The right to come home – within or outside the scope of the EEA Agreement?

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This contribution presents and comments on the recent judgment of the EFTA Court *Campbell*, E-4/19, published on 13 May 2020, which confirms the EFTA Court's judgment in the *Jabbi* case, E-28/15, from 2016. Both the *Jabbi* case and the present case are highly controversial, but the EFTA Court remains true to its course and gives priority to the principle of homogeneity, at least as far as the result is concerned.

Factual background

Ms Campbell, a Canadian national, has been married to Ms Gjengaar, a Norwegian national, since 2012. After an application for family reunification in Norway was rejected by the Norwegian authorities, the couple moved to Sweden at the end of 2012. As Ms Gjengaar could not find work in Sweden, she started working for coastal ships in Norway in shifts of three weeks aboard and three weeks off. She spent her time off in Sweden, but also occasionally in Norway and for holidays in other countries. Ms Gjengaar moved back to Norway in November 2013 but did not formally register there until January 2014.

Her spouse Ms Campbell filed an application for a right of residence in Norway as a family member of an EEA national in June 2014. Her application was rejected by the Norwegian Directorate of Immigration, whose decision was upheld by the Immigration Appeals Board. In contrast, the Oslo District Court overturned the decision as invalid, ruling that Ms Campbell has a derived right of residence in Norway under Directive 2004/38/EC (Free Movement Directive). After the Norwegian Government had appealed against this judgment, the Borgarting Court of Appeal ruled in favour of the Government. Ms Campbell appealed against that decision again and the case ended before the Supreme Court of Norway, which decided to ask the EFTA Court for an Advisory Opinion on the interpretation of Article 7(1)(b) of Directive 2004/38/EC read in conjunction with its Article 7(2).

Judgement of the Court

In its preliminary remarks, the EFTA Court refers to its task under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement, SCA) and recognises the need to address the issue of free movement of workers according to Article 28 of the EEA Agreement in order to provide a comprehensive answer to the present case. The Court considers that Ms Gjengaar must be regarded as a worker under Article 28 of the EEA Agreement, although recognising that it is for the national court to rule on the facts of the case.

Consequently, the Court finds that a family member of an EEA national who is a worker within the meaning of Article 28 and who has created or strengthened family life through genuine residence in the host State has a derived right of residence in the EEA national's State of origin.

The Court then goes on to consider the Supreme Court's first question on the applicability of Directive 2004/38/EC. Since "the EEA legal context remains unaltered since *Jabbi*", the Court considers that this judgment from 2014 is still valid so that the situation in which an inactive EEA national returns to his or her State of origin with a family member who is a national of a third-country falls within the scope of Article 7(1)(b) and (2) of Directive 2004/38/EC.

The EFTA Court then clarifies the understanding of the requirement of genuine residence in the host State, which, as the Court notes, must be fulfilled both within the scope of Article 28 of the EEA Agreement and within the scope of Article 7(1)(b) and (2) of Directive 2004/38/EC. A derived right of residence in the State of origin of an EEA national only arises "where the residence in the other EEA State has been sufficiently genuine so as to enable the worker [or the inactive national] to create or strengthen family life there." By citing the *Jabbi* case and judgments of the ECJ, the Court argues that "residence in the host EEA state pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of the Free Movement Directive is evidence of settling there and enables the EEA national to create or strengthen family life".

Furthermore, the Court is of the view that a contextual and teleological interpretation of the Directive 2004/38/EC does not require constant physical presence in the host State, but allows reasonable periods of absence, as long as those periods do not prevent the creation or strengthening of family life. As the Norwegian Supreme Court also raised the question of the meaning of the abuse of rights provision in Article 35 of the Free Movement Directive, the EFTA Court clarifies that an abuse of rights cannot be assumed if an EEA national seeks a situation which guarantees him or her a right of residence in another EEA State.

Comment

a) The scope of the EEA Agreement in the home State

By its first question referred for a preliminary ruling, the Norwegian Supreme Court appears to be asking the EFTA Court to overrule its position in the *Jabbi* case and to rule that Article 7(1)(b) of Directive 2004/38/EC does not apply by analogy to the situation of an EEA national in his or her home State. This approach would also have been supported by the Norwegian Government, as can be seen from the written arguments submitted. However, the EFTA Court has not granted them this favour. Instead, the Court notes that "in the context of EEA law, the fact that no parallel to Article 21 TFEU exists in the EEA law entails that the Free Movement Directive must be interpreted differently in the EEA". Thus, while the situation of an economically inactive Union citizen in his or her home State falls within the scope of Article 21 TFEU, the same situation of an EEA citizen is covered by analogy by Directive 2004/38/EC, leading to the same result as regards the derived right of residence for the family member.

