and who accompanies or is reunited with an EEA national with a right of residence under section 112, first paragraph, (d), has a right to stay in the realm for as long as the EEA national's right of residence lasts.

16 Chapter 13, Section 114, paragraph 1, of the Norwegian Immigration Act reads*:*

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).

17 The relevant instruction from the Ministry of Labour and Social Affairs to the immigration authorities, Circular AI-2017 (*Instruks i saker om familiegjenforening etter EØS-regelverket*, "the Circular"), adopted on 31 May 2017, provides that for a third-country national family member to obtain a derived right of residence in Norway under EEA law, the returning Norwegian national must have been an employee, a self-employed person, a service provider or student or must have lived in another EEA State with sufficient funds to support himself and his family.

18 Point 3 of the Circular provides that the assessment of whether the residence in the host State has been real and genuine must be carried out on a case by case basis. It lists factors which might be relevant for that assessment. According to the Circular, the factors listed are non-exhaustive and it is possible to present all types of documentation that may confirm the use of the right to move and reside freely in another EEA State. However, the Circular expressly states that one of the conditions of assessment is whether the Norwegian citizen has been an employee, self-employed person, service provider, student or had their own resources and stayed in the other EEA State for at least three months continuously before returning to Norway (making reference to Case E-28/15 *Jabbi* [2016] EFTA Ct. Rep. 575, ("*Jabbi*"), paragraph 80). Shorter stays such as weekends and holidays do not fulfil the conditions themselves if taken together they last for a longer period (making reference to the judgment in *O.* v *Minister voor Immigratie, Integratie en Asiel and Minister voor*

Immigratie, Integratie en Asiel v *B.*, C-456/12, EU:C:2014:135, ("*O. and B.*"), paragraph 59).

II Facts and procedure

19 Ms Campbell, a Canadian national, has been married to Ms Gjengaar, a Norwegian national, since June 2012. Ms Campbell's application for family reunification to reside in Norway with Ms Gjengaar was rejected by decision of the Directorate of Immigration of 8 October 2012. That decision was upheld on 12 December 2012 by the Immigration Appeals Board.

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

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

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

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

24 The Directorate of Immigration refused the application on 23 September 2014, and at the same time adopted a decision to reject (NO*: "bortvise"*) Ms Campbell from Norway on the ground that she lacked the necessary permit under Section 17, first paragraph, point (d) of the Norwegian Immigration Act.

25 The Immigration Appeals Board upheld that decision on 23 December 2016. In its opinion, Ms Campbell did not meet the conditions for right of residence under the EEA rules. The Immigration Appeals Board did not find it disproportionate for the purposes of the Norwegian Immigration Act to reject Ms Campbell. Following an application for reversal of the decision, the Immigration Appeals Board on 19 January 2017 adopted a decision not

to reverse its earlier decision. That decision was upheld by way of reply to notice of legal action of 25 January 2017.

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

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

28 Ms Campbell appealed Borgarting Court of Appeal's judgment to the Supreme Court of Norway on points of law. By decision of 25 February 2019, the Supreme Court's Appeals Selection Committee granted leave to appeal. By decision of 27 March 2019 the conditions of sufficient resources and health insurance, specified in Article 7(1)(b) of the Directive, were provisionally excluded from the scope of proceedings.

29 Ms Campbell then put forward a new claim concerning a derived right of residence as a result of her spouse having exercised her freedom of movement as a worker on the basis of Article 28 EEA. By decision of 5 April 2019, the Supreme Court's Appeals Selection Committee did not grant leave for Ms Campbell to put forward that claim under national procedural law.

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

31 The referring court's request, dated 28 June 2019, was registered at the Court on the same date.

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

> *1. In the light of the EU Court of Justice's recent case law in which the view of the Grand Chamber in its judgment of 12 March 2014 in Case C-456/12 O and B concerning the derived right of residence has been maintained, and on the basis of the homogeneity principle, is Article 7(1)(b) of Directive 2004/38/EC, read in conjunction with its Article 7(2), applicable by analogy to a situation where an EEA citizen returns to the home State together with a family member?*
>
> *2. What does the requirement of 'continuous' residence under the Directive as expressed in paragraph 80 of the EFTA Court's judgment of 26 July 2016 in Case E-28/15 Jabbi entail? It would be especially useful if the EFTA Court could comment on:*
>
> *a. whether and, if so, to what extent there can be interruptions in residence, and*
>
> *b. whether the cause of a possible interruption – such as its being for work-related reasons – may be of import for the assessment of whether the residence is continuous within the meaning of the Directive.*
>
> *3. What is required by the condition that the EEA citizen's residence in the host State must have been 'genuine such as to enable family life in that State', as expressed in, inter alia, paragraph 80 of the EFTA Court's judgment of 26 July 2016 in Case E-28/15, Jabbi; paragraph 51 of the judgment of the EU Court of Justice of 12 March 2014 in Case C-456/12, O and B, read in conjunction with paragraphs 56 and 57 thereof; and paragraphs 24 and 26 of the latter Court's judgment of 5 June 2018 in Case C-673/16, Coman, and read also in the light of the abuse of rights provision in Article 35 of the Directive?*

