JUDGMENT OF THE COURT

27 June 2014[*]

(Free movement of persons – Article 28 EEA – Directive 2004/38/EC – Directive 90/365/EEC – Right of residence – Right to move from the home State – Less favourable tax treatment)

In Case E-26/13,

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 from the Supreme Court of Iceland (Hæstiréttur Íslands), in the case between

The Icelandic State

and

Atli Gunnarsson

concerning the interpretation of Article 28 of the EEA Agreement and Article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,

THE COURT,

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

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- the Icelandic State, represented by Óskar Thorarensen, Supreme Court Attorney, Office of the Attorney General (Civil Affairs), acting as Agent;

[*] Language of the request: Icelandic.

- Atli Gunnarsson, represented by Stefán Geir Þórisson, Supreme Court Attorney;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Gjermund Mathisen and Maria Moustakali, Officers, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Richard Lyal and Wim Roels, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Icelandic State, represented by Óskar Thorarensen; Atli Gunnarsson, represented by Stefán Geir Þórisson and Sigrún Ingibjörg Gísladóttir; the Icelandic Government, represented by Matthías Geir Pálsson; the Norwegian Government, represented by Pål Wennerås; ESA, represented by Gjermund Mathisen; and the Commission, represented by Richard Lyal, at the hearing on 10 April 2014,

gives the following

Judgment

I Legal background

European law

1 Article 28 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 Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity ("Directive 90/365") (OJ 1990 L 180, p. 28) was referred to at point 7 of Annex VIII to the EEA Agreement.

3 Recitals 1, 2, 3 and 8 of the preamble to Directive 90/365 read:

Whereas Article 3 (c) of the Treaty provides that the activities of the Community shall include, as provided in the Treaty, the abolition, as between Member States, of obstacles to freedom of movement for persons;

Whereas Article 8a of the Treaty provides that the internal market must be established by 31 December 1992; whereas the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty;

Whereas Articles 48 and 52 of the Treaty provide for freedom of movement for workers and self-employed persons, which entails the right of residence in the Member States in which they pursue their occupational activity; whereas it is desirable that this right of residence also be granted to persons who have ceased their occupational activity even if they have not exercised their right to freedom of movement during their working life;

…

Whereas the Treaty does not provide, for the action concerned, powers other than those of Article 235.

4 Article 1 of Directive 90/365 reads:

1. Member States shall grant the right of residence to nationals of Member States who have pursued an activity as an employee or self-employed person and to members of their families as defined in paragraph 2, provided that they are recipients of an invalidity or early retirement pension, or old age benefits, or of a pension in respect of an industrial accident or disease of an amount sufficient to avoid becoming a burden on the social security system of the host Member State during their period of residence and provided they are covered by sickness insurance in respect of all risks in the host Member State.

The resources of the applicant shall be deemed sufficient where they are higher than the level of resources below which the host Member State may grant social

assistance to its nationals, taking into account the personal circumstances of persons admitted pursuant to paragraph 2.

Where the second subparagraph cannot be applied in a Member State, the resources of the applicant shall be deemed sufficient if they are higher than the level of the minimum social security pension paid by the host Member State.

2. The following shall, irrespective of their nationality, have the right to install themselves in another Member State with the holder of the right of residence:

(a) his or her spouse and their descendants who are dependants;

…

5 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC ("Directive 2004/38") (OJ 2004 L 158, p. 77) was incorporated into Annex V to the EEA Agreement at point 1 and Annex VIII at point 3 by Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 ("Joint Committee Decision") (OJ 2008 L 124, p. 20, and EEA Supplement No 26, 8.5.2008, p. 17).

6 All three EEA/EFTA States indicated constitutional requirements for the purposes of Article 103 EEA. As the last of the three, Norway gave notification on 9 January 2009 that the constitutional requirements had been fulfilled. Consequently, the Joint Committee Decision entered into force on 1 March 2009.

7 Recital 8 of the preamble to the Joint Committee Decision reads:

The concept of 'Union Citizenship' is not included in the Agreement.

8 Article 1 of the Joint Committee Decision reads:

Annex VIII to the Agreement shall be amended as follows:

(1) …

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

…

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

…

9 The Joint Declaration by the Contracting Parties to the Joint Committee Decision 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.

…

10 Recital 3 of the preamble to Directive 2004/38 reads:

Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

11 Article 3 of Directive 2004/38, as adapted for the purposes of the EEA Agreement, reads:

Beneficiaries

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.

…

12 Article 4 of Directive 2004/38, as adapted for the purposes of the EEA Agreement, reads:

Right of exit

1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.

2. No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies.

3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.

4. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years.