The different interpretation of the Directive in the EU and in the EEA – on the one side its inapplicability in an EU home State and on the other side its applicability in an EEA home State – is supported by the EFTA Surveillance Authority and the European Commission in their written submissions. In contrast,

the Norwegian Government argued that the EFTA Court should follow the ECJ ruling in the *O and B* case, C-456/12, and subsequent case-law which rule that the Directive 2004/38/EC does not cover the return to the State of origin and hereby rejected "homogeneity in result".

As in the *Jabbi* case, the question of the applicability of the Free Movement Directive in the home State is very controversial. We should therefore take a step back and ask ourselves: why does the situation of a returning inactive Union citizen and his or her family members fall within the scope of EU law? The reason for this – and this has been stated several times by the ECJ – is the effectiveness of the free movement of Union citizens: without a derived right of residence for family members in the home Member State of the Union citizen, this Union citizen could be deterred from exercising his or her right to free movement within the EU.

Considering the objective of the EEA Agreement of establishing a homogeneous European Economic Area based on common rules and equality, there is little reasoning why this premise should not also apply to EEA nationals. Just like economically inactive Union citizens in the EU, economically inactive EEA nationals have a right to move freely within the EEA. It is obvious that this right is limited if the EEA national is not allowed to return to his or her State of origin with the family after having exercised the free movement right. From the perspective of the principle of effectiveness of the EEA law, a right of residence for family members in the home State of the EEA citizen may therefore be justified in any event.

The obvious problem we face here is that the ECJ does not base its arguments on Directive 2004/38/EC, but on Article 21 TFEU. The reason is understandable: the Directive literally applies only to "Union citizens who move to or reside in a Member State other than that of which they are a national" (it should be noted, however, that also the ECJ applies the Directive by analogy in relation to the conditions for granting a derived right of residence for third-country nationals in the Union citizen's State of origin, see *O and B*, paragraph 61).

The EFTA Court applies the Directive 2004/38/EC by analogy for the simple reason that there is no provision similar to Article 21 TFEU in the main body of the EEA Agreement. However, since the analogous application of the Free Movement Directive is disputable, the question must be asked whether the Directive is really the only legal basis for a derived right for the family members of an EEA citizen in the home State of that citizen. Or does such a right not (also) arise from the main body of the EEA Agreement itself? Directives and regulations can only confer rights which are already guaranteed by the main body of the EEA Agreement, otherwise the scope of the EEA Agreement would have been wrongly extended by the application of the incorporation procedure pursuant to Article 102 of the Agreement and not by the general rules of international and national law on the amendment of treaties. The same reasoning applies *mutatis mutandis* to the EU law: secondary EU law cannot grant more rights than EU primary law.

At this point it is necessary to look back to the time before the Maastricht Treaty when European Citizenship and Article 21 TFEU were not yet introduced. Even at that time, economically inactive nationals of EU Member States had a right of free movement: Directives 90/364/EC, 90/365/EC and 90/366/EC granted the right of residence in another Member State to inactive persons, retired people and students. These Directives were based on Articles 3(c), 8a and 235 of the EEC Treaty, which aimed

to establish a single market and remove obstacles to the free movement of persons. Hence, even before the introduction of European Citizenship and Article 21 TFEU, it was recognized that the freedom of movement for economically inactive citizens was a cornerstone of the internal market (see in this context also the reasoning of the EFTA Court in the *Gunnarsson* case, E-26/13, paragraphs 79-81). In the EEA, all three Directives entered into force in 1994 with the EEA Agreement and were therefore applicable from the outset.

Consequently, it can be argued with good reason that the right to free movement for economically inactive citizens also derives from the concept of the internal market and not solely from the concept of European Citizenship, as would undoubtedly be the case, for example, with the political rights pursuant to Article 22 TFEU. In this vein, the Contracting Parties to the EEA Agreement recognise in their Joint Declaration to Decision No 158/2007 of the Joint Committee incorporating Directive 2004/38/EC into the EEA Agreement that the EEA Agreement does not provide a legal basis for political rights of EEA nationals. The Parties link their reservation to the concept of European Citizenship with the political rights associated to this status. However, the right to free movement for inactive persons was not excluded from the scope of the Directive and this right as such is not disputed.

