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I.

Nathan Cambien, Leuven*

Permanent Means Unconditional – Permanent Residence and the Right to Family Reunification

(Arnulf Clauder, EFTA Court, Judgment of 26 July 2011, E-4/11)

This judgment is the next in a series of cases concerning the right to permanent residence laid down in Article 16 of Directive 2004/38. The EFTA Court was faced with the question whether this right entails a right to family reunification and, if so, under what conditions. The Court convincingly held that the right to permanent residence entails an unconditional right to family reunification.

(1) Facts and Procedure

Arnulf Clauder was a German national who had been resident in Liechtenstein since 1992, initially as the family member of a worker and since 2002 on the basis of a permanent residence permit. Mr Clauder received old-age pensions from both Germany and Liechtenstein and was, moreover, in receipt of supplementary benefits in Liechtenstein. In 2010 he married a German spouse, with whom he intended to live in Liechtenstein. However, his *application for family reunification* was *rejected* by the Liechtenstein Office for Immigration and Passports on the ground that he could not prove that he had *sufficient financial resources* for himself and his wife without having recourse to social welfare benefits. It appears from the facts of the case that if Mrs Clauder were allowed to reside with her husband in Liechtenstein, the amount of supplementary benefits received by Mr Clauder would increase, even if Mrs Clauder were to take up employment.

Mr Clauder lodged a complaint against the refusal of his application for family reunification, which was rejected by the Liechtenstein Government. This decision was challenged by Mr Clauder before the Administrative Court (*Verwaltungsgerichtshofs des Fürstentums Liechtenstein*), which made a request to the EFTA Court (hereinafter: «Court») for an Advisory Opinion.

The Administrative Court asked the Court three *questions* concerning the interpretation of Directive 2004/38/EC.¹ First, it wanted to know whether, under that Directive, an EEA national² with a right of permanent residence, who is a pensioner and in receipt of social benefits, may claim the right to family reunification even if the family member will also be claiming social welfare benefits. Second, the referring court asked whether it

was of relevance for the answer to that question whether the EEA national with a right of permanent residence had been economically active in the host State prior to attaining the retirement age. Lastly, the referring court asked whether it was of relevance whether the family member would be economically active and still be claiming benefits.

(2) Judgment

The Court started with a number of *preliminary observations* on Directive 2004/38. It pointed out that the Directive repeals earlier directives on the free movement of persons and aims to strengthen the right of free movement and residence of EEA nationals.³ Accordingly, the provisions of the Directive should not be interpreted restrictively and must not in any event be deprived of their effectiveness. Besides, the Court emphasised that the Directive not only confers residence rights on EEA nationals, but also grants derived residence rights to family members who accompany or join them. Lastly, the Court pointed out that the Directive provides for three levels of residence, namely a right of residence for up to three months (Article 6), a right of residence for more than three months (Article 7) and a right of permanent residence (Article 16(1)).

The Court went on to consider the first question, which revolved around two issues. In the first place, the Court examined whether an EEA national's right of permanent residence confers a *derived right of residence* in the host State on his family members. It observed that Article 16(1) of the Directive is silent on whether an EEA national's right to permanent residence also confers a right on his family members. Still it followed from the scheme and purpose of the Directive that the right to permanent residence, which represents the highest level of integration under the Directive, must confer a derived right of residence on the holder's family members.

In the second place, the Court examined whether that derived right of residence was subject to the condition of *financial self-sufficiency*. In this regard it pointed out that the right of permanent residence under Article 16, in contrast to earlier directives, is not subject to any further conditions re-





garding financial resources. The Court further observed that if an EEA national with a right of permanent residence were precluded from founding a family in the host State, such would impair the right to move and reside freely and thus deprive the Directive of its full effectiveness. That would be true, even if the family member became a burden on the social assistance system of the host State. The Court concluded that the derived right of family members of an EEA national with a right of permanent residence is not subject to a condition of having sufficient resources. That conclusion was underpinned by the fact that Directive 2004/38 no longer contains a general requirement to have sufficient resources. From this, the Court inferred that the condition to have sufficient resources is henceforth only a legitimate condition for residence rights in the cases specifically mentioned in the Directive.

Finally, the Court pointed out that, according to settled case law, the provisions of the EEA Agreement are to be interpreted in the light of *fundamental rights*. This was true, in particular, for the right to respect for private and family life laid down in Article 8 ECHR and Article 7 of the Charter of Fundamental Rights.

Given the Court's reply to the first question, it was unnecessary to answer the second and third questions.

(3) Comment

(a) Tiered residence Rights for EEA Nationals and Their Family Members

The provision central to the *Clauder* dispute is Article 16 of Directive 2004/38 concerning the right of permanent residence. As the Court points out, this right of residence is the «third level» of residence provided for by the Directive. The *first level of residence*, namely residence of up to three months, is subject to the sole condition of holding a valid identity card or passport. This condition applies to both the EEA national himself and to his family members joining or accompanying him in the host State. By contrast, the *second level of residence*, residence in the host State for more than three months, is subject to rather burdensome conditions. The EEA national must in principle demonstrate to be either economically active in the host State or to have sufficient resources for himself and his family members and comprehensive sickness insurance cover in the host State (see Article 7 of the Directive).

