UTLENDINGSNEMNDA
UNE

EFTA Court
1 Rue du Fort Thüngen
L-1499 Luxembourg

Your ref:	Our ref:	Date
	24/566 JBE	19 September 2024

Request for an Advisory Opinion

Parties: AO and IM
[address omitted]

Introduction:

(1) The Immigration Appeals Board (*Utlendingsnemnda – UNE*) hereby requests an advisory opinion from the EFTA Court pursuant to Article 34 [of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA)] concerning the interpretation of Directive 2004/38/EC ("the Directive") in the EEA law context.

(2) The request concerns the interpretation of Article 7(1)(b) of the Directive. The issue in respect of which an advisory opinion is sought concerns to what extent a third-country national's income can form part of the basis of assessment of whether an EEA national has "sufficient resources" for himself or herself and his or her family members, see Article 7(1)(b) of the Directive.

The Immigration Appeals Board as an independent administrative body

(3) The Immigration Appeals Board (*Utlendingsnemnda – UNE*) is a politically independent administrative body within the Ministry of Justice and Public Security that deals with complaints lodged under the Immigration Act (*utlendingsloven*) and the Citizenship Act (*statsborgerloven*). The Board deals with complaints against any decisions under the Immigration Act and Citizenship Act taken by the Directorate of Immigration (*Utlendingsdirektoratet – UDI*), which were previously dealt with by the Ministry of Justice. UNE has 18 Board Chairs who rule on cases. Those Board Chairs must be qualified to sit as judges and they work independently of political and administrative authorities.

(4) It follows from the second paragraph of section 76 of the Immigration Act that instructions may not be given to UNE's Board Chair/Boards: "The Ministry's general right of instruction does not confer authority to instruct in relation to decisions in individual cases. Nor may the Ministry instruct the Immigration Appeals Board on the interpretation of legislation or the exercise of discretion in cases other than cases involving return grants under section 90a. The Ministry may instruct in relation to prioritisation of cases."

(5) Nor can the Board Chairs be instructed in individual cases by the Director of UNE, see the second paragraph of section 16-2 of the Immigration Regulation: "The Director may issue general guidelines concerning the examination of individual cases, exercise of discretion etc., but may not give instructions in an individual case."

(6) UNE's decisions are final and not subject to appeal. They are binding on the complainants and determine their legal rights and obligations as foreign nationals in Norway. UNE's decisions may be the subject of review before the ordinary courts, but the latter can only uphold or set aside UNE's decisions.

(7) UNE refers to the legal basis for the Board's establishment and function, see section 77 of Act No 35 of 15 May 2008 relating to the admission of foreign nationals into the realm and their stay here (Immigration Act) (*lov 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her (utlendingsloven)*), and section 16-2 et seq. of the Regulation relating to the admission of foreign nationals into the realm and their stay here (Immigration Regulation) (*Forskrift om utlendingers adgang til riket og deres opphold her (utlendingsforskriften)*). Reference is further made to the EFTA Court's case-law relating to the "court or tribunal" criterion under Article 34 SCA, see, in particular, from recent case-law, Case E-5/16 *Municipality of Oslo*, paragraphs 35–43, and E-8/19 *Scanteam*, paragraphs 40–54.

(8) In paragraph 42 of the judgment in Case E-8/19, the EFTA Court describes its case-law: "*When assessing whether a referring body qualifies as a court or tribunal within the meaning of Article 34 SCA, the Court takes account of a number of factors. These include, in particular, whether the referring body is established by law, has a permanent existence, exercises binding jurisdiction, applies rules of law, is independent, and, as the case may be, whether its procedure is inter partes and similar to a court procedure (see Joined Cases E-3/13 and E-20/13 Fred. Olsen and Others [2014] EFTA Ct. Rep. 400, paragraph 60 and case law cited).*"

(9) On the basis of the EFTA Court's case-law, UNE considers that it constitutes a court within the meaning of Article 34 SCA and that the request for an advisory opinion can be heard by the EFTA Court.

Anonymity:

(10) Pursuant to Article 45 of the Rules of Procedure of the EFTA Court, it is hereby requested that the parties' names and personal information be omitted from any documents made public.

Background to the case – the parties:

(11) The request concerns two persons, AO and IM. The parties are married and have a child, born in 2018.