13 Article 7 of Directive 2004/38, as adapted for the purposes of the EEA Agreement, reads:

Right of residence for more than three months

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;

…

14 Article 21 of the Treaty on the Functioning of the European Union ("TFEU") reads:

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

National law

15 Article 1 of Act No 90/2003 ("the Income Tax Act") stipulates that all persons domiciled in Iceland, or who spend more than 183 days there during each twelve-month period, are obliged to pay tax to Iceland on all their income, irrespective of where it is earned.

16 Articles 61 and 66 of the Income Tax Act contain provisions on the calculation of income tax for these taxpayers. After income tax has been calculated, a personal tax credit specified in the first paragraph of part A of Article 67 of the Income Tax Act is deducted. If a taxpayer in this category is married and the spouse cannot utilise the tax credit in full, the part of the tax credit that the spouse does not utilise is added to the taxpayer's tax credit. This follows from the second paragraph of part A of Article 67 of the Income Tax Act.

17 Article 62 of the Income Tax Act permits the transfer of unused credits between spouses.

18 On the other hand, Article 3 of the Income Tax Act contains an exhaustive list of persons who are subject to limited tax liability in Iceland. This category includes everyone who spends 183 days or less in Iceland each year and who either receives wages or other payments in Iceland, including an old-age pension, other pension benefits or comparable payments. Income tax is payable on such income in Iceland.

19 Article 70 of the Income Tax Act contains a special rule that applies to old-age pensioners and recipients of other pension benefits who are subject to limited tax liability in Iceland under Article 3 of the Act. For such taxpayers, a personal tax credit may not be transferred between spouses unless they are both old-age pensioners or recipients of other pension benefits from Iceland.

20 Act No 165/2010 added Article 70a to the Income Tax Act, entitling individuals resident in other EEA States, and who are subject to limited tax liability in Iceland, to the same rights as individuals who are resident in Iceland and subject to full tax liability there. This includes the unconditional transfer of tax credits between spouses, unless they receive less than 90% of their total annual income from Iceland.

II Facts and procedure before the national court

21 Mr Gunnarsson and his wife are both Icelandic citizens who were resident in Denmark from 24 January 2004 to 3 September 2009. During that period, the couple's total income consisted of unemployment benefit that Mr Gunnarsson's wife received in Iceland until 1 May 2004 and of Mr Gunnarsson's own disability pension from the Icelandic Social Insurance Administration, together with benefit payments he received from two Icelandic pension funds.

22 Mr Gunnarsson paid tax on his income in Iceland. He claims that he was overcharged in the period from 1 May 2004 to 1 October 2009 because he was prevented from utilising his wife's personal tax credit while they resided in Denmark. Under the Icelandic tax legislation applicable at the time, the couple had to reside in Iceland for Mr Gunnarsson to be entitled to utilise his wife's personal tax credit in addition to his own.

23 On 22 December 2006, Mr Gunnarsson and his wife applied to the Icelandic Directorate of Internal Revenue asking that they be allowed to utilise his wife's tax credit in respect of his income in Iceland. On 9 January 2007, the Directorate turned down the request. It was denied on the grounds that such transfer was only possible between taxpayers with unlimited tax liability in Iceland (essentially resident taxpayers) or where both spouses were in receipt of an Icelandic pension. As Mr Gunnarsson and his wife were neither resident in Iceland nor both in receipt of a pension pursuant to Icelandic law during the relevant period, the Directorate concluded that the conditions authorising the transfer of unused personal tax credits between spouses were not fulfilled.

24 In a letter dated 8 February 2008, Mr Gunnarsson complained to ESA. On 7 July 2010, ESA issued a letter of formal notice to Iceland, stating that Iceland had failed to fulfil its obligations under Article 28 EEA and Article 7 of the Directive by refusing to allow pensioners who were resident in another EEA State to utilise their spouses' personal tax credit, as they would have been able to do if they had been resident in Iceland.

25 The Income Tax Act was amended on 28 December 2010 to allow spouses who receive at least 90% of their total annual joint income in Iceland to request the transfer tax credits between spouses. Had this provision been in force at the time in question, Mr Gunnarsson would, under such conditions, have been able to make use of his wife's unused tax credits.

26 On 22 July 2010, Mr Gunnarsson demanded repayment of the income tax he had paid on his income during the relevant period that would not have been payable had he been able to use his wife's tax credits. In support of the claim, Mr Gunnarsson referred to ESA's letter of formal notice. On 10 August 2010, the Directorate of Internal Revenue refused to adopt a position on the claim. It considered that the time had not yet come to do so, because the formal notice did not constitute a final conclusion on the matter.