33 On 6 November 2019, the Court prescribed measures of organization of procedure pursuant to Article 49(1), and in accordance with, Article 49(3)(a) of the Rules of Procedure.

34 The measures of organization of procedure made reference to point 9 of the referral, wherein the referring court quoted Borgarting Court of Appeal's relevant findings of fact, which reads as follows:

> *"... Gjengaar and her spouse ... Campbell travelled to Sweden a couple of weeks after Ms Campbell received the Immigration Appeals Board's decision of 12*

December 2012 refusing her application for family reunification. Ms Gjengaar entered into a lease with an acquaintance who owned a flat in the village of Mörsil, situated about 200 km from Trondheim. She applied, vainly, for work in Sweden, until 21 February 2013, when she began working as a restaurant employee on board Hurtigruten in Norway. She had also previously worked there for several periods for a number of years, from 2007 to 2012. In her work, Ms Gjengaar had shifts with three weeks at work and three weeks off. During her time off she usually travelled back to Sweden, but she also stayed in Trondheim from time to time, and took holidays in other countries. She left the job on Hurtigruten on 10 September 2013, but was back working there from March 2014, after she permanently had moved back to Norway. Ms Gjengaar formally registered as having moved back to Norway in January 2014, but on the basis of the evidence adduced it is taken as established that Ms Gjengaar in fact predominantly stayed in Norway from the end of November 2013 until she formally registered as having moved back to Norway. …"

35 Those participating in the proceedings before the Court were requested to answer the following questions in writing, by 15 November 2019:

a) *In light of the description of the facts as presented by the Supreme Court of Norway, please provide your views on whether, as a matter of EEA law, the situation of a person such as Ms Gjengaar falls within the scope of the freedom of movement of workers?*

b) *If in your view a person in a situation such as that of Ms Gjengaar may be considered to be a worker or an economically active person, how may that affect the application of Article 7(1) of the Directive?*

36 Responses were received on 15 November 2019 from Ms Campbell, the Government of Norway, ESA and the Commission.

37 Ms Campbell submits that it had been submitted in the proceedings before the Oslo District Court that Ms Gjengaar qualified as a worker under Article 28 EEA, and hence exercised her rights in accordance with Article 7(1)(a) of the Directive. In response to question (a), the term "worker" should be interpreted in its EU/EEA legal context. As a job-seeker in Sweden, Ms Gjengaar qualified as a worker for the first two months. That Ms Gjengaar subsequently lived in Sweden and worked in Norway did not change her status as a worker. Moreover, Ms Gjengaar qualified as a worker from September 2013 until she returned to Norway, even though during this period she was not exercising an economic activity. She thus qualified as a worker during the entirety of her stay in Sweden. In response to question (b), Article 28 EEA would apply in any event, even if the Directive were to be inapplicable. Article 7(1)(a) of the Directive may be applied by analogy in the event of a return to the home country.

38 The Government of Norway submits that the Court's questions raise issues that, in the circumstances of the case, fall outside the Court's tasks in the cooperation with the national

court. In any event, even assessing the substance of the questions, would not provide any additional arguments for the right of residence of Ms Campbell. Should the present case also raise questions concerning free movement of workers that the Court finds it appropriate to comment upon, contrary to the Government of Norway's submissions, it cannot in any event be claimed that the referring court's questions concerning the Directive are irrelevant. Those questions must thus be answered by the Court, irrespective of whether it should find that it may *in addition* furnish guidance concerning the interpretation of inter alia Article 28 EEA.