(12) The parties have separate pending appeal cases before UNE. AO has appealed against the decision of 3 January 2024 of UDI, by which her application for a permanent residence certificate under the first paragraph of section 119 of the Immigration Act, read in conjunction with section 115 thereof, was rejected. IM has appealed against the decision of 14 November 2022 of UDI, by which his application for a permanent residence certificate under the second paragraph of section 119 of the Immigration Act, read in conjunction with section 116 thereof, was rejected.

(13) AO is a Polish national. She arrived in Norway on 2 May 2016, registered as a job-seeker on 7 June 2016 and as a worker on 11 August 2016. On 7 June 2016, she was issued with a registration certificate as an EEA national under section 117 of the Immigration Act, read in conjunction with section 112 thereof.

(14) Public registers show the following for her employment and income situation in Norway in the period 2016-2022:

Jun 2016 to Sep 2017	Employment income	NOK 247 191
Oct 2017 to Oct 2018	No income	
Oct 2018 to Aug 2019	Unemployment benefits from NAV	NOK 105 560
Aug 2019 to Feb 2022	No income	

(15) IM is an Egyptian national. On 14 October 2016, he applied for a residence card as a family member of an EEA national, see section 118 of the Immigration Act, read in conjunction with section 114 thereof, on the basis of his marriage with AO.

(16) That application was granted by decision of 30 November 2016 of Oslo Police District.

(17) IM's tax returns and "*A-meldinger*" (monthly income and tax reports sent to various government authorities) suggest that he has been in full-time employment since July 2017, with the following income information:

2017	NOK 317 329
2018	NOK 520 636
2019	NOK 537 717
2020	NOK 568 761
2021	NOK 627 278
2022	NOK 766 195
2023	NOK 800 727

Pending appeal – AO

(18) On 10 November 2022, AO applied for a permanent residence certificate as an EEA national: see the first paragraph of section 119 of the Immigration Act, read in conjunction with section 115 thereof. In the application, she stated that she had been in Norway since 2 May 2016, and that she had been a worker and self-employed person in Norway. Together with her application, she submitted her passport, employment contract from 2016, income and tax information for her spouse IM and the decision of November 2018 of the Norwegian Labour and Welfare Administration (*Arbeids- og velferdsetaten - NAV*), by which she had been granted unemployment benefits (*dagpenger*).

(19) UDI rejected the application by decision of 3 January 2024. UDI referred to the fact that AO was registered as being without income in the period September 2017 to October 2018 and in the period August 2019 to the date of the decision, whilst she was receiving unemployment benefits in the period October 2018 to August 2019. UDI accordingly took the view that it had not been documented that she had exercised rights under EEA law in Norway during those periods and that, as a result, she had not had five years' continuous lawful residence in Norway at the time of the decision. UDI further took the view that IM's income had no bearing on the determination of whether AO was exercising rights under EEA law in Norway.

(20) AO appealed against the decision on 15 January 2024. In the appeal, she referred to the fact that she was a worker in the period June 2016 to July 2017, but that she subsequently was unemployed due to pregnancy. Furthermore, she did not apply for sickness benefits (*sykepenger*), as she and IM were, in any event, due to move to XXX, and there was no point in being employed in a company that was 400 km away from where she was going to move. AO further stated that she did not obtain new employment right away in XXX, and that she received unemployment benefits during the period October 2018 to August 2019. She further stated that her spouse, IM, had income and that she regularly received money from him.

(21) UDI assessed the information in the appeal, but found no ground to reverse its own decision. UDI referred to the reasons in the decision, adding that IM's income could not be included in any determination of whether AO was exercising rights under EEA law in Norway on the basis of sufficient resources, see letter (c) of the first paragraph of section 112 of the Immigration Act.

(22) On 25 January 2024, UDI referred the case to UNE for appeal proceedings.

Pending appeal – IM

(23) On 13 January 2022, IM applied for a permanent residence card as a family member of an EEA national, see the second paragraph of section 119 of the Immigration Act, read in conjunction with section 116 thereof. Together with his application, he submitted his own and AO's passports, employment contract and payslips, an extract from the Brønnøysund Register of Business Enterprises relating to an enterprise operated by AO and a contract of purchase for housing.

