The Reality Test of Residence goes through the Looking Glass

Court of Justice of the European Free Trade Association States (EFTA Court), judgment of 26 July 2016, Case E-28/15, *Yankuba Jabbi* v *The Norwegian Government, represented by the Immigration Appeals Board*

Jeremy B. Bierbach*

Introduction

In July 2016, the EFTA Court issued a judgment on the circumstances under which EEA law provides for a derived right of residence in the home member state of an EEA national for the third-country national family member of that EEA national, specifically when that EEA national has returned from residing in another EEA state as an economically inactive person. In this, the Court was adding its own translation into EEA law (at least as it applies to the EFTA states, the three member states of the EEA that do not belong to the EU: Norway, Liechtenstein and Iceland) onto a veritable tower of case law from the European Court of Justice, its EU counterpart, starting with *Surinder Singh,*[1] going on to *Eind*,[2] and most recently restated in *O&B*.[3]

* Dr. Jeremy Bierbach is attorney at Franssen Advocaten, Amsterdam, and associate fellow of the Amsterdam Centre for European Law and Governance.

[1] ECJ 7 July 1992, Case C-370/90, *R* v *Immigration Appeal Tribunal and Surinder Singh, ex p Secretary of State for the Home Department*.

[2] ECJ 11 December 2007, Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie* v *RNG Eind*.

[3] ECJ 12 March 2014, Case C-456/12, *O* v *Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel* v *B. See* my extensive analysis of this case and the case it was paired with, *S&G*: ECJ 12 March 2014, Case C-457/12, *S* v *Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel* v *G*, in J.B. Bierbach, *Frontiers of Equality in the Development of EU and US citizenship* (TMC Asser Press 2017) ch. 10.

European Constitutional Law Review, 13: 383–399, 2017
© 2017 The Authors
doi:10.1017/S1574019617000104

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

An analysis of this case can reveal the nature of the divergence between EEA law (as it applies to the EFTA states) and EU law regarding freedom of movement. The EU Court's case law does not directly bind the EFTA Court or the EFTA member states, nor (vice versa) is the EFTA Court's case law directly binding on the European Court of Justice or the EU member states. But the parallel EFTA and EU universes do not exist in complete isolation from each other, separated by an impermeable looking glass: both of them share substantially identical Agreement[4]/Treaty[5] provisions on the freedom of movement of workers, the freedom of establishment, and the freedom to provide services as well as a single legislative instrument with EEA-wide validity, Directive 2004/38.[6] When ruling on the interpretation of such shared provisions, the EFTA Court is bound by the principle of homogeneity[7] to construe those provisions in the same way as the European Court of Justice does. In *Jabbi*, the EFTA Court openly accepts the reasoning that lies at the heart of the European Court of Justice's *Singh* and *Eind* decisions, based as they were on the freedom of movement of workers and the freedom of establishment as enshrined in primary law. But by the same token, the EFTA Court expressly rejects any binding nature of the European Court of Justice's considerations in *O&B* for being based on Article 21(1) TFEU, the Treaty provision on freedom of movement of EU citizens that has no parallel in the Agreement.

Yet when one goes through the looking glass, nothing is as simple as it seems. I will first briefly review the EU case law and legislation on rights of residence for third-country national family members of returning EU citizens, which culminates in the European Court of Justice establishing (in *O&B*) a 'reality' or genuineness test of residence in the host member state. Then I will review the facts and the arguments of Jabbi and the Norwegian government.

In my comment on the EFTA Court's decision, I will show, first of all, where in the primary EEA legislation the EFTA Court finds the basis for rights of residence for economically inactive EEA nationals. Moreover, I will note that the EFTA Court reveals itself to be substantially inspired by *O&B* and that decision's 'reality test' of residence. While rejecting the binding nature of *O&B,* the Court does appear to copy the European Court of Justice's considerations establishing that test. I will note the roots of that test in the case law of the European Court of Justice, as well as in the case law of a single EU member state, in order to trace it back to a binding common precedent in EEA and EU law, and also to point out how the phrasing of the language version of *O&B* that the EFTA Court might have chosen to read could have caused it to miss the reference to that precedent.

[4] Art. 28, Art. 33 and Art. 36 EEA Agreement.

[5] Art. 45, Art. 49 and Art. 56 TFEU.

[6] In the EFTA states, the Directive must be read in conjunction with the Decision of the EEA Joint Committee No. 158/2007 of 7 December 2007, which provides guidelines for the reading and implementation of the Directive there.

[7] 4th and 15th recitals and Art. 6 EEA Agreement.

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

Finally, I will note how the EFTA Court is ambiguous about one of the most important considerations of *Eind*.

Any remaining divergence between EU law and EEA law could serve to help answer the question of whether EU citizenship is really necessary to effectuate the general freedom of movement of persons, or if it can be deconstructed into the bundle of separately legislated freedoms of movement that preceded it.