39 In response to question (a), ESA submits that as a matter of EEA law, the situation of a person such as Ms Gjengaar falls within the scope of the freedom of movement of workers as established by Article 28 EEA. The freedom of movement for workers is enshrined in Article 28 EEA and Article 7 of the Directive gives effect to this provision. Rights following from Article 7 would also follow from Article 28 EEA. However, Article 7 of the Directive does not set out exhaustively when the status of a worker is conferred under Article 28 EEA. Once an EEA national has the status of a worker, no other conditions for the right of residence exceeding three months are required. In view of the facts of the case, Ms Gjengaar should be considered to be economically active, and thus her situation should be seen as falling within the scope of EEA law, namely Article 28 EEA and the Directive. In response to question (b), that Ms Gjengaar can be considered a worker or an economically active person does not affect the application of Article 7 of the Directive. It would appear from the facts of the case, as stated by the referring court, that it would be Article 7(1)(a) that would apply. Based on *O. and B.* and *Jabbi* the conditions of the Directive should be applied by analogy: there still needs to be genuine residence in the host EEA State for the provision to apply upon Ms Gjengaar's return to her home State.

40 In response to question (a), the Commission submits that where a national of an EEA State works in the State of which she is a national but resides in another EEA State, the situation falls within the scope of free movement of workers. In response to question (b), in a case such as the present, where the EEA national spouse returns from the host State to the State of which she is a national, her family members may rely on derived rights flowing from the Directive only where family life has been created or strengthened through genuine residence in the host State. In determining whether genuine residence exists, account must be taken of all relevant circumstances.

41 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answer of the Court

Preliminary remarks

42 The referring court directed its questions to the interpretation of Article 7(1)(b) of the Directive, read in conjunction with Article 7(2) thereof.

43 At the outset, the Court recalls that, under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers an advisory opinion necessary to enable it to give judgment. The purpose of Article 34 SCA is to establish cooperation between the Court and the national courts and tribunals. It is intended to be a means of ensuring a homogenous interpretation of EEA law and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law (see Case E-23/13 *Hellenic Capital Market Commission* [2014] EFTA Ct. Rep. 88, paragraphs 30 and 33).

44 Furthermore, it is settled case law that questions on the interpretation of EEA law referred by a national court, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (see, Joined Cases E-3/13 and E-20/13 *Fred. Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraph 75 and case law cited).While it is for a referring court to assess the facts and determine the national law in a pending case, it is established case law, that the Court may extract, from all the factors provided by that court, the elements of EEA law requiring an interpretation having regard to the subject-matter of the dispute (see, Joined Cases E-26/15 and E-27/15 *Criminal Proceedings against B and B* v *Finanzmarktaufsicht (FMA)* [2016] EFTA Ct. Rep. 740, paragraph 88 and case law cited.)

45 Thus, although the referring court has limited its question to the interpretation of Article 7(1)(b) and 7(2) of the Directive it is incumbent on the Court to give as complete and as useful a reply as possible and it does not preclude the Court from providing the national court with all the elements of interpretation of EEA law which may be of assistance in adjudicating the case before it, whether or not reference is made thereto in the question referred (see, Case E-2/12 *HOB-vín ehf.* [2012] EFTA Ct. Rep. 1092, paragraph 38).

46 Under the circumstances of the present case, to realise the purpose of cooperation under Article 34 SCA, the Court finds it necessary to address Article 28 EEA as it concerns the freedom of movement of workers.

47 According to the reference, Ms Gjengaar moved to Sweden from Norway in late December 2012, where she sought employment. She subsequently took up employment with the Norwegian Hurtigruten coastal ships between 21 February 2013 and 10 September 2013 in shifts of three weeks aboard and three weeks off. Ms Gjengaar completed a number of such contracts, before moving back to Norway at the end of November 2013.

48 The Court observes that the Directive regulates the freedom of EEA nationals to move and reside freely within the territory of the EEA States, wherein Article 7(1) confers the right of residence for both economic and non-economic purposes. The objectives pursued by the Directive, do not render redundant the rights which the EEA Agreement had already established for the exercise of an economic activity, including freedom of movement for workers provided in Article 28 EEA. Since freedom of movement for workers represents a specific expression of the general right to move and reside freely within the EEA, the Court finds it appropriate at the outset to address the regime established under Article 28 EEA in conjunction with Article 7(1) of the Directive (compare the judgments in *Hendrix*, C-287/05, EU:C:2007:494, paragraph 61 and case law cited, and *S.* v *Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel* v *G ("S. and G.")*, C-457/12, EU:C:2014:136, paragraph 45 and case law cited).