27 On 9 November 2010, Mr Gunnarsson brought the present action before the District Court. He claims annulment of the decision of the Directorate of Internal Revenue, and repayment of the alleged excess taxes paid. In the alternative, he claims damages for the Icelandic State's failure to fulfil its obligations under the EEA Agreement. The District Court upheld Mr Gunnarsson's claim for annulment and the repayment of taxes, except for the part of his claim that related to taxes due prior to 9 November 2006, which had lapsed because of expiry of the period of prescription. The District Court held that the decision by

the Directorate of Internal Revenue was incompatible with the obligations imposed by the EEA Agreement.

28 Both Mr Gunnarsson and the Icelandic State appealed to the Supreme Court of Iceland. In the view of the Supreme Court, there was doubt about whether Mr Gunnarsson's position should be assessed pursuant to Article 28 EEA and/or Article 7 of the Directive, individually or together, or to other EEA rules. Accordingly, the Supreme Court decided to seek an Advisory Opinion from the Court.

29 The Supreme Court referred the following questions to the Court:

> *1. Is it compatible with Article 28 of the Agreement on the European Economic Area and/or Article 7 of Directive 2004/38/EC that a State (A), which is party to the Agreement, does not give spouses the option of pooling their personal tax credits in connection with the assessment of income tax in circumstances in which both spouses move from State (A) and live in another State (B) in the European Economic Area and one of them receives a pension from State (A) while the other has no income, if the tax position of the couple would be different if both lived in State (A), including the fact that they would be entitled to pool their personal tax credits?*
>
> *2. When Question 1 is answered, is it of significance that the Agreement on the European Economic Area does not contain any provision corresponding to Article 21 of the Treaty on the Functioning of the European Union?*

30 As mentioned, Directive 2004/38 was incorporated into the EEA Agreement subject to the fulfilment of constitutional requirements by all three EEA/EFTA States, cf. Article 103(1) EEA. Upon the expiry of the six-month period provided for in Article 103(2) EEA, that is 7 June 2008, Liechtenstein notified such fulfilment, whereas Iceland and Norway did not submit such notification until 29 August 2008 and 9 January 2009, respectively. However, through the written observations submitted to the Court, it became clear that on 2 June 2008 Norway had notified that provisional application could not take place pursuant to Article 103(2) EEA, whereas it appeared as if Iceland had not submitted such notification.

31 Against this background, in a letter of 11 March 2014, the Court asked the parties to the main proceedings, the EEA States, ESA and the Commission a series of questions. The first two questions concern Article 103 EEA:

> *1. Does a notification from one EFTA/EEA State pursuant to Article 103(2) EEA that provisional application cannot take place, take effect for that State only, or does it take effect for all three EFTA/EEA States?*

2. *What obligations, if any, fall on an EFTA/EEA State when a decision of the EEA Joint Committee is to be applied provisionally?*

32 The remaining questions posed are as follows:

3. *Were the disability benefits received by Mr Gunnarsson from Icelandic pension funds dependent on the prior existence of an employment relationship which has come to an end? In that case, how do these circumstances affect the applicability of Article 28 EEA for the purposes of the case pending before the national court?*

4. *Was Mr Gunnarsson's wife actively seeking employment in Denmark when she and Mr Gunnarsson originally moved there? If so, what effect does that have on her status under Article 28 EEA?*

33 Subsequently, the Court became aware that, contrary to its earlier assumption, on 3 June 2008, Iceland had also given notification pursuant to Article 103(2) EEA that provisional application could not take place. Therefore, the questions raised in the Court's letter of 11 March 2014 concerning Article 103 EEA became redundant in the context of the present case.

34 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 The questions

Observations submitted to the Court

35 The Icelandic State submits that there is nothing to suggest that, at the time they moved to Denmark, Mr Gunnarsson or his wife had the status of a worker for the purposes of Article 28 EEA. Persons who have carried out all their occupational activity in the EEA State of which they are nationals and who have only exercised the right to reside in another EEA State after their retirement, without any intention of working in that other State, cannot rely on the free movement of workers. As for Mr Gunnarsson's wife, she never intended to seek work in Denmark when they moved there.

36 Article 7(1)(b) of Directive 2004/38 does not impose obligations on the home State. Under the case law of the Court of Justice of the European Union ("ECJ"), the obligation on the EU Member States to remove obstacles to the right of free movement and residence by their own nationals as Union citizens is based on Article 21(1) TFEU. Article 21(1) TFEU and the concept of Union Citizenship are not included in the EEA Agreement, however. The EEA Agreement cannot be interpreted in conformity with the case law of the ECJ concerning EU Citizenship.