The Case Law of the European Court of Justice in Three Parts

Deterrent effect

In *Surinder Singh*,[8] the European Court of Justice confirmed that the rights of residence for family members, as guaranteed by the secondary legislation on freedom of movement of workers and of establishment, also applied to family members of member state nationals who had made use of one of those freedoms of movement to return to their own member states after making use of a freedom of movement in a host member state. Those rights derived directly from the Treaty-guaranteed freedoms of movement of workers and of establishment (now Articles 45 and 49 TFEU). After all, the Court reasoned, a member state national 'would in particular be deterred from [making use of those freedoms]' in a host member state 'if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of [the host] Member State'.[9] This doctrine would accordingly become known as the 'deterrent effect', which the application of Community law to family members of returning member state nationals was meant to avoid.

Right of return reinforced

In its last decision prior to *O&B* concerning the rights of family members of returning Union citizens, *Eind*,[10] the Court reinforced the right of Union citizens to return to their home member states after making use of the freedom of movement of workers.

The Court clarified, essentially, that the 'deterrent effect' that was to be avoided applied to a member state national's use of freedom of movement to move to a host member state in the first place. When a member state national returns to his own member state, moreover, his right of entry and residence as a national of that

[8] *Supra* n. 1.

[9] *Supra* n.1, para. 20.

[10] *Supra* n. 3. *See*, generally, J.B. Bierbach, 'European Citizens' Third-Country Family Members and Community Law', 4(2) *EuConst* (2008) p. 344.

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

state is unconditional, and not subject to the conditions of being economically active or satisfying the conditions for legal residence for economically inactive Union citizens. Therefore, to guarantee the useful effect of Article 45 TFEU, any family member must have an equally unconditional right to enter and reside in the home member state when returning together with the Union citizen (as long as that person still qualified as a family member in the sense of the secondary legislation).[11]

Right of return consolidated

O&B represented the European Court of Justice's first decision on the case of EU citizens who had made use of the new Directive 2004/38 as (possibly) economically inactive Union citizens, now that the Directive consolidated the right of freedom of movement for both economically active and inactive Union citizens into one instrument. In this case, the Court first of all made clear,[12] as it had in *Shirley McCarthy,*[13] that this secondary legislation did not by any reading – literal, systematic, or teleological – apply to either the third-country nationals O or B or their Union citizen family members (who had the nationality of the Netherlands) while they were living in the Netherlands, the member state of which the Union citizens had the nationality. The European Court of Justice interprets the provisions of the Directive very strictly, and one of them, Article 3(1), defines as the beneficiaries of the Directive (italics added) 'all Union citizens who move to or reside in a Member State *other than that of which they are a national*, and to their family members […] who accompany or join them'.

For the European Court of Justice, then, the only possible source of a right of residence for O and B outside of the literal provisions of the Directive could be the primary legislation. Therefore, the Court went on to determine when a third-country national family member could be said to have a derived right of residence from Article 21(1) TFEU after a Union citizen had returned from living in another member state. It reviewed its case law as established in *Singh* and *Eind* and the rationale behind it within the freedom of movement of workers, i.e. the need to avoid any 'deterrent effect' or obstacle to the use of the freedom of movement of workers. In *O&B*, the Court now made clear that that this equal applicability of Union law was also to be extended to the general freedom of movement and

[11] *Supra* n. 3, paras. 31-40.

[12] *Supra* n. 1, paras. 37-43.

[13] ECJ 5 May 2011, Case C-434/09, *McCarthy* v *Secretary of State for the Home Department*, also known in the literature - and referred to in *Jabbi* - as *McCarthy I.* A subsequent decision from the ECJ in the case of an unrelated 'McCarthy', but in a not entirely unrelated area, ECJ 18 December 2014, Case C-202/13, *Sean Ambrose McCarthy et al* v *Secretary of State for the Home Department*, is also known as *McCarthy II*.

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

residence (Article 21(1) TFEU) for Union citizens, including economically inactive Union citizens.[14] Nevertheless, this should not have come as a surprise in light of the Court's incorporation of its previous case law on freedom of movement of workers into the rights of movement and residence for economically inactive Union citizens (based on Article 21(1) TFEU) in *Chen.*[15]

In the *Singh* and *Eind* case law, it was not a subject of debate for the referring courts or the European Court of Justice whether or not the member state nationals involved had actually made use of the freedom of movement of workers or the freedom of establishment in the host member state. Moreover, it would seem fairly easy for an EU citizen to provide indisputable evidence that she or he has worked in employment or self-employment in a host member state, and thereby made use of one of those fundamental freedoms on which no 'deterrent effect' should be exercised by her or his home member state.

However, the introduction of the general freedom of movement and residence for Union citizens with Article 21(1) TFEU meant that the Court now had to establish a standard for determining when a Union citizen had made a sufficiently serious use of that general freedom, which might not have involved economic activity, to warrant preventing the 'deterrent effect'. The Court determined in *O&B* that when a Union citizen had had 'genuine residence' in a host state, satisfying the conditions of Article 7(1) and 7(2) of the Directive, which provide for a right of residence for longer than three months,[16] such as to enable the Union citizen to 'create or strengthen' family life there with a third-country national, then that family member could get a derived right of residence based on Article 21(1) TFEU upon the Union citizen's return to the home member state.[17] Moreover, despite the fact that the provisions of the Directive do not literally apply to the family member's right of residence in the returning EU citizen's home state, they would have to apply by analogy, such that a right of residence based on the primary legislation could not be any less favorable than a right of residence in a host member state based on the Directive.[18]

[14] *O&B*, *supra* n. 3, para. 49.

[15] ECJ 19 October 2004, Case C-200/02, *Kunqian Catherine Zhu, Man Lavette Chen* v *Secretary of State for the Home Department* para. 45, in which the Court refers directly to ECJ 17 September 2002, Case C-413/99, *Baumbast and R* v *Secretary of State for the Home Department* paras. 71-75. *See also* Bierbach (2017), *supra* n. 3, p. 359-360.

[16] Or, for that matter, Art. 16(1) and (2) of the Directive, providing for a right of permanent residence after five years of legal residence in the host member state.

[17] *O&B*, *supra* n. 3, paras. 51-56.

[18] ECJ *O* v *Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel* v *B* para. 61.

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

The Facts[19] and Arguments[20] in *Jabbi*

Mr Jabbi is a national of Gambia, who married a national of Norway, Ms Amoh, while she was living in Spain. They lived there together for at least six months after getting married. Ms Amoh was economically inactive while she lived in Spain, but claimed that she could live off savings there; in any case, she was entitled to a disability pension there. In October 2012, Ms Amoh returned to live in Norway, bringing Mr Jabbi with her, and in November 2012, Mr Jabbi applied to the Norwegian immigration authority for recognition of his right of residence as the spouse of an EEA national. Mr Jabbi's application was rejected, and he was expelled from Norway; his repeated appeals to the Immigrations Appeal Board against the rejection decision were also rejected. When Mr Jabbi filed a judicial appeal to the District Court of Oslo, claiming a derived right of residence as the spouse of a returning EEA national, the District Court referred the question to the EFTA Court:

> Does Article 7(1)(b), *cf.* Article 7(2), of Directive 2004/38/EC confer derived rights of residence to a third country national who is a family member of an EEA national who, upon returning from another EEA State, is residing in the EEA State in which the EEA national is a citizen?

Jabbi, in his observations submitted to the Court, cited *O&B*. He noted that Article 21(1) TFEU (the basis in EU law for the derived rights of residence, since – recall – the Directive does not itself apply to that situation in EU law) has no parallel in the EEA Agreement, but that the principle of homogeneity meant that the applicable provisions of EEA law, including Article 7(1)(b) of the Directive, had to be interpreted to achieve the same effect in order to ensure a uniform right of free movement throughout the EEA.[21]

It must be noted, by the way, that the Norwegian statute implementing the Directive (as reviewed in paragraph 20 of the decision) does provide, intriguingly enough, that:

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

[19] Paras. 22-27 of the decision.
[20] Paras. 28-47 of the decision.
[21] Paras. 28-33.

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

Thus essentially, what the Norwegian government was arguing against Jabbi before the EFTA Court was that Ms Amoh had not 'exercised the right to free movement' in Spain *under the EEA Agreement*, since Articles 28, 31 and 36 of that Agreement only apply to economic freedoms (of workers, establishment, and service provision). Therefore, in the Norwegian government's view, Ms Amoh could have only had legal residence in Spain based on Article 7(1)(b) of the Directive, the specific provision of the Directive concerning rights of residence of economically inactive EEA nationals that did not have an express basis in the EEA Agreement.[22]

The EFTA Court's judgment in *Jabbi*

The Court, however, does not hew to such a restrictive literal interpretation of the Agreement. It first notes the historical fact that Directives 90/364/EEC, 90/365/EEC and 93/96/EEC, the original Community directives providing for freedom of movement of economically inactive member state nationals and their family members (which, I can note, were enacted prior to the Maastricht Treaty's introduction of Union citizenship), were part of the EEA Agreement at its time of entry into force, incorporated into it via Annex VIII on the freedom of establishment.[23] (Apparently, therefore, the fact that economically inactive EEA member state nationals were not technically making use of the freedom of establishment in the sense of Article 31(1) EEA was not seen as a barrier to the full incorporation of those Directives.)

However, and perhaps more significantly, the Court draws on the fifteenth recital of the Agreement[24] as a source for the principle of homogeneous interpretation of the provisions of EU law substantially reproduced in the EEA Agreement and its annexes.[25] 'Without independence in its adjudication no court could claim legitimacy. Every court must exercise its jurisdiction based upon the relevant legal sources. An essential legal source for the Court is the case law of the ECJ and the General Court.' Nonetheless, the European Court of Justice's case law in *O&B* fails to provide a complete source for the EFTA

[22] Para. 36.

[23] Para. 61. By obvious comparison, Directive 2004/38 is also incorporated into the EEA agreement, in Annexes V and VIII on the freedom of movement of workers and the freedom of establishment, respectively: para. 7.

[24] 'WHEREAS, in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition'.

[25] Para. 70.

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

Court, since the European Court declares the Directive not to be applicable to return situations and instead draws on Union citizenship and Article 21(1) TFEU.[26]

The EFTA Court goes on to apply the substance of *O&B* to the case at hand, all the while exclusively referring to *Eind*, the last of the European Court of Justice's judgments on the right of return after making use of a specifically economic freedom of movement, and the Directive. If an EEA national can satisfy the conditions of Article 7(1)(b) of the Directive for the right of residence for longer than three months in another EEA state as an economically inactive person, then the EEA national's home state also may not deter him or her from freely moving to that other state to make use of that provision of the Directive.[27] Such a deterrent effect would result from the EEA national's home state denying her or his spouse a derived right of residence upon her or his return.[28] Important conditions are that the residence in the host state was 'genuine such as to enable family life in that State' and that the 'duration of residence [exceeded] a continuous period of three months'.[29] Therefore:

> where an EEA national, pursuant to Article 7(1)(b) and Article 7(2) of the Directive, has created or strengthened a family life with a third country national during genuine residence in an EEA State other than that of which he is a national, the provisions of that directive will apply by analogy where that EEA national returns with the family member to his home State.[30]

Comment

The first comment that can be made concerns the basis in primary law that the EFTA Court identifies for the freedom of movement and residence of economically inactive EEA nationals. It is true, and that was the implicit argument of the Norwegian government, that the main text of the EEA Agreement does not expressly provide for any such thing. The EFTA Court notes that *O&B* cannot be applied homogeneously because the European Court of Justice relies on EU citizenship for that judgment and also does not directly apply the Directive to an EU citizen's right of residence in her or his home state. Nevertheless, the EFTA Court identifies its own independent jurisdiction in ensuring homogeneous interpretation of the

[26] Para. 71.

[27] Paras. 72, 74-75.

[28] Para. 77, citing *Eind*, *supra* n. 2, paras. 35 and 36. *Cf. O&B*, *supra* n. 3, para. 54, which makes an identical reference to *Eind*.

[29] Para. 80.

[30] Para. 81 (and the dictum). *Cf. O&B*, *supra* n. 3, para. 61.

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

Agreement[31] – in an argument that draws obvious comparisons to the European Court of Justice's *Van Gend en Loos*[32] – as the basis in primary EEA law[33] for the freedom of movement of economically inactive EEA member state nationals.

This provides something of a clue as to why the EFTA Court feels the need to fall back on *Eind* as a source, despite the fact that the EFTA Court also does not apparently see the Directive as being directly applicable (considering that it said the Directive would apply 'by analogy') to an EEA national's right of residence in her or his own state. In *Eind*, Union citizenship is not terribly prominent: Article 21(1) TFEU (then-Article 18(1) EC) gets a mention in paragraph 28, and in fact, the European Court of Justice had declined to answer the referring court's fourth question, which directly asked if Article 21(1) TFEU was of any additional significance. Rather, the EU Court frames its decision in *Eind* as an interpretation of the freedom of movement of workers (albeit one 'substantiated by the introduction of the by the introduction of the status of citizen of the Union, which is intended to be the fundamental status of nationals of the Member States'[34] – paragraph 32).

In *O&B*, on the other hand, the ruling begins 'Article 21(1) TFEU must be interpreted as meaning […]', leaving no doubt about the central importance of that provision of primary EU law; for that matter, the European Court of Justice does not devote any considerations in that decision to any distinction between rights of residence as an economically active Union citizen and rights of residence as an economically inactive Union citizen, as long as any of the specific provisions of Article 7(1) of the Directive is satisfied. Thus the EFTA Court may have seen

[31] Hereby also for the first time openly asserting its independence, according to Philipp Speitler, a former high-ranking member of the legal staff of the Court, in 'Where have all the vision(arie)s gone?: Free movement of people and the new legal order – the EEA', blog entry at the Centre for European Legal Studies <www.cels.law.cam.ac.uk/brexitfree-movement-persons-and-new-legal-order/philipp-speitler-where-have-all-visionaries-gone>, visited 25 March 2017.

[32] ECJ 5 February 1963, Case 26/62, *Van Gend en Loos* v *Nederlandse Administratie der Belastingen*: 'In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.'

[33] With regard to the other sources of the principle of homogeneity referred to *supra* in n. 7: the Court could not have drawn on Art. 6 EEA for this ruling, because that provision provides only for homogeneous interpretation of EEA law with 'the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement'. And the 4th recital of the EEA Agreement, 'CONSIDERING the objective of establishing a […] homogeneous European Economic Area, […] providing for the adequate means of enforcement including at the judicial level' does not appear to provide much of a basis for the Court to exceed the limits set by Art. 6 EEA by asserting its *independence*.

[34] Which, in turn, is a reference to ECJ 20 September 2001, Case C-184/99, *Rudy Grzelczyk* v *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*.

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

cause to separately reinvent the wheel of *O&B* by at least formally restating *Eind*'s freedom of movement of workers for economically inactive EEA nationals, in order to make its decision more palatable to the EFTA states (particularly the historically dualist Norway and Iceland, which may prefer to view their Agreement as being more of an ordinary intergovernmental treaty[35] and their adoption of Directive 2004/38 as accordingly being based on their express political will), while at the same time following the substance of *O&B* on an EU citizen's use of the Directive.

Length of residence in a host state: the Directive

Perhaps by the same token of addressing the EFTA-states-as-legislator, though, the EFTA Court appears to read the Directive in a much more restrictive way than even its literal text warrants. In paragraph 73, and again in paragraph 80, the Court establishes as a hard criterion for activating a derived right of residence for a family member of a returning EEA national that '[the] duration of residence in the host State must exceed a continuous period of three months'. I would first point out that in my view, the question to be answered in determining genuine use of Article 7(1) of the Directive is not whether or not the EEA national *actually resided* for more than three months in a host state, but whether the EEA national *established the right* to reside in the host state for more than three months.

This distinction may appear to be of only marginal importance, but I can explain it by reference to *O&B*. There, the EU Court contrasted a right of residence based on Article 7(1) of the Directive to the right of residence for less than three months based on Article 6(1) of the Directive, which is how we could qualify a stay as a tourist or mere visitor in a host state. The key difference, according to the EU Court, was that

> a Union citizen who exercises his rights under Article 6(1) of Directive 2004/38 does not intend to settle in the host Member State in a way which would be such as to create or strengthen family life in that Member State,[36]

ergo that there is no obligation for EU law to protect any such family life (for instance, a holiday fling) upon the EU citizen's return to her or his home state.

However, I can certainly think of many hypothetical examples in which an economically inactive EEA national might clearly be able to demonstrate that he or she genuinely established long-term residence in a host state, and thereby

[35] *See* C. Baudenbacher, 'The EFTA court: an actor in the European judicial dialogue', 28(2) *Fordham International Law Journal* (2005) p. 353 at p. 360; C. Baudenbacher, 'Facets of an EEA Constitutional Order', in N. Colneric et al. (eds.), *Une communauté de droit : Festschrift für Gil Carlos Rodríguez Iglesias* (Berliner Wissenschafts-Verlag, 2003) p. 346.

[36] *O&B*, *supra* n. 3, para. 52.

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

immediately began enjoying a right of residence based on Article 7(1), through a constellation of facts such as signing a rental or purchase contract on a long-term home, signing up for utilities, joining the library and a gym, etc., all while possessing sufficient resources for the intended stay and comprehensive medical insurance. For that matter, that EEA national's third-country national family member would also immediately have been entitled to apply for a residence card in the host state on the basis of Article 7(2) and Article 9(2) of the Directive (without, say, first having to wait for three months of stay on the basis of Article 6(2) to elapse), thus enabling the creation and strengthening of family life in the host state. But what if this EEA national's residence in the host member state were to be interrupted due to unforeseen and fairly catastrophic events, such as the sudden illness of a relative, forcing the EEA national and his or her family member to return to the home state prior to the completion of three months of residence in the host state? I fail to see why no 'deterrent effect' would be exercised on the EEA national's original move if her or his family member would then be denied a right of residence in the home state, nor do I see why this should work any differently in EFTA states than in EU member states.

Genuine residence: the case law of the European Court of Justice[37]

In *O&B*, by contrast, length of residence in a host member state did not seem to play much of a role for the European Court of Justice, if any. That Court even declined to answer the referring court's specific question as to whether there was 'a requirement that the residence of the Union citizen in another Member State must have been of a certain minimum duration'.[38] The Court simply placed the emphasis on *genuine residence* based on Article 7(1) of the Directive.[39] I find it to be unlikely that the Court grasped this term out of thin air. It is altogether plausible, in fact, that it was inspired by a term used in the referral decision from the Dutch *Raad van State* in *O&B.* And that term, in turn, draws on very longstanding case law of the European Court of Justice on the freedom of movement of workers.

In the referral decision and the court cases in the Netherlands leading up to it, there is a clear concern on the part of the Dutch courts and the Dutch minister of immigration for whether the Dutch nationals involved had had 'effective and genuine' residence (*reëel en daadwerkelijk verblijf*) in the host member state, or had made 'effective and genuine' use of the right of movement and residence. This is a formula that in Dutch is directly and unmistakably derived

[37] I am borrowing heavily here from one part of my analysis of *O&B* in Bierbach (2017), *supra* n. 3 at p. 423-424.

[38] *O&B, supra* n. 3, para. 32, second question.

[39] *O&B, supra* n. 3, para. 56.

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

from *Levin*.[40] There, the Court had established a standard of Community law for what defined a member state national as a 'worker' making use of the freedom of movement of workers: being engaged in 'effective and genuine *activities*, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary'. In similar cases prior to the referral decision, the use of the phrase 'effective and genuine *residence*' with regard to residence in a host member state had already been in use for some time, since at least 2010 or before.[41]

To further underscore the natural appeal of *Levin* for the European Court of Justice, I can note that that decision was already of significance in the Court's own case law on rights of residence for third-country family members of returning EU citizens. In *Akrich,* a decision that was handed down subsequent to *Singh*, but prior to *Eind,* the British government claimed that it constituted 'abuse' of the freedom of movement of workers when the British citizen involved had intentionally moved to a host member state in order to obtain a right of residence for her husband. The Court referred to *Levin* to say that the subjective motives of a member state national in making use of freedom of movement were of no consequence to her right to enter and reside in a host member state, nor for that matter to her right to return to her home member state with her family member: all that mattered was that she had engaged in effective and genuine activities as a worker in the host member state.[42]

[40] ECJ 23 March 1982, Case C-53/81, *DM Levin* v *Staatssecretaris van Justitie.*

[41] *Afdeling bestuursrechtspraak van de Raad van State*, 7 September 2010, ECLI:NL:RVS:2010: BN6685 (with annotation by H. Oosterom-Staples), *Jurisprudentie Vreemdelingenrecht* (2010) p. 437, para. 2.1.3; in another judgment, the *Raad van State* reads ECJ 25 July 2008, Case C-127/ 08, *Blaise Baheten Metock and Others* v *Minister for Justice, Equality and Law Reform* as requiring 'genuine use' of the right of movement and residence for Directive 2004/38 to be applicable:*Afdeling bestuursrechtspraak van de Raad van State*, 29 February 2012,ECLI:NL:RVS:2012:BV7838, *Jurisprudentie Vreemdelingenrecht*, (2012) p. 159, para. 2.1.3, and concludes in that case that the Dutch national and his family member had not had 'effective and genuine residence' in Estonia, para. 2.3. This case law of the *Raad van State*, in which its own interpretation of European law takes on a life of its own, can be characterised as what Van Harten calls a 'national European law precedent': H. Van Harten, *Autonomie van de nationale rechter in het Europees recht : een verkenning van de praktijk aan de hand van de Nederlandse Europeesrechtelijke rechtspraak over de vestigingsvrijheid en het vrijedienstenverkeer* (diss. Universiteit van Amsterdam 2011) ch. 5.

[42] ECJ 23 September 2003, Case C-109/01, *Secretary of State for the Home Department* v *Hacene Akrich*, paras. 55-56. *See* S. Peers, 'Free Movement, Immigration Control and Constitutional Conflict', 5(2) *EuConst* (2009) p. 173, who rightly says (on p. 178) that 'the *Akrich* judgment probably qualifies as the worst judgment in the long history of the Court of Justice' due to numerous flawed considerations, which the Court subsequently overturned in ECJ 25 July 2008, Case C-127/ 08, *Blaise Baheten Metock and Others* v *Minister for Justice, Equality and Law Reform*; however, as Peers notes on p. 194, there is no reason to think that the Court thereby overturned its consideration in *Akrich* on 'abuse'.

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

I can therefore present an arguable case for a conceptual relationship (admittedly through some layers of translation) between *Levin* and *O&B*, extending *Levin* to the general rights of movement and residence for Union citizens. In almost all of the original Community languages, the Court's decision in *O&B* echoes a word from the *Levin* formula for rendering '*genuine* residence'. In Dutch, the Dutch courts' riff on *Levin* was abbreviated to 'daadwerkelijk verblijf'. In French, the choice fell to '*effectif*,' there as well preserving the *Levin* pedigree: '*réelle et* effective'. In Italian, the Court likewise spoke of '*soggiorno* effetivo' (*Levin:* '*attività reali ed* effective').

In German, however, the Court's translators used a curiously restrictive formulation, speaking of residence '*von einer gewissen Dauer*', i.e. 'of a certain length of time', which had no relationship to the *Levin* formula '*tatsächlich und echt*'. I must therefore wonder if the judges of the EFTA Court were most heavily relying on the German translation of *O&B* in effectively transcribing the European Court of Justice's considerations to *Jabbi*, whereby they may have inadvertently accorded more importance than was warranted to the length of residence in the host member state.

It must be granted, of course, that a stay of less than three months in a host member state could quite often lead to the conclusion that the EEA national's stay in the host state constituted a less-than-genuine use of Article 7(1) of the Directive, especially if the EEA national was economically inactive. But the length of stay cannot be the only criterion, and in my view, all other factors surrounding the move to and residence in the host country must be taken into consideration. On this point of insisting on a minimum length of residence, then, the EFTA Court's judgment does not lead to a result entirely homogeneous with EU law.

Conditions on the derived right of residence in the home state?

Finally, one of the EFTA Court's considerations, taken by itself, is ambiguous on what all of the conditions are for a derived right of residence in the EEA national's home state. In paragraph 80, the Court says (italics added) 'a derived right of residence for a third country national *in the spouse's home State* is conditional. *In addition to the requirements of sufficient resources and health insurance*, the following conditions must be fulfilled', before going on to list the previously discussed criteria of genuine residence exceeding three months in the *host* state prior to return.

Does this mean that the Court is also setting a condition of sufficient resources for the family member's derived right of residence in the *home* state or that it only applied to the right of residence in the *host* state? Fløistad is of the opinion that this consideration, as well as the one that provides for the applicability by analogy of the Directive (paragraph 82), does apply to the home state, leaving room for a

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

home state to make the derived right of residence for the family member of a returning EEA national conditional on the EEA national's continued ability to satisfy the conditions of Article 7(1)(b) of the Directive: sufficient resources and medical insurance. She sees this as being in line with recent case law of the EU court in which rights of residence of economically inactive Union citizens are interpreted as strictly as possible in order to minimise the burden on host states. In the concrete case of Jabbi, this would mean that his spouse's use of freedom of movement is unlikely to help him if she has insufficient resources in Norway,[43] thereby placing him in not much of a better position than he would have been in if his right to stay had been solely subject to the internal rules of Norwegian family reunification law.

However, I am more inclined to agree with the analysis of Groenendijk,[44] who sees this condition as only applying to the right of residence in the host state prior to the return. Groenendijk places the ambiguous consideration in its context: the fact that the EFTA Court so closely followed *Eind* in its decision must also mean that one of the key considerations of that decision[45] applies (either because the EFTA Court meant it to apply, or in spite of the fact that the EFTA Court did not mean it to apply). And specifically: that since the right of the EU citizen (in that case) to return to his own member state after making use of the freedom of movement of workers is unconditional, the derived right of residence of his family member must also not be conditional on whether the EU citizen continues to work or not.

The fact that in *Jabbi* and *O&B*, the Directive has been declared to be applicable 'by analogy' to that derived right of residence upon return cannot be read to mean that the provisions of the Directive also apply concerning any conditions that the EEA national has to satisfy in her home state, in my view. After all, in *Eind* the then-applicable secondary legislation (Regulation 1612/68) was likewise declared to be applicable by analogy to Miss Eind's right of residence in the Netherlands:[46] but this meant only that she had to continue to be one of the family members listed as beneficiaries in that Regulation (in Article 10) in order to continue to derive a right of residence, not that her father had to continue his economic activity as a worker. This unconditional derived right of residence for a third-country national family member after the EEA national has made genuine use of the freedom of movement and returns to his home state serves an important purpose, in my view. It allows the EEA national's home state to function as a

[43] Karin Fløistad, 'Free movement of persons in the European Economic Area (EEA) – different from the EU?', *EU Law Analysis*, 27 July 2016, <eulawanalysis.blogspot.nl/2016/07/free-movement-of-persons-in-european.html>, visited 24 March 2017.

[44] C.A. Groenendijk, annotation of *Jabbi* in *Jurisprudentie Vreemdelingenrecht* 2016/268, para. 5.

[45] *Supra* n. 11.

[46] *Eind*, *supra* n. 2, para. 39.

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

'safety net' in case the EEA national's use of freedom of movement in a host state does not work out,[47] and also helps to prevent the EEA national and his family from becoming a burden on the host state.

Freedom of movement without citizenship?

I conclude that if the principle of homogeneity continues to function reasonably well in the case law of the EFTA Court, there can be little effective divergence between the freedom of movement enjoyed by EU citizens, construed as a single right (subject to varying conditions based on economic [in]activity) based on Article 21(1) TFEU, on the one hand; and on the other hand the freedoms of movement enjoyed by EEA nationals, construed as a bundle of rights for workers, establishment, and service provisions enumerated in the EEA Agreement, plus the incorporation of Directive 2004/38. One question remains: would EU citizenship even really be necessary to effectuate rights of movement across borders that are nearly identical to today's Article 21(1) TFEU?

It is clear, of course, that EU citizenship is absolutely necessary to derive rights of residence for a Union citizen's third-country national family members from Article 20 TFEU, the right to (the effective enjoyment of) Union citizenship itself, as the European Court of Justice has done in *Rottmann* and *Ruiz Zambrano*,[48] and that there is no parallel to this right in EFTA law. It was not only this basis in primary law, but also the monistic, autonomous tradition of the European Court of Justice that allowed that truly groundbreaking line of case law based on EU citizenship to flourish. Moreover, nationals of EFTA states do not enjoy the political rights attached to EU citizenship.

But the question regarding the more prosaic, functional freedom of movement provided for by Article 21(1) TFEU is: if EU citizenship had never been introduced, could the EU Court have continued to extensively interpret the economic fundamental freedoms, supplemented by Directives like the 1990 Directives which were originally passed on the primary law basis of 'necessity' (*cf.* Article 352 TFEU, thus on the basis of the unanimous political will of the member states represented in the Council) to arrive at a similar result? Is the EFTA Court, in its parallel universe, successfully able to deconstruct the general freedom of movement and residence – which in the EU is now attached to EU citizenship – back into a bundle of rights appealing to states of a dualist bent that could just as

[47] Bierbach (2017), *supra* n. 3, p. 373-374.

[48] For a good overview of the distinction that can be made between rights derived from Art. 20 TFEU and Art. 21(1) TFEU in EU law, *see* the comments of the (now) President of the European Court of Justice, K. Lenaerts, '"Civis europaeus sum": from the cross-border link to the status of citizen of the Union', 3 *FMW: Online Journal on free movement of workers within the European Union* (2011) p. 6.

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

easily have existed in the pre-'Maastricht' European Community? Could EEA membership via the EFTA be, as the President of the EFTA Court himself recently suggested,[49] an attractive alternative for a post-Brexit United Kingdom wanting to regain more sovereignty, including potentially in such areas as (being able to restrict) freedom of movement of EEA nationals and their third-country national family members?

If the EFTA's current form of freedom of movement with the EU were to serve as the model for any of those scenarios, I would answer 'no' to both of those questions. EU citizenship may not appear to play as spectacular a role in Article 21(1) TFEU as it does in Article 20 TFEU. But certainly since *Grzelczyk*[50] it has contributed to a development in the general rights of movement and residence, especially of economically inactive EU citizens, that are not construed purely in terms of protecting the interests of host member states or the will of the secondary legislator. The direct effect of Article 21(1) TFEU serves to fill lacunae in the secondary legislation (as in *Chen*,[51] and indeed in *O&B*, where the literal provisions of Directive 2004/38 do not apply).

The EFTA Court may do its best to keep up the appearance of only construing rights from the classic economic freedoms of the Community that the EEA inherited at its genesis, for instance by basing its express considerations on *Eind*. But even in *Eind*, EU citizenship palpably lurks under the surface as an important addition to the fundamental freedoms. In reality, the freedom of economically inactive EEA nationals to return to their home states with their third-country national family members is not construed out of the dualistic will of the EFTA states to adopt Directive 2004/38 (if it had been, the Court would have declared the Directive to actually apply), but is anchored in a legal basis in primary law: the independence of the EFTA Court to enforce the principle of homogeneity with EU law. And that legal basis, as much as the EFTA Court may not want to admit it, provides a necessary simulacrum in EEA law for Article 21(1) TFEU and the EU citizenship that EU law has developed and that EEA nationals do not have.

To be fair, however, the 'deconstructionist' approach of the EFTA Court can also serve to revive lines of thought that have become dormant or are taken for granted in the case law of the EU Court. In *Clauder*,[52] the EFTA Court's first advisory opinion concerning Directive 2004/38, it extended the literal provisions of the Directive to provide for a right of residence in a host state for the family member of an EEA national who had a right of permanent residence based on

[49] P. Wintour, 'European Free Trade Area Could be UK's Best Brexit option, says judge', *The Guardian*, 1 December 2016.

[50] *Supra* n. 34. See Bierbach (2017), *supra* n. 3, p. 326-329.

[51] *Supra* n. 15.

[52] EFTA 26 July 2011, Case E-4/11, *Arnulf Clauder*.

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press

Article 16(1) of the Directive, but could not satisfy the conditions of Article 7(1). It did so by effectively selecting a legal basis in Article 8(1) ECHR, the right to family life.

The European Court of Justice, for its part, has scarcely devoted any express thought to that provision in the context of freedom-of-movement cases since *Baumbast*.[53] It only made some ambiguous references to that provision and the substantially identical Article 7 of the Charter in *Dereci*,[54] which in any case did not show the Court to draw on Article 7 Charter/Article 8 ECHR as a productive source of new readings of the primary or secondary EU legislation. Perhaps this is due to the European Court of Justice considering the right to family life to already be so thoroughly incorporated in EU citizenship and the provisions of Article 21(1) TFEU and Directive 2004/38[55] that it is unable to take a step back. Indeed, it is true that in most cases where a family member of an EU citizen can derive a right of residence from Article 21(1) TFEU and/or the Directive, the ensuing positive obligations on member states for the protection of family life go above and beyond the level mandated by Article 8(1) ECHR in situations covered only by national law.[56] Nonetheless, it cannot be assumed at the outset that there are no remaining gaps in the protection of family life of EU citizens by EU law that may not need to be filled by reference to the right to family life.[57]

Thus it is not only the case that the EFTA Court can be inspired by the European Court of Justice's construction of freedom of movement based on EU citizenship: the European Court of Justice may yet be inspired by the EFTA Court's deconstruction of it.

[53] *Supra* n. 15, para. 72.

[54] ECJ 15 November 2011, Case C-256/11, *Dereci et al* v *Bundesministerium für Inneres* para. 70-72.

[55] '[A] provision such as Article 20 or 21 TFEU is not simply a basis for residence status separate from Article 7 of the Charter. Rather, considerations regarding the exercise of the right to a family life permeate the substance of EU citizenship rights': AG Sharpston in ECJ 12 December 2013, Case C-456/12, C-457/12 *O and S* v *Minister voor Immigratie, Integratie en Asiel* (Opinion).

[56] *See* Bierbach (2017), *supra* in n. 3, p. 365.

[57] *See*, for instance, A. Schrauwen, 'Hof van Justitie EU (Grote Kamer) 12 maart 2014, C-457/12. (annotation)', *European Human Rights Cases*, 2014 (2014) p. 136, para. 6, who notes critically that where in *Carpenter*, the Court once relied significantly on the right to family life in interpreting the freedom of establishment (Art. 56 TFEU), the court followed up on that in *S&G*, *supra* n. 3, with a reading of the freedom of movement of workers (Art. 45 TFEU) that might not provide the same level of protection of family life.

https://doi.org/10.1017/S1574019617000104 Published online by Cambridge University Press