(24) UDI rejected the application by decision of 14 November 2022. In the rejection, UDI referred to the fact that AO was registered as being without income in the period September 2017 to October 2018 and in the period August 2019 to the date of the decision, whilst she was receiving unemployment benefits in the period October 2018 to August 2019. UDI accordingly took the view that it had not been documented that AO had exercised rights under EEA law in Norway during those periods and that, as a result, IM had not had five years' continuous lawful residence in Norway at the time of the decision.

(25) IM appealed against the decision on 28 November 2022. In the appeal, he referred to the fact that AO was a worker in the period June 2016 to July 2017, but that she subsequently was unemployed due to pregnancy. Furthermore, AO did not apply for sickness benefits, as she and IM were, in any event, due to move to XXX, and there was no point in being employed in a company that was 400 km away from where she was going to move. IM

further stated that AO did not obtain new employment right away in XXX, and that she received unemployment benefits during the period October 2018 to August 2019.

(26) Lastly, IM referred to the fact that he had a good income throughout that period, and that the parties accordingly had sufficient resources for residence purposes and were not dependent on AO being continuously in employment.

(27) UDI assessed the information in the appeal, but found no basis to reverse its own decision. UDI referred to the reasons in the decision, adding that IM's own income could not be included in any determination of whether AO was exercising rights under EEA law in Norway on the basis of sufficient resources, see letter (c) of the first paragraph of section 112 of the Immigration Act.

(28) On 2 March 2023, UDI referred the case to UNE for appeal proceedings.

(29) On 17 June 2024, UNE informed the parties that it was considering referring the case to the EFTA Court for an advisory opinion, and requested the parties to submit any comments they might have relating thereto. UNE has not received a reply to that inquiry.

(30) Neither of the parties is represented by a lawyer or other agent.

Relevant national legislation

(31) The parties' appeals concern the right of "permanent residence", see Article 16(1) (AO) and Article 16(2) (IM) of the Directive.

(32) Article 16(1) of the Directive provides that Union citizens who have resided legally for a continuous period of five years in the host Member State are to have the right of permanent residence there. The provision is implemented in Norwegian law through section 115 of the Immigration Act.

(33) Article 16(2) of the Directive provides that the right of permanent residence also applies to family members who are not nationals of a Member State but who have legally resided with the Union citizen in the host Member State for a continuous period of five years. The provision is implemented in Norwegian law through section 116 of the Immigration Act.

(34) A requirement for permanent residence under the Directive is continuous "legal residence" for five years. This is a reference to Article 7(1) and Article 7(2) of the Directive. Those provisions are implemented in Norwegian law through sections 112 and 114 of the Immigration Act.

(35) Under Article 7(1) of the Directive, a citizen of a Member State is entitled to legal residence [on the territory of another Member State] for a period of longer than three months if she fulfils one of the four grounds for residence listed in that provision.

Background for the request:

(36) The main question in the parties' cases is whether they have a right of permanent residence as an EEA national and family member of an EEA national, respectively, see Chapter 13 of the Immigration Act and the Citizenship Directive 2004/38/EC. Both parties' cases are contingent

on AO having continuously resided lawfully in Norway for five years. This implies a requirement that she fulfils one of the alternative grounds for residence under Article 7(1) of the Directive during that five-year period.

(37) Specifically, it is Article 7(1)(b) that is relevant to the case. That provision provides for a right of residence for EEA nationals having "sufficient resources for themselves and their family members" not to become a burden on the social assistance system of the host State during their period of residence and have comprehensive sickness insurance cover in the host State.

(38) It is the interpretation of the requirement of "sufficient resources for themselves and their family members" that forms the basis for the present request. AO has not had income-generating employment or other own sources of income for lengthy periods of time. At the same time, during the entire period 2017-2023, IM has had well-paid income-generating employment.

(39) This brings to the fore the following point at issue: to what extent can the third-country national's income be included in the assessment of whether the EEA national has "sufficient resources for [himself or herself] and [his or her] family members"?

(40) Section 112 of the Immigration Act (Article 7(1) of the Directive) confers on EEA nationals a right to reside in Norway as long as they fulfil one of the alternative bases for residence under the first paragraph of section 112 of the Immigration Act (Article 7(1) of the Directive).

(41) Section 114 of the Immigration Act (Article 7(2) of the Directive) confers on family members of an EEA national who themselves are not EEA nationals a right to reside in Norway as long as the EEA national's right of residence remains, see section 114 of the Immigration Act.