37 In the alternative, the Icelandic State submits that, if Article 7 of the Directive precludes the provisions of the Tax Act at issue in the case, those obligations could not be binding before the Directive entered into force in the EEA on 1 March 2009.

38 Moreover, according to the Icelandic State, any inequality of treatment deemed to flow from such an interpretation may be justified on the grounds of fiscal cohesion and the effectiveness of fiscal supervision in Iceland.

39 Mr Gunnarsson submits that it is clear from the case law of the ECJ that any EU national who has exercised the right to free movement of workers and has been employed in another EEA State falls within the scope of Article 45 TFEU, which corresponds to Article 28 EEA, irrespective of his residence or nationality. A worker residing in another EEA State can invoke the rights inherent in that provision against the EEA State of which he is a national.

40 A person who has lost the status of worker in the strictest sense may still enjoy the protection of the Article 45 TFEU concerning the free movement of workers, which in substance corresponds to Article 28 EEA.

41 Mr Gunnarsson contends that a pensioner like himself, who has Icelandic nationality but who resides in Denmark with his wife, must not be precluded from receiving tax credits when pensioners in the same or a similar situation residing in Iceland receive such tax credits.

42 Mr Gunnarsson submits that his wife was actively seeking employment in Denmark throughout their stay, but without success. They both attended a language school to study Danish in order to increase the job opportunities. It is long established that job seekers enjoy the status of workers under Article 28 EEA.

43 In Mr Gunnarsson’s view, the entry into force of Directive 2004/38 in the EEA has in no way affected his legal status. Article 28 EEA provides for all the necessary legal protection in his case. Initially, the free movement of persons established by the EEA Agreement only applied to persons moving to another EEA State in order to pursue economic activity. Directive 90/365 extended the right of residence to persons who had ceased being economically active. Directive 90/365 was part of the EEA Agreement until repealed by Directive 2004/38.

44 The Norwegian Government submits that, since Mr Gunnarsson never exercised his rights of free movement as a worker in another Member State, the application of Article 7(1)(a) of Directive 2004/38 and of Article 28 EEA is excluded.

45 As for Mr Gunnarsson’s wife, the assertion – which has not been pleaded before the national court – that she was a genuine jobseeker in Denmark has not been supported by any element put before the Court. In any event, when new assertions based on more or less loose factual claims are presented to the Court,

thereby raising new questions of law, this is liable to undermine effective cooperation between national courts and the Court. It could lead to a circumvention of the system pursuant to which it is for the national court to pose questions to the Court in light of the facts of the case established in the national proceedings.

46 It follows from a literal, contextual and teleological interpretation that Article 7 of Directive 2004/38 does not impose obligations on the home Member State, which is Iceland in this case. The wording refers to "residence in another Member State". As regards the context, it is clear that Chapter II of Directive 2004/38 regulates the right of exit and entry, whereas Chapter III, of which Article 7 forms part, does not contain any provision directed at the home State.

47 This conclusion is further supported by the fact that the ECJ has not applied that provision in analogous cases, but has instead assessed those cases on the basis of Article 21(1) TFEU. If a case falls within the scope of a directive, it must first be assessed with regard to the directive, read in light of the relevant provision of the main part of the EEA Agreement and, thereafter, if appropriate, with regard to the latter provision itself. This means by implication that the ECJ considered that Directive 2004/38 was not applicable.

48 In the alternative, the Norwegian Government argues that, if Article 7 of Directive 2004/38 entails rights in relation to the home State, it clearly follows from the Incorporation Decision of the EEA Joint Committee that only economically active persons are included. Directive 2004/38 also promotes free movement in the context of Union citizens regardless of economic activity. However, the legal basis for this is Article 21(1) TFEU, which has no equivalent in the EEA Agreement. Furthermore, the procedure in Article 102 EEA effectively prevents the possibility of fully incorporating Directive 2004/38 since Union Citizenship falls outside the material scope of the Annexes to the EEA Agreement.

49 At the oral hearing, the Norwegian Government argued that this is the case despite the fact that a similar provision as that in Article 7(1)(b) of Directive 2004/38 was included in the EEA Agreement from the outset. The reason is that Article 7(1)(b) of Directive 2004/38 is based on the fundamental right conferred directly by virtue of Article 21(1) TFEU.

50 Therefore, if Article 7 of Directive 2004/38 can be invoked against the home State, Mr Gunnarsson could in principle rely on Article 7(1)(a) if he were an economically active person. However, Mr Gunnarsson cannot, as an economically inactive person, avail himself of Article 7(1)(b), since this provision is based on Union Citizenship.

