The EFTA Court and Fundamental Rights

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Fundamental rights – EFTA Court – Multilevel normative frameworks of human rights protections – General and unwritten principles of EEA law – Impact of the EU Charter on EEA fundamental rights – The European Convention on Human Rights as the dispositive normative basis for the EFTA Court's resolution of a case – Fundamental rights operationalising the principle of homogeneity between EEA and EU law – Restriction of a fundamental freedom to further an aim based on fundamental rights.

Introduction[1]

This article seeks to provide some reflection on the interrelationship between the EFTA Court (one of the two European Economic Area[2] Courts[3] in Luxembourg) and the European Court of Human Rights in Strasbourg ('the Strasbourg Court'), focusing in particular on the EFTA Court's interpretation of fundamental rights in its recent jurisprudence, as seen against the backdrop of the transformative moment in EU law when the Charter of Fundamental Rights ('the EU Charter' or 'the Charter') became formally binding with the Treaty of Lisbon in 2009.

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[1] This article is based on a lecture given on 7 December 2016 at the EFTA Court in Luxembourg as part of the EFTA Court Lunchtime Talks series. The analysis presented reflects my personal viewpoint and should not in any way be understood as reflecting the views of the European Court of Human Rights. I thank my legal assistant, Ms Sabina Garahan, for her valuable contribution in the research and drafting process.

[2] The European Economic Area ('the EEA') was established on 1 January 1994 with the entry into force of the EEA Agreement which provides for the free movement of persons, goods, services and capital within the European Single Market and specifies that membership is open to member states of either the EU or the European Free Trade Association