49 In that respect, it must be noted that the concept of "worker", insofar as it defines the scope of a fundamental freedom within the EEA, must be interpreted broadly (compare to that effect *L.N.*, C-46/12, EU:C:2013:97, paragraph 39 and case law cited). Its essential feature is that for a certain period of time a worker performs services for and under the direction of an employer in return for remuneration. Moreover, a person is a worker even if only engaged in part-time work, or where the remuneration received is below the minimum guaranteed wage in the State concerned, provided that the activity in question is not purely marginal and ancillary (see, inter alia, judgments in *Levin* v *Staatssecretaris van Justitie*, 53/81 EU:C:1982:105, paragraphs 15 to 17, and *Lawrie-Blum* v *Land Baden-Württemberg*, 66/85, EU:C:1986:284, paragraph 17).

50 As noted by ESA and the Commission, 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. This also applies to EEA nationals, who, while residing in another EEA State, find employment in their State of origin (compare the judgments in *S. and G.*, cited above, paragraph 39, *Ritter-Coulais*, C-152/03, EU:C:2006:123, paragraphs 31 and 32, and *Hartmann*, C-212/05, EU:C:2007:437, paragraph 17).

51 When an EEA national makes use of their right as a worker under Article 28 EEA, and establishes in another EEA State a genuine residence which creates or strengthens family life, the effectiveness of that right requires that the EEA national's family life may continue on their return to the EEA State of origin. Accordingly, a worker may not be deterred from exercising that right by an obstacle to the entry and residence of the worker's family members in the EEA State of origin. Thus, EEA law requires that a worker's family members are granted a derived right of residence in that State. This also applies when the family member is a third-country national. Furthermore, the derived right of residence does not arise solely when the EEA national has exercised an economic activity (see *Jabbi*, paragraphs 77 and 78; compare, inter alia, judgments in *O. and B.*, paragraph 54, *S. and*

G., cited above, paragraph, 40, *Deha Altiner and Ravn,* C-230/17, EU:C:2018:497, paragraph 26 and case law cited).

52 Whether, having regard to the facts of the case, Ms Gjengaar should be considered a worker as a matter of EEA law is for the referring court to determine. It is also for the referring court to decide whether family life was created or strengthened through genuine and continuous residence in the host State, by taking into account all relevant circumstances. However, considering the information in the referring court's request, it would appear that Ms Gjengaar is to be considered to be a worker pursuant to Article 28 EEA. The requirements of "genuine and "continuous" residence will be addressed below, as they concern residence for both economic and non-economic purposes (compare *Coman and Others*, C-673/16 EU:C:2018:385, paragraphs 23 to 25). If the referring court were to find that the dispute is not to be resolved by reference to Ms Gjengaar's status under Article 28 EEA, the following findings remain applicable when her status can be determined on other grounds set out in Article 7 of the Directive.

53 A derived right of residence in an EEA national's State of origin for that national's family member, who is a third-country national, will arise where the residence in the other EEA State has been sufficiently genuine so as to enable that worker to create or strengthen family life there.

Question 1

54 By its first question, the referring court has, in essence, asked whether the Directive and its Article 7(1)(b), read in conjunction with Article 7(2), in the light of recent case law of the Court of Justice of the European Union ("ECJ") upholding the judgment in *O. and B.*, and the principle of homogeneity, is applicable by analogy to a situation where an EEA national returns to the EEA State of origin together with a family member. As the reference makes clear, the referring court considers the central question at stake to be whether the Directive can by analogy give Ms Campbell, in view of her status as spouse, a derived right of residence upon her return to Ms Gjengaar's State of origin, Norway, following their stay in Sweden.

55 In *O. and B.*, the ECJ held that a derived right of residence for third-country national family members could not be based on the Directive. Instead, the ECJ based a derived right of residence for family members on EU citizenship, provided in Article 21 TFEU. As this judgment makes clear, when an EU national returns to the State of origin, the Directive applies by analogy, and his family members derive rights, which are at least equivalent to those enshrined in the Directive. To ensure effectiveness and to achieve homogeneity in the area of the free movement of persons, the Court similarly ruled in *Jabbi* that when an EEA national, not considered a worker, has created or strengthened family life with a third-country national during genuine residence in another EEA State, the provisions of the Directive apply when that EEA national returns to their EEA State of origin (see *Jabbi*,

cited above, paragraph 77 and, Case E-26/13 *Gunnarsson* [2014] EFTA Ct. Rep. 254, paragraph 82).

56 The Court's judgment in *Jabbi* is based on the specific legal context of the EEA Agreement. In that regard, the Court's interpretation of the Directive must take into account the context in which the Directive is situated in EEA law and the manner in which this context differs from the EU pillar.