51 ESA submits that persons who have carried out all their occupational activity in the EEA State of which they are nationals and who have gone on to reside in another EEA State only after their retirement, without any intention of working in that State, cannot rely on the freedom of movement guaranteed by Article 28

EEA. Mr Gunnarsson does not seem to have previously made any use of his right to free movement of workers. At least, he received no form of pension from any other EEA State, which would be indicative of his previously having moved within the EEA as a worker. It is therefore of no consequence whether the benefit payments Mr Gunnarsson received from two Icelandic pension funds were dependent on the prior existence of an employment relationship that has come to an end.

52 If Mr Gunnarsson's wife was a job seeker in Denmark, it can be asked whether she may invoke Article 28 EEA not only for herself, but also for her husband. There is no clear case law on this question. Any right would, in any event, be limited in time to the period of her job search.

53 Turning to Directive 2004/38, ESA submits that, assuming that Mr Gunnarsson and his wife had sufficient resources not to become a burden on Denmark's social assistance system during their period of residence, and assuming that they had comprehensive sickness insurance cover in Denmark, the couple would enjoy rights under Article 7 of Directive 2004/38. However, those rights cannot be invoked against the home State.

54 Article 7 – indeed the whole of Chapter III of Directive 2004/38 – is drafted with the host State in mind. In contrast, Article 4, for example, is drafted so as to apply in relation to Member States in general, including the home State. Interpreting Article 7 of Directive 2004/38 such that it could also be invoked against the home State would indeed be an extensive interpretation.

55 Importantly, there are indications in case law that the ECJ has not envisaged such an extensive interpretation of Directive 2004/38. Similar cases that are analogous to the present case in the sense that they concern complaints against the home State from non-economically active persons resident in a host Member State seem to fall directly under Article 21(1) TFEU, not under the Directive.

56 Accordingly, ESA submits that the application of the more specific provision of Article 7 must be excluded in the present case. If this provision of secondary law were applicable, the ECJ would have had to apply it in cases analogous to the present case. The fact that the ECJ instead applied Article 21(1) TFEU directly means, by implication, that a case such as the present one falls outside the scope of Article 7.

57 Turning to the second question, ESA observes that there is no provision corresponding to Article 21 TFEU on Union Citizenship in the EEA Agreement. There is no basis for reading into Article 7 of the Directive obligations that, in the EU, flow only from Article 21 TFEU. On the contrary, homogeneity must be ensured. Homogeneity requires that the interpretation of Article 7 of the Directive be the same as in the EU.

58 According to ESA, the present case is analogous to Case E-15/12 *Wahl* [2013] EFTA Ct. Rep. 534, where the Court found that the exclusion of the concept of

Union Citizenship could have no material impact on the interpretation of the provisions of Directive 2004/38 at issue in that case. This means that neither a narrower nor a more extensive interpretation of Article 7 of Directive 2004/38 can follow from the non-inclusion of the concept of Union Citizenship in the EEA Agreement.

59 For the sake of completeness, ESA adds that nor can the principle of homogeneity be overridden by considerations of reciprocity. There is no basis in the EEA Agreement for concluding that, as EEA law, Article 7 of the Directive gives rise to different sets of obligations for the EU States and the EFTA States. This would also raise an issue of legal certainty.

60 The Commission submits that insofar as Mr Gunnarsson is entitled to exercise a right of free movement or residence under EEA law, he must be allowed the benefit of his wife's unused tax credits in the same way as a resident of Iceland. There appears to be no dispute between the parties on that point.

61 Article 28 EEA creates a right of free movement for workers. The benefit of that provision and the corresponding provision of the TFEU have been extended to economically inactive persons only in very limited circumstances. Persons who have not exercised freedom of movement during their working life and who move to another State only after they stop working, without any intention of working in the latter State, may not rely on the freedom of movement granted by Article 28 EEA. Accordingly, Mr Gunnarsson is not able to rely on Article 28 EEA in order to demonstrate a right of free movement.

62 If Mr Gunnarsson's wife moved to Denmark to look for work, she should be regarded, at least in some respects, as a worker for the purposes of Article 28 EEA. Moreover, the rights enjoyed by a worker under this provision may have consequences for family members. More specifically, the equal treatment requirement under Article 28 EEA means that one spouse cannot be placed at a tax disadvantage in the State of origin by reason of the fact that the other spouse moves to another EEA country in search of work, at least where that tax disadvantage relates to the joint taxation of the spouses. However, there must come a point where it is no longer plausible to regard someone as a job seeker. It follows from case law that someone may be regarded as a job seeker for more than six months. It would seem difficult to maintain that someone retained the status of job seeker for a period of almost six years.