(42) Section 115 of the Immigration Act (Article 16(1) of the Directive) confers a right of permanent residence on an EEA national who has had continuous lawful residence in the realm for five years.

(43) A family member who is not an EEA national, and who has cohabited with an EEA national and had continuous lawful residence in the realm for five years under the first paragraph of section 114 of the Immigration Act (Article 7(2) of the Directive, also acquires a right of permanent residence, see the first paragraph of section 116 of the Immigration Act (Article 16(2) of the Directive).

(44) Hence, in order to determine whether the parties fulfil the requirements for a right of permanent residence, UNE must assess whether the EEA national (AO) has had continuous lawful residence in Norway for five years.

(45) EEA nationals have a right of residence in Norway as long as they exercise rights under EEA law under section 112 of the Immigration Act (Article 7(1) of the Directive), for example, by being employed or by having sufficient resources at their disposal.

(46) UNE asks the question whether AO can be said to have exercised rights under EEA law in Norway continuously for five years. In that connection, UNE has examined whether AO has been a worker and whether she has had sufficient resources at her disposal to provide for herself.

(47) AO has not been a worker continuously for five years. UNE refers to the reasoning of UDI in its decision of 14 November 2022:

(48) "We refer to the fact that [AO] has been employed as a worker in Norway from June 2016 to July 2017 for XXX. From September 2017 to 8 October 2018, there is no record of her having had any income. From 8 October 2018 to August 2019, she has received unemployment benefits from NAV. It has not been documented that AO has retained her status as worker through involuntary unemployment following the expiry of her employment contract with XXX with effect from July 2017, through it being documented that she was involuntarily unemployed and has been registered with NAV as a job-seeker. After August 2019, there has been no income recorded to date, either through an *a-melding* concerning income as a worker or on the tax return as a self-employed person."

(49) In the parties' appeals, they state that the reason why AO was not in employment during those periods was in part due to pregnancy and later because she was caring for her newborn child. UNE takes the view that this fact does not mean that she has retained her status as a worker. AO has not availed herself of welfare schemes relating to sickness and childbirth that would have enabled her to retain her employment and status as a worker. It was her own choice to terminate the employment relationship.

(50) For UNE, it does not appear as though AO has been a worker, see letter (a) of the first paragraph of section 112 of the Immigration Act (Article 7(1)(a) of the Directive), after July 2017.

(51) The question whether the EEA national's rights remain will be contingent on whether the requirements of Article 7(3) of the Citizenship Directive are fulfilled. It appears as though in this case it has not been documented that any of the exceptions apply.

Sufficient resources?

(52) UNE has examined whether AO, in those periods when she has not been a worker, nevertheless has exercised rights under EEA law by having sufficient resources at her disposal to provide for herself and her family members: see letter (c) of the first paragraph of section 112 of the Immigration Act (Article 7(1)(b) of the Directive).

(53) AO has not submitted documentation showing that she has had sizeable resources held in her bank account, or that she herself has had other sources of income that have enabled her to provide for herself and her family members. In that connection, UNE refers inter alia to the fact that her tax return for 2022 shows that she had approximately NOK 10 000 held in her bank account at the end of 2022.

(54) In the parties' appeals they have stated that AO has had access to funds through IM's employment income. In other words, it is the third-country national who has brought in all available resources to the household.

The request for an advisory opinion:

(55) It is assumed that the requirement of sufficient resources can be fulfilled even though the resources are derived *in part* from a family member of the EEA national. This entails that a

spouse's or cohabitant's income may be included in the calculation of the EEA national's available resources.

(56) Such a position is consistent with the judgment of 12 July 2015 of the Court of Justice of the European Union (ECJ) in *Kuldip Singh and Others* v *Minister for Justice and Equality*, C-218/14, in which that court held as follows in paragraph 77 [and point 2 of the operative part]:

"Article 7(1)(b) of Directive 2004/38 must be interpreted as meaning that a Union citizen has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host Member State during his period of residence even where those resources derive ***in part*** *from those of his spouse who is a third-country national."*
(emphasis added by UNE)

(57) The wording "in part" can be construed as meaning that the ECJ accepts that parts of the reference person's own resources may derive from his or her spouse, but not that the spouse's income can account for all or most of the reference person's resources in those periods when he or she is not employed. As UNE understands that judgment, it was, in other words, held that the EEA national himself or herself had to have a certain share (own contribution) of the resources – they could not derive solely from the third-country spouse.