The right of permanent residence, the *third level of residence* for EEA nationals, is acquired af-

ter residing legally for a continuous period of five years in the host State and is not subject to any conditions. An EEA national with a right to permanent residence is, in other words, assimilated in the host State to nationals of that State. However, the position is less clear-cut as far as family members of an EEA national are concerned. Admittedly, it is clear that family members may themselves acquire an autonomous right of permanent residence after legally residing in the host State for five years. This follows from Article 16(1) for family members who are EEA nationals themselves, and from Article 16(2) for other family members. By contrast, Article 16 of the Directive is silent as to whether it is possible to derive a right of residence from one's capacity as a family member of an EEA national with a right of permanent residence, *i.e.* without satisfying the conditions for permanent residence oneself.

Consequently, the question to be answered by the Court in *Clauder* had no obvious answer that could be derived from the text of Article 16. This explains the *opposing submissions* of the parties before the Court, with the applicant, the EFTA Surveillance Authority and the European Commission arguing for a broad interpretation of Article 16, whereas the Governments of Liechtenstein, the Netherlands and Denmark were arguing for a restrictive interpretation.

(b) Unconditional Permanent Residence?

The first thing one notices when reading the judgment is the structured approach of the Court. The Court cleverly divided the main question into two sub-questions, which it treated separately. In answering them, the Court drew on a number of legal techniques, which taken together provided convincing support for its holding.

The Court started by interpreting Article 16 in light of the «*scheme and purpose*» of Directive 2004/38. As was mentioned above, the Directive provides for different levels of residence, which are subject to different conditions. EEA nationals who want to reside for longer periods in the host State will initially have to satisfy rather burdensome requirements relating to their financial situation in order to avoid that they will become a burden for the host State. Only after five years of residence in the host State these conditions are dropped. The reason is that EEA nationals are after five years of legal residence in the host State expected to be integrated in the society of that State and, therefore, obtain the right to be treated as nationals of that State in all but name.⁴ One can agree with the Court that this highest level of resi-





dence must *at least entail the same rights regarding family reunification* as the lower levels of residence. An interpretation of Article 16 as not entailing a derivative right of residence for family members would go completely against the scheme and purpose of the Directive. One would, under such interpretation, be punished for acquiring a right of permanent residence because thereby one would lose the right to family reunification. Such would go contrary to the idea underlying the Directive that higher levels of residence imply stronger entitlement in the host State.

However, the foregoing says nothing about the conditions surrounding the derivative residence rights of family members. Even if it is accepted that EEA nationals with a right of permanent residence must enjoy at least the rights regarding family reunification they enjoyed before acquiring permanent residence status, this does not necessarily mean that they must enjoy these rights under *more favourable conditions*. It could be argued that EEA nationals with a right of permanent residence enjoy those rights under exactly the same conditions as EEA nationals residing more than three months in the host State, namely the conditions regarding self-sufficiency laid down in Article 7 of the Directive. In other words, the silence in Article 16 regarding derivative rights for family members could be interpreted as meaning that these rights are regulated in Article 7 of the Directive until such time as the family members in question acquire a right of permanent residence in their own right.⁵

The Court in *Clauder* refuted this interpretation by pointing out that if it were accepted this would have for a consequence that EEA nationals with a right of permanent residence but without sufficient resources could not be joined by their family members. Such would make it less attractive for EEA nationals to exercise their right to move to and reside in another State. Indeed, an EEA national could be *discouraged from moving to another State* and settling there if he did not have the guarantee that he could found a family there and reside together with his family members. The said interpretation would therefore be contrary to the purpose of the Directive, namely promoting the right to free movement and residence. This point is correct, but not conclusive in itself. To see this, it must be acknowledged that Directive 2004 purports to reconcile two conflicting interests, namely the interest of EEA nationals and their family members to move freely, on the one hand, and the interests of the Member States in not incurring excessive financial burdens, on the

other hand.⁶ Even before a right of permanent residence is acquired, the conditions in Article 7 can act as a deterrent for the exercise of free movement rights. Still they are considered to be legitimate in order to protect the interests of the Member States. Hence, it becomes necessary to explain why they should no longer apply once a right of permanent residence is acquired.

One can distinguish three arguments in the *Clauder* judgment which justify reading Article 16 of the Directive as conferring a right to family reunification which is not subject to the conditions of Article 7. First, the Court explained that where a provision of EEA law is open to several interpretations, preference must be given to the *interpretation which ensures its effectiveness*. In practice, this often comes down to giving the interpretation which safeguards best the interest of the EEA nationals. The ECJ has consistently given a lenient interpretation to the requirements surrounding family reunification in order to enforce conditions conducive to the exercise of free movement rights, even in cases where a more restrictive interpretation seemed to accord better with the interests of the Member States.⁷ In the circumstances of the *Clauder* case, this approach militates in favour of the view that the conditions of Article 7 no longer apply once a right of permanent residence is acquired.

Second, the Court also pointed out that Directive 2004/38, in contrast to the directives it replaces, no longer contains a *general requirement to have sufficient resources*. Indeed, the Directive only imposes this requirement with regard to the second level of residence rights. One can conclude from this that the requirement should not apply to persons coming under the third level of residence. Admittedly, Article 16 only states that the conditions of Article 7 shall not apply to individuals who acquire a right of permanent residence, leaving open the possibility that they apply to their family members. However, that view ignores the fact that the categories and conditions employed by the Directive are centred on the EEA national, who is the principal beneficiary of residence rights.⁸ Accordingly, the conditions imposed by Article 7 are to be satisfied by the EEA national, and no conditions are imposed directly on his family members. Hence, if the conditions of Article 7 do not apply to the EEA national once he acquires a right of permanent residence, they should not apply at all. This is a very convincing argument, which again principally relies on the scheme of the Directive.





Finally, the Court observed that EEA law has to be interpreted in accordance with *fundamental rights*. The need to comply with the right to respect for family life has been relied upon by the ECJ in various cases in order to justify a generous interpretation of the rights of Union citizens and their family members, be it mostly as a subsidiary argument.⁹ The Court in *Clauder* only mentions the argument without elaborating it or drawing any firm conclusions from it. The reason is perhaps that it is far from clear that an interpretation of Article 16 of the Directive in accordance with fundamental rights requires granting an unconditional right to family reunification. It is settled ECtHR case law that Member States retain a large discretion to apply their immigration rules and that Article 8 ECHR does not entail the obligation for States «to respect the choice by married couples of the country of their matrimonial residence».¹⁰ The fundamental rights based argument is *not the most convincing* one therefore.

(c) Impact of the Judgment

The *Clauder* judgment is by all means an important judgment. The right of permanent residence contained in *Article 16 of Directive 2004/38 was introduced only recently* and the precise conditions surrounding it are at present far from clear. Moreover, it is a right with potentially far-reaching consequences for the Member States: since beneficiaries of the right can no longer be made subject to conditions of self-sufficiency, they can potentially become a significant burden for the public finances of the host State, in particular because they have the right to be treated equally as far as access to social benefits is concerned. Understandably, Member State authorities have a considerable interest in exactly determining the conditions for the applicability of Article 16. This explains the relatively important number of preliminary references to the ECJ in recent years concerning the interpretation of that Article.¹¹ So far, however, the ECJ has never stated on the nature or the conditions of the rights enjoyed by family members of Union citizens with a right of permanent residence.

It logically follows that the EFTA Court could not base itself on concrete guidance from existing case law. Despite this fact and despite the rather opened wording of Article 16, it reached a *convincing conclusion*. The Court's contextual and teleological reasoning provides a satisfactory basis for its holding that the residence rights of family members of EEA nationals with a right of permanent residence cannot be subjected to conditions of self-sufficiency. It is clear from the struc-

ture and the aims of Directive 2004/38 that the Union legislator intended that after five years of residence in the host State, the *interest of the EEA national in being joined by his family members prevails* over the financial interests of the Member States. After all, permanent residence means unconditional residence and this equally applies as far as the rights regarding family reunification are concerned.

It can be expected that the near future will continue to see high-profile cases before the ECJ concerning the interpretation of Article 16 of Directive 2004/38.¹² The EFTA Court's *Clauder* judgment may provide very *useful guidance* in this connection.¹³

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¹ Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of the 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, [2004] O.J. L158/77.

² In the context of the EEA Agreement, the term «Union citizen» in Directive 2004/38 has to be read as «EEA national». See EEA Joint Committee Decision No 158/2007 of 7 December 2007 amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement, [2008] O.J. L124/20.

³ The Court referred to recital 3 in the preamble to Directive 2004/38.

⁴ *Barnard*, The Substantive Law of the EU: The Four Freedoms, 3rd edition (2010), p. 439-440.

⁵ See the submissions by the Governments of Liechtenstein, the Netherlands and Denmark in paras. 28-32 of the judgment.

⁶ See the discussion in *Dougan*, Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?, in: *Barnard/Odudu* (eds.), The Outer Limits of European Union Law (2009), p. 119-165.

⁷ For an oft-discussed example, see ECJ of 25 July 2008, C-127/08 *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*, with a case note by *Cambien* in *Colum. J. Eur. L.* [2009] 321-341. See further the discussion in *Tryfonidou*, Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach, *European Law Journal* [2009] 634-653.

⁸ ECJ of 5 May 2011, C-434/09 *Shirley McCarthy v. Secretary of State for the Home Department*, para. 42.

⁹ E.g. ECJ of 11 July 2002, C-60/00 *Mary Carpenter v. Secretary of State for the Home Department*, paras. 40-45.

¹⁰ See the discussion in *Thym*, Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: a Human Right to Regularize Illegal Stay?, *Int'l & Comp. L.Q.* [2008] 87-112.





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