63 At the hearing, the Commission noted that the ECJ has found that the joint taxation of spouses, or the consequences for one spouse of the tax position of the other, is a matter that falls within the scope of the rules on free movement. A relatively extreme example of this is C-403/03 *Schempp* [2005] I-6421 paragraphs 21 to 25: in principle, an ex-husband was held to be entitled to rely on the free movement rights of his ex-wife regarding the taxation in his hands of the maintenance payments he was obliged to pay to her. The Commission also referred to Case C-303/12 *Imfeld and Garcet*, judgment of 12 December 2013, concerning the joint tax treatment of spouses and the tax consequences for the

spouse who did not move. In the Commission's view, there is no reason to suppose that the outcome of that case would have been any different if Mr Imfeld had not been a party to the case along with his wife.

64 Article 7 of Directive 2004/38 applies without distinction to workers, persons who establish themselves in another State in order to pursue an economic activity and persons who have no economic activity. The result of the incorporation of Directive 2004/38 is that economically inactive persons have quite extensive rights of movement and residence. That is quite independent of the notion of "citizenship". The question in the present case is whether those rights can be asserted against the State of origin. Mr Gunnarsson therefore had a right of free movement and residence on the basis of that provision from the moment at which it came into force, namely 8 June 2008.

65 The Commission acknowledges that it can be objected that Article 7 may be interpreted as only creating obligations for the host State, that is to say, the EEA State in which the person concerned wishes to take up residence. However, if regard were had merely to the wording, the same could be said of Article 28 itself, of Article 31 EEA or of Article 27 TFEU. As the ECJ held in relation to the freedom of establishment, those provisions also prohibit the home Member State from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation. The ECJ took the same approach in relation to what is now Article 45 TFEU, as well as to what is now Article 21 TFEU.

66 Similarly, the rights of free movement and residence envisaged by Article 7 of Directive 2004/38 would be set at nought if the home State could obstruct persons wishing to avail themselves of those rights. It can be observed, moreover, that Article 4 of the Directive expressly provides for a right to leave the territory of the home State.

67 The Commission therefore concludes that Mr Gunnarsson is entitled to rely on Article 7 of Directive 2004/38 in order to claim equal treatment with residents of Iceland in relation to the pooling of personal tax credits with his spouse.

68 Concerning the second question, the Commission does not consider that the absence of a provision equivalent to Article 21 TFEU in the EEA Agreement is relevant to the outcome of the present case. Directive 2004/38 has been incorporated in Annexes V and VIII of the EEA Agreement by Decision No 158/2007 of the EEA Joint Committee, including the provisions that apply to economically inactive persons like Mr Gunnarsson. In recital 8 of its preamble, the Joint Committee Decision notes that the concept of Union Citizenship is not included in the EEA Agreement. Moreover, the Joint Declaration of the Contracting Parties states that the EEA Agreement does not provide a legal basis for political rights of EEA nationals. This qualification does not affect the application of Article 7(1)(b) as regards persons who do not pursue an economic activity.

69 At the hearing, the Commission asserted that the ECJ does not generally look at secondary law when the right being asserted flows from primary law. The ECJ has not been called upon to determine the precise content of Article 7 of the Directive because that is not necessary in the Union legal order. Only in the EEA context is that provision an independent source of rights, and that is why it is necessary to determine what precise rights it confers.

70 The Commission therefore concludes that, notwithstanding the absence of a provision in the EEA Agreement equivalent to Article 21 TFEU, Mr Gunnarsson is entitled to rely on Article 7 of the Directive.

Findings of the Court

71 By its questions, the Supreme Court of Iceland wishes to know, first, whether it is compatible with Article 28 EEA and/or Article 7 of Directive 2004/38 if an EEA State does not give spouses who have moved to another EEA State the option of pooling their personal tax credits in connection with the assessment of income tax, whereas they would be entitled to do so if they lived in the home State, in a situation where one of them receives a pension from the home State, while the other has no income; and, second, whether the absence in the EEA Agreement of a provision corresponding to Article 21(1) TFEU is of any significance in this regard. The Court finds it appropriate to consider the questions jointly.

72 According to the observations received from Mr Gunnarsson on the third of the Court's questions in its letter of 11 March 2014, the pension received by him is linked to a relationship of employment. When answering the questions referred by the Supreme Court, the Court therefore presupposes that, when one of the spouses is in receipt of a pension from the home State, that pension is dependent on the prior existence of a relationship of employment.

73 The incorporation of Directive 2004/38 into the EEA Agreement became effective on 1 March 2009. At the same time, Directive 90/365 was repealed with respect to the EEA/EFTA States. As the period relevant to the case before the national court is 24 January 2004 to 3 September 2009, the Court finds that the questions must therefore also be assessed in the light of Directive 90/365.