57 In the context of EEA law, the fact that no parallel to Article 21 TFEU exists in EEA law entails that the Directive must be interpreted differently in the EEA, in order to realize the objective of the Directive, which is, above all, to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the EEA States. Since the freedom of movement for persons is one of the foundations of the Directive, any limitations to that freedom must be interpreted strictly. In the light of the context and the aims pursued by the Directive, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their practical effect (compare, to that effect, *Metock and Others,* EU:C:2008:449, paragraphs 83 and 84).

58 Recent case law of the ECJ referred to in the Supreme Court of Norway's request has upheld relevant findings of the judgment in *O. and B*. However, none of these judgments concern the interpretation of the Directive in the context of the EEA Agreement. The Court finds that the EEA legal context remains unaltered since *Jabbi*, and accordingly, as firmly supported by ESA and the Commission, the Court finds no reason to depart from the understanding of homogeneity and effectiveness as expressed in that judgment.

59 It follows that the answer to the first question must be that with regard to an EEA national who has not pursued an economic activity, Article 7(1)(b) and (2) of the Directive are applicable to the situation where that EEA national returns to the EEA State of origin together with a family member, such as a spouse who is a national of a third country.

Questions 2 and 3

60 By its second and third questions, the referring court essentially seeks guidance on the words "continuous" and "genuine residence", and the interrelation between genuine residence and abuse of rights. The Court finds it appropriate to address these questions together.

61 It is established case law that a derived right of residence of a third-country national who is a family member of an EEA national exists in order to ensure that the EEA national can exercise his freedom of movement effectively. The purpose and justification of a derived right of residence are therefore based on the fact that a rejection thereto would interfere with the exercise of the rights provided for EEA nationals (compare the judgments in *Iida*, C-40/11, EU:C:2012:691, paragraphs 62 and 63; *O. and B.*, cited above, paragraph 45; and *Lounes*, C-165/16, EU:C:2017:862, paragraph 48).

62 Not every instance of residence in a host EEA State, accompanied by a family member, will necessarily suffice for a derived right to be established (compare the judgments in *O. and B.*, cited above, paragraph 51, and *S. and G.*, cited above, paragraphs 41 and 42). However, where an EEA national creates or strengthens family life during a genuine residence in a host EEA State, the effectiveness of the right of free movement requires that the family life may continue when the EEA national returns to the EEA State of origin through the grant of a derived right of residence to the third-country national family member (compare, to that effect, the judgments in *O. and B.*, cited above, paragraph 51; *Coman and Others*, cited above, paragraph 24; and *Deha Altiner and Ravn,* cited above, paragraph 20).

63 Genuine residence in the host EEA State goes hand in hand with creating and strengthening family life in that State. As such, residence in the host EEA State pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of the Directive is evidence of settling there and enables the EEA national to create or strengthen family life (see, *Jabbi*, cited above, paragraphs 77 and 78; compare also the judgments in *O. and B.*, cited above, paragraphs 53 and 54 and *Deha Altiner and Ravn*, cited above, paragraph 26).

64 The Court notes that any assessment of the condition of continuous residence must be made bearing in mind the overall context of the Directive. In this context it may be recalled that Article 6 of the Directive concerns a right of residence for an EEA national in another EEA State for up to three months while Article 7 concerns the right of residence for an EEA national in another EEA State for more than three months. Residence pursuant to Article 7 implies that the EEA national has an intention to settle there, which is not the case for residence pursuant to Article 6 of the Directive. Residence, which is a direct corollary to the exercise to free movement, may ultimately culminate in the right of permanent residence for the EEA national in question (see, to this effect, *Gunnarsson,* cited above, paragraph 75, and compare the judgment in *B and Vomero*, Joined Cases C-316/16 and C-424/16, EU:C:2018:256, paragraph 51 and case-law cited).

65 The notion of continuity, referred to in *Jabbi*, cannot be read so as to exclude any absences from the host EEA State. It follows from the context and objectives of the Directive that its provisions cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness (compare, to that effect, *Metock and Others*, cited above, paragraph 84). Thus, residence for the purpose of Article 7 of the Directive does not require constant physical presence and allows temporary absences as part of the enjoyment of the right of residence itself.

66 This understanding is confirmed by the fact that neither Chapter III of the Directive, which regulates the right of residence, nor Chapter IV, which governs the right of permanent residence, contains a conditional requirement that an EEA national's presence in the host State be wholly without temporary absences to enjoy the rights conferred by those Chapters.