Why then should this right be separated by allowing people to reside in another EEA State but not to return to their home country with their family members? It is one of the main principles of EU and EEA law that Member States must not only allow the free movement of persons, but that they are also prohibited from impeding the exercise of this right. It follows from all this that the derived right of residence for family members in the home State of an economically inactive EEA national after having exercised the right to free movement is inherent in the nature and spirit of the EEA Agreement as a whole. Hence, the right to come home rightly falls within the scope of the EEA Agreement.

b) The notion of residence in the host State

The second disputed issue concerns the condition of "genuine residence". The central question is how residence in the host State must have taken place in order for the family member to enjoy a derived right of residence in the EEA citizen's home State after their return. In the *Jabbi* case, the EFTA Court concluded that the EEA national's residence in the host State must have been "genuine such as to enable family life" and the duration must exceed a continuous period of three months. Reflecting this judgment and the ECJ rulings, the Norwegian Government argues in its written observations on the present case, that, firstly, only an uninterrupted period of three months in the host State qualifies as residence within the meaning of Article 7 of the Directive 2004/38/EC, and that, secondly, a substantive requirement must also be fulfilled, i.e. the residence must be genuine enough to enable family life to be created or strengthened.

As far as the first argument is concerned, the Court rightly concludes that a requirement of constant physical presence without any absence would be contrary to the context and telos of the Free Movement Directive. In the same spirit, Advocate General Sharpston has already recognised in her Opinion to the cases *O and B*, C-456/12, and *S and G*, C-457/12, that residence does not require constant physical presence in the territory of a single Member State, although it may require a preponderance of presence. The ECJ ruled in the *O and B* case that short periods of residence such as weekends or holidays cannot be regarded as residence within the meaning of Article 7 of the Directive 2004/38/EC. This does not mean, however, that an EEA national living in another EEA State must reside uninterruptedly

in the host State and may not work or take holidays abroad. The right of permanent residence under Article 16 of the Directive 2004/38/EC also permits temporary absences.

In conclusion, a Norwegian national on holiday in Sweden falls within the scope of Article 6 of the Free Movement Directive, but a Norwegian national living in Sweden, i.e. staying there for a considerable amount of time, falls within the scope of Article 7 of the Directive – on arrival and not only after a three-month stay (see in this context also the written submissions of the EFTA Surveillance Authority and the European Commission).

Moreover, residence in the host State pursuant to and in conformity with the conditions laid down in Article 7 of Directive 2004/38/EC appears to be sufficient for a derived right of residence of a family member in the EEA national's home State. According to the Norwegian Government, the ECJ judgment in *O and B*, however, must be understood as requiring further evidence that the residence was genuine and could create or strengthen a family life in the host country. Although the wording of the ECJ's judgment may be vague, the structure of the argumentation is revealing. First, in paragraph 52 of *O and B*, the ECJ ruled that a Union citizen exercising the rights under Article 6(1) of the Directive 2004/38/EC cannot be regarded as someone who intends to settle in the host Member State and create or strengthen a family life there. Then the ECJ continues in paragraph 53, stating that, on the contrary, residence in another Member State in accordance with Article 7(1) of the Directive 2004/38/EC is evidence of settling there and the creation and strengthening of a family life. The ECJ does not impose any further conditions.

It does indeed appear that the ECJ considers a stay under Article 7 to be sufficient. The EFTA Court therefore rightly follows the answer proposed by the European Commission and concludes that "any period of residence pursuant and in conformity with the conditions set out in Article 7(1) and (2) of Directive 2004/38/EC" by an EEA national in another EEA State confers a derived right of residence for the family member in the EEA State of origin of the EEA citizen after their return. Finally, the Court's statement on abuse of rights must also be supported. Its view that it does not constitute an abuse of rights for an EEA national to seek a situation in which a right of residence is secured under EEA law is in line with, inter alia, the 2004 ECJ judgment in the *Zhu and Chen* case, C- 200/02.

Conclusion

The EFTA Court has rejected the proposal of the Norwegian Supreme Court to overrule the *Jabbi* case. Although several ECJ rulings have confirmed the non-applicability of Directive 2004/38/EC in the home State of an EU national, the EFTA Court in its judgment in the *Campbell* case explicitly and clearly states that the Directive must be interpreted differently in the EEA context and is applicable in an EEA national's State of origin. This statement leads to the question to what extent and in which cases, apart from the issue at hand, the Free Movement Directive is to be understood differently in the EEA than in the EU legal framework. This problem could perhaps have been mitigated if the EFTA Court had based its reasoning not only on the Directive and its different scope of application in the EEA but also on the EEA Agreement as a whole.

Now it remains to be seen how the Supreme Court of Norway will react to the EFTA Court ruling. An easy way – and Professor Halvard Haukeland Fredriksen has rightly pointed this out – would be to consider the situation of Ms Campbell as falling within the scope of the free movement of workers

under Article 28 of the EEA Agreement. Such an approach would not require the Supreme Court to explicitly recognise the applicability of the Directive 2004/38/EC in the EEA national's home State. However, this would not change the EFTA Court's view and it is probably time to accept that the EFTA Court, as recently demonstrated also in the *D and E* case, E-2/19, protects the free movement of persons within the EEA by all means. In the end, the right to free movement is at the heart of European integration.

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