74 Article 28 EEA gives workers the right to move and reside freely within all EEA States. However, persons who have carried out all their occupational activity in the EEA State of which they are nationals and who have not exercised the right to reside in another Member State before their retirement cannot rely on the freedom guaranteed by Article 28 EEA (see, for comparison, Case C-520/04 *Turpeinen* [2006] ECR I-10685, paragraph 16).

75 As is clear in particular from recital 3 of its preamble, Directive 90/365 extends the right to reside in another EEA State to persons who have ceased their occupational activity, including those who have not carried on any economic activity in another EEA State during their working life. Directive 90/365, as well

as Directives 90/366/EEC, which gave a right of residence to students, and Directive 90/364/EEC, which conferred that right on other economically inactive persons, were referred to in Annex VIII to the EEA Agreement on freedom of establishment. Therefore, those directives conferred rights on economically inactive individuals from when the EEA Agreement entered into force in 1994.

76 Pursuant to Article 1(1) of Directive 90/365, residence shall be granted to a formerly economically active person provided that he receives a pension or benefits of an amount sufficient for him not to become a burden on the social security system of the host State. It follows from Article 1(2) of that Directive that the spouse of such a person has a derived right of residence.

77 According to its wording, Article 1 of Directive 90/365 is intended in particular to create a right of residence in an EEA State other than the home State of the person concerned. However, taking up residence in another State presupposes a move from the EEA State of origin. Therefore, Article 1 of Directive 90/365 must be understood such that it also prohibits the home State from hindering the person concerned from moving to another EEA State (see, by analogy, as regards Article 31 EEA and the right of establishment, Case E-15/11 *Arcade Drilling* [2012] EFTA Ct. Rep. 676, paragraph 59, and case law cited). Were it otherwise, the objective of the Directive to further the free movement of employees and self-employed persons who have ceased their occupational activity could be undermined and the right to reside in another EEA State be rendered ineffective.

78 The substance of Article 1 of Directive 90/365 has been maintained in Article 7(1)(b) of Directive 2004/38. The Court finds that there is nothing to suggest that the latter provision must be interpreted more narrowly than the former with regard to a right to move within the EEA from the home State. On the contrary, recital 3 of the preamble to Directive 2004/38 states that it aims in particular to strengthen the right of free movement and residence. The fact that Article 7 is placed in Chapter III of Directive 2004/38 entitled ‘Right of residence’, and not in Chapter II on ‘Right of exit and entry’, cannot be decisive. The provisions of Chapter II concern mere formalities regarding border controls.

79 Moreover, it is of no consequence that the rights of economically inactive persons in Directive 2004/38 were adopted by the Union legislature on the basis of Article 21 TFEU on Union Citizenship. That concept was introduced in the EU pillar through the Maastricht Treaty, which entered into force on 1 November 1993. However, the rights of economically inactive persons in Directive 90/365, and also Directives 90/366/EEC (students) and 90/364/EEC (other economically inactive persons), were adopted on the basis of Article 235 EEC prior to the introduction of the concept of Union citizenship. This provision conferred on the EU legislature a general power to take the appropriate measures necessary for the operation of the common market where no specific legal basis existed in the Treaty. When Directive 90/365 as well as Directives 90/364/EEC and 90/366/EEC were made part of the EEA Agreement in 1994, these directives conferred rights on economically inactive persons.

80 According to the Joint Committee Decision and the accompanying Joint Declaration by the Contracting Parties, the concept of Union Citizenship has no equivalence in the EEA Agreement, and the EEA Agreement does not provide a legal basis for political rights of EEA nationals. Therefore, the incorporation of Directive 2004/38 cannot introduce rights into the EEA Agreement based on the concept of Union Citizenship. However, individuals cannot be deprived of rights that they have already acquired under the EEA Agreement before the introduction of Union Citizenship in the EU. These established rights have been maintained in Directive 2004/38.

81 Nor can it be decisive that, in the EU pillar, the ECJ has based the right of an economically inactive person to move from his home State directly on the Treaty provision on Union Citizenship, now Article 21 TFEU, instead of on Article 1 of Directive 90/365 or Article 7 of Directive 2004/38. As the ECJ was called upon to rule on the matter only after a right to move and reside freely was expressly introduced in primary law, there was no need to interpret secondary law in that regard (compare, in particular, *Turpeinen*, cited above, paragraph 40).

82 The Court therefore concludes that Article 1(1) of Directive 90/365 and Article 7(1)(b) of Directive 2004/38 must be interpreted such that they confer on a pensioner who receives a pension due to a former employment relationship, but who has not carried out any economic activity in another EEA State during his working life, not only a right of residence in relation to the host EEA State, but also a right to move freely from the home EEA State. The latter right prohibits the home State from hindering such a person from moving to another EEA State. A less favourable treatment of persons exercising the right to move than those who remain resident amounts to such a hindrance. Furthermore, a spouse of such a pensioner has similar derived rights, cf. Article 1(2) of Directive 90/365 and Article 7(1)(d) of Directive 2004/38, respectively.

83 The Court notes that the provisions of Directive 90/365 and Directive 2004/38 form part of the EEA Agreement, and must, as far as possible, be given an interpretation that renders them consistent with the provisions of the EEA Agreement and general principles of EEA law.

84 The prohibition on discrimination in EEA law requires that comparable situations must not be treated differently and that different situations must not be treated in the same manner.

85 The national legislation at issue in the main proceedings concerns tax. It is settled case law that, even though direct taxation falls within the EEA States' competence, the EEA State must nonetheless exercise that competence consistently with EEA law (see, most recently, Case E-14/13 *ESA* v *Iceland* [2013] EFTA Ct. Rep. 924, paragraph 25, and case law cited).

86 In relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable (see, for comparison, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 31).

87 However, a non-resident taxpayer, whether employed or self-employed, who receives all or almost all of his income in the State where he works, is objectively in the same situation as regards income tax as a resident of that State who does the same work there. Both are taxed in that State alone and their taxable income is the same (compare Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 20). That reasoning also applies in a situation where a retirement pension constitutes the taxable income (compare *Turpeinen*, cited above, paragraph 29).

88 Consequently, it must be held that, insofar as the pension paid in the home State constitutes all or almost all of his income, a non-resident retired person such as Mr Gunnarsson is in the same situation as regards income tax as retired persons resident in the home State who receive the same pension.

89 It is undisputed that, in the period relevant to the proceedings before the national court, Icelandic law provided that spouses resident in Iceland, one being a pensioner receiving benefits as a consequence of the prior existence of an employment relationship, and one being without income, may pool personal tax credits in connection with the assessment of income tax, whereas spouses resident in another EEA State were not entitled to such pooling.

90 Such less favourable tax treatment of a pensioner and his wife who have exercised the right to move freely within the EEA is not compatible with Article 1(1) and (2) of Directive 90/365 and Article 7(1)(b) and (d) of Directive 2004/38, where the pension received by the pensioner constitutes all or nearly all of that person's income, unless objectively justified.

91 The Icelandic State has argued that such differential treatment is justified on the grounds of fiscal cohesion and the effectiveness of fiscal supervision in Iceland. However, such grounds are permitted neither under Directive 90/365 nor under Directive 2004/38. Pursuant to subparagraph 3 of Article 2(2) of Directive 90/365, EEA States shall not derogate from the provisions of the treaty save on grounds of public policy, public security or public health. Moreover, it is stated in Article 27(1) of Directive 2004/38 that EEA States may restrict the freedom of movement and residence of EEA citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. Under Article 27(1), these grounds shall not be invoked to serve economic ends.

92 The reply to the questions from the Supreme Court must therefore be that it is not compatible with Article 1 of Directive 90/365/EEC and Article 7(1)(b) and (d) of Directive 2004/38/EC that an EEA State does not give spouses who have moved to another EEA State the option of pooling their personal tax credits in connection with the assessment of income tax, whereas they would be entitled to pool their personal tax credits if they lived in the home State, in a situation where one of them receives a pension from the home State, and that pension constitutes all or nearly all of that person's income, while the other spouse has no income.

93 In these circumstances, there is no need to rule on the applicability of Article 28 EEA.

IV Costs

94 The costs incurred by the Icelandic, Norwegian and Liechtenstein Governments, ESA and the Commission, which have submitted observations to the Court, and/or replied to the written questions of the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Supreme Court of Iceland, any decision on costs concerning those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Hæstiréttur Íslands, hereby gives the following Advisory Opinion:

It is not compatible with Article 1 of Directive 90/365/EEC and Article 7(1)(b) and (d) of Directive 2004/38/EC that an EEA State does not give spouses who have moved to another EEA State the option of pooling their personal tax credits in connection with the assessment of income tax, whereas they would be entitled to pool their personal tax credits if they lived in the home State, in a situation where one of them receives a pension from the home State, and that pension constitutes all or nearly all of that person's income, while the other spouse has no income.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 27 June 2014.

Gunnar Selvik
Registrar

Carl Baudenbacher
President