67 Therefore, "residence" must be interpreted as allowing reasonable periods of absence which may or may not be work-related, and which as to their duration do not contravene and are not inconsistent with a genuine residence. The notion of genuine residence requires that the circumstances of the situation as a whole are suited to creating or strengthening family life between the EEA national and the third-country national. Thus, any period of absence, considered in isolation or together, cannot be of such a duration or character that it inhibits the creation or strengthening of family life.

68 In the present case, it is common ground that Ms Gjengaar and Ms Campbell lived together for an uninterrupted period of approximately seven weeks in Sweden. Thereafter, Ms Gjengaar found work aboard the Hurtigruten coastal ships in Norway. As noted above, Ms Gjengaar's work aboard the Hurtigruten coastal ships comprised of shifts of three weeks aboard and three weeks off. During her time off, Ms Gjengaar travelled back to Sweden, but she also occasionally stayed in Norway, and from time to time took holidays in other countries. While it is for the national court to determine the facts of the case, the Court notes that such working schedules may not be uncommon, and that such absences do not appear inconsistent with the requirements of genuine residence.

69 At the same time, the scope of EEA law cannot be extended to cover abuses. Where the third-country national family member of an EEA national derives rights of entry and residence from the Directive, the EEA state in question may restrict that right only in compliance with Articles 27 and 35 of the Directive (compare the judgments in *McCarthy and others*, C-202/13, EU:C:2014:2450, paragraph 45, and *Metock and Others*, cited above, paragraphs 74 and 95). Any such measure must be proportionate and subject to the procedural safeguards provided for in the Directive (compare, *Metock and Others*, cited above, paragraphs 74 and 75).

70 Further, adoption of measures under Article 35 requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EEA rules, the purpose of those rules has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the EEA rules by artificially creating the conditions laid down for obtaining it (compare the judgement in *O. and B.*, cited above, paragraph 58)

71 However, as noted by the Commission, the fact that an EEA national consciously seeks a situation conferring a right of residence in another EEA State does not in itself constitute abuse. Nor can such conduct constitute an abuse even if the spouse did not, at the time when the couple installed itself in another EEA State, have a right to remain in the EEA State of origin (compare the judgment in *Akrich*, C-109/01, EU:C:2003:491, paragraphs 55 and 56).

72 The Court observes that no allegation of abuse of rights or fraud has been made in the present proceedings. Any assessment of fraud or abuse by a national court must be conducted on a case-by-case basis.

73 Finally, the Court notes that restrictions on rights granted by the Directive may be justified by reasons of public policy, public security or public health pursuant to Article 27(1) of the Directive (see *Jabbi*, cited above, paragraph 80).

74 The answer to questions 2 and 3 is that any period of residence pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of the Directive by an EEA national in an EEA State other than the EEA State of origin, during which the EEA national has created or strengthened family life with a third-country national, creates a derived right of residence for the third-country national upon the EEA national's return to the EEA State of origin. The notion of residence must be interpreted as allowing reasonable periods of absence which may or may not be work-related, and which as to their duration do not contravene and are not inconsistent with the genuine residence. This is without prejudice to Article 35 of the Directive. However, that an EEA national consciously places himself or herself in a situation conferring a right of residence in another EEA State does not in itself constitute a sufficient basis for assuming abuse.

IV Costs

75 The costs incurred by ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Supreme Court of Norway (*Norges Høyesterett*) hereby gives the following Advisory Opinion:

1. **When an EEA national makes use of the right as a worker under Article 28 EEA, and establishes in another EEA State a genuine residence which creates or strengthens family life, the effectiveness of that right requires that the EEA national's family life may continue on returning to the EEA State of origin.**

   With regard to an EEA national who has not pursued an economic activity, Article 7(1)(b) and (2) of Directive 2004/38/EC are applicable to the situation where an EEA national, who has not pursued an economic activity, returns to the EEA State of origin together with a family member, such as a spouse, who is a national of a third country.

2. **Any period of residence pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of Directive 2004/38/EC by an EEA national in an EEA State other than the EEA State of origin, during which the EEA national has created or strengthened family life with a third-country national, creates a derived right of residence for the third-country national upon the EEA national's return to the EEA State of origin. The notion of residence must be interpreted as allowing reasonable periods of absence which may or may not be work-related, and which as to their duration do not contravene and are not inconsistent with a genuine residence. This is without prejudice to Article 35 of Directive 2004/38/EC. However, that an EEA national consciously places himself or herself in a situation conferring a right of residence in another EEA State does not in itself constitute a sufficient basis for assuming abuse.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 13 May 2020.

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
President