(58) UNE notes that the judgment in *Kuldip Singh* is difficult to reconcile with other judgments, such as *Zhu and Chen*, C-200/02, and *Adzo Domenyo Alokpa and Others* v *Ministre du Travail, de l'Emploi et de l'Immigration*, C-86/12. In those cases, no form of own contribution from the EEA national was required. Both of those cases were characterised by the fact that the EEA nationals were children and resources were made available by third-country parents. UNE notes that the facts of *Kuldip Singh* seem to imply that the complainant in that case had a right of *permanent* residence, see the information in paragraph 14, to the effect that the EEA national spouse had been continuously employed for a five-year period when the dispute in the main proceedings that gave rise to the reference came about. That [judgment] accordingly seems to be based on an insufficient analysis of the facts.

(59) As regards the ECJ's guidance on interpretation, it does not discuss how that person's own contribution must be arranged. Is it required that the EEA national *continuously* has a certain minimum of resources (in parallel with the third-country national's contribution) or is it sufficient that the EEA national only has resources during certain periods, in such a way that those periods correspond to the ECJ's requirement of own contribution(s)? In the latter scenario, it is assumed that the third-country national's contribution is present continuously or at least in the periods in which the EEA national does not have resources.

(60) If the latter (sequential) scenario is permitted, questions may be asked about the significance of who provides the resources in the initial phase following establishment in the host State in cases where the resources are generated by the third-country national through employment. During that initial phase, the EEA national will not have any right of residence under Article 7(1) of the Directive (first paragraph of section 112 of the Immigration Act) and nor, therefore, will the third-country national be able to derive a right of residence under Article 7(2) of the Directive (section 114 of the Immigration Act). The employment will accordingly be unlawful and a criminal offence under the first paragraph of section 55 of the Immigration Act, read in conjunction with letter (a) of the second paragraph of section 108.

(61) UNE notes that the ECJ has accepted the proceeds of unlawful and criminal employment as resources within the meaning of Article 7(1)(b) of the Directive in *Bajratari*, C-93/18, but also observes that the facts of that case concerned the parent-child relationship, as did those of the abovementioned cases referred to in connection with the judgment in *Kuldip Singh*, C-218/14.

(62) In the parties' appeals in the present case, the EEA national has been completely without income or significant assets for long periods. During those periods, the parties have lived solely off IM's income. In line with the statement in the ECJ's judgment reproduced above, UNE asks whether the requirement of sufficient resources is fulfilled during those periods, since the appellant's income cannot account for all or most of the parties' resources for providing for themselves.

(63) UNE considers that it is unclear whether it is permissible that the entire income/ all of the available resources derive from the third-country national's income. It is also unclear whether it makes any difference if this takes place initially or subsequently in the period in question, in other words, if it makes a difference whether the EEA national initially meets the requirements versus a situation where that national has never had his or her own income/ own resources.

(64) One argument for *not* accepting that one lives solely off resources from the third-country national may be that it would be contrary to the purpose of the EEA rules. The intention is that an *EEA national* who is going to work in an EEA State shall be able to bring family members who are third-country nationals to the host State. This follows from Articles 1(d) and 2 of the Citizenship Directive. The person holding the rights in this situation is the EEA national, not the family members, who have only a derived right. In such a situation as described – where only the third-country national is bringing in income for the family – the EEA national will not exercise any rights and the basis for the use of the rules then seems to cease to exist. The EEA national's status then becomes a passive role devoid of substance.

(65) In the light of the foregoing, UNE requests the EFTA Court to answer the following questions of interpretation:

a. To what extent can a third-country national's income/resources form part of the assessment of whether the EEA national has "sufficient resources" for himself or herself and his or her family members: see Article 7(1)(b) of Directive 2004/38/EC?

b. If the answer to question a entails that the third-country national's resources cannot form the entire basis in order for the EEA national to have "sufficient resources", is it then required that the EEA national make an "own contribution" on a continuous basis in order for the requirement of "sufficient resources" to be fulfilled, or can the EEA national's contribution be limited to a shorter period, for example that the EEA national has gainful employment for one year, subsequently to which the parties rely on the third-country national's income during the following four years?

Sincerely,

Johan Berg
Board Chair