



# Migration and access to the internal market

Halvard Haukeland Fredriksen





# Migration and EFTA State access to the internal market

- The EEA model:
  - Almost full integration into the internal market
    - Not really a question of access to the internal market: The EEA EFTA States are part of the internal market
  - Free movement of persons almost as in the EU
  - Participating EFTA States: Iceland, Liechtenstein and Norway
- The Swiss model:
  - Includes a bilateral Agreement on Free Movement of Persons (workers and self-employed persons only)
  - Switzerland is not a full member of the internal market (limitations in the field of services in particular)



# EFTA State participation in the EU social security coordination regime

- EEA Agreement: Art. 29 and Annex VI
- Switzerland: The Agreement on Free Movement of Persons
- The UK-EU fight over EFTA State participation in the regime established by Reg. No 883/2004 and No 987/2009
  - Case C-431/11 *UK v. Council (EEA)* and C-656/11 *UK v Council (Switzerland)*
  - Key objection: The extension of the regimes to cover economically inactive nationals from the EFTA States
  - The ECJ: Not the main or predominant purpose or component of the contested decisions
- Renny and van Elsuwege, CMLRev 2014:
  - “[N]ationals of the four EFTA States are not to be regarded as third-country nationals as far as the application of the EU’s social security rules is concerned. On the contrary, they have the same status as the nationals of EU Member States.”



## Migration under the EEA Agreement

- Workers and self-employed persons (Art. 28 ff. EEA)
- Students
  - 1994: Dir. 93/96/EC; now: Dir. 2004/38
- Pensioners
  - 1994: Dir. 90/365/EEC; now: Dir. 2004/38
- Other economically inactive persons from EEA Member States
  - 1994: Derived rights for family members
  - Now: Independent rights flowing from Dir. 2004/38
- Third Country Nationals
  - 1994: Derived rights of residence under Dir. 90/364/EC
  - Now: Derived rights flowing from Dir. 2004/38
  - Dublin and Schengen outside the scope of EEA law



# The free movement of workers in the EEA

- Essentially a carbon copy of EU law
- But not with regard to Liechtenstein
  - Protocol 15 EEA and then JCD 191/1999, amending Annex V (Free movement of workers) and Annex VIII (Right of Establishment)
  - Amended by the 2003 EEA Enlargement Agreements
  - Recognised e.g. by the JDC incorporating the Citizenship directive into the EEA Agreement
  - 72 residence permits granted to EEA citizens in 2015!
  - To be reviewed in 2019, but may well be extended
- Based on Liechtenstein's small size and geographical position
- Not on offer for bigger countries (such as Switzerland)



## The free movement of students in the EEA

- Essentially as in EU law
  - The Erasmus+-programme was incorporated into the EEA Agreement in 2014
- Important exception: Protocol 29 EEA
  - The Contracting Parties “agree that the provisions of the Agreement concerning the right of residence for students do not alter the possibilities of individual Contracting Parties, existing before the entry into force of the Agreement, as to the tuition fees charged to foreign students.”
- As a result, students from the EFTA States have to pay higher fees in the UK than students from EU countries



# Free movement of other persons?

## The fight over the Citizenship Directive

- Regarded as only partially EEA-relevant by the EFTA States
- Eventually incorporated *in toto* as a result of considerable political pressure from the EU
  - The Commissions perspective:
    - ‘Sometimes our stance is that things should be EEA-relevant because we want them in. In these cases, we don’t discuss legal details. It is relevant because we say it is relevant. That was the case with respect to this Directive.’ (Quoted after Jonsdottir 2013 p 107)
  - The EFTAs perspective:
    - ‘In the end, what could we do? We agreed to adopt this Directive and continue EEA cooperation and that is that’
    - ‘We certainly wanted to go a step further with the adaptations, but the strength of the EU convinced us to take it over.’



## The Preamble of JCD 158/2007

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

(9) Immigration policy is not part of the Agreement.

(10) The Agreement does not apply to third country nationals. Family members within the meaning of the Directive having third country nationality shall nevertheless enjoy certain derived rights such as those foreseen in Articles 12(2), 13(2) and 18 when entering or moving to the host country.



## The Joint Declaration to JCD 158/2007

The concept of Union Citizenship ... has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC ... shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the ECJ based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals. The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18.



## The view of the EFTA Court

- Case E-4/11 *Clauder*
  - Art. 16 of the Directive interpreted such that an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host EEA State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits
  - A “vigorously teleological approach” which enabled the EFTA Court “to overcome” the lack of a clear legal basis for EEA citizenship in the EEA Agreement (Burri and Pirker, YEL 2013)



## The view of the EFTA Court (cont.)

- Case E-26/13 *Gunnarsson*
  - Art 7 of the Directive interpreted such that it also imposes obligations on the *home state* of an EEA national
  - At odds with the ECJ’s judgment in *O and B*
  - Deviating from the observations submitted by Iceland, Norway and the EFTA Surveillance Authority (but supported by the Commission)
  - “Citizenship by the backdoor?” (Burke and Hannesson, CMLRev 2015)
  - “an approach highly geared towards ensuring homogeneity in practice” (Fredriksen and Franklin, CMLRev 2015)



## The view of the EFTA Court (cont.)

- Case E-28/15 *Jabbi*
  - Art 7 of the Directive applied *by analogy* where an economically inactive EEA national returns to his/her home state with a TCN partner met during genuine residence in another EEA State
  - Essentially a confirmation of the approach in *Gunnarsson* (this time with the support of both ESA and the Commission)
  - A very broad result-oriented conception of the homogeneity principle used to overcome the lack of an EEA law equivalent to the concept of Union citizenship
  - Obviously controversial in light of the preamble of and the Joint Declaration attached to JCD 158/2007



## The view of the national courts

- The Supreme Court of Iceland did not give effect to the EFTA Court's conclusion in *Gunnarsson*
  - But the acquittal of the government was based on the lack of a legal basis in Icelandic law to support Mr. Gunnarson's claim, not on direct opposition to the EFTA Court's interpretation of the Directive (no principle of direct effect under EEA law)
- No Norwegian case yet on the question of home state obligations
  - *Jabbi* is pending before Oslo City Court
- But one “wholly internal situation”-case where the Supreme Court rejected the EEA relevance of *Zambrano*: Rt. 2015 p. 93 *Maria*
  - Citing the Joint Declaration and the fact that the ECJ based its finding on Art. 20 TFEU
  - Note: The SC's subsequent interpretation of Art. 104 of the Norwegian Constitution mimics to a great extent the ECJ's approach in *Zambrano*



# Some topical legal issues

- Are the derived rights of family members of EEA nationals and Norwegian nationals who have exercised their free movement rights fully ensured?
  - Will *Jabbi* be complied with or challenged?
  - See also ESA Case No. 73930 (pending)
- Are Icelandic and Norwegian authorities too eager to deny entry to or expel EEA-foreigners based on grounds of public order or public security?
  - Cf. Case E-15/12 *Wahl (Hell's Angels)*

## Further reading:

- Simonsen Vogt Wiig (Fløistad et al), *Legal study on Norway's obligations under the EU Citizenship Directive* (available online from the homepage of the Norwegian Directorate of Immigration)



# And some political ones

- Renegotiation of the EEA Agreement along the lines of Cameron's deal with the EU?
  - Political desire to limit so-called export of benefits, e.g. through a possibility to index child benefits to the standard of living in the EEA State where the child resides
  - But probably out-weighted by the fear of opening Pandora's box and, after Brexit, to rock the EEA boat in any way
- EEA EFTA States' reaction to Swiss quotas?
- EEA EFTA States' reaction to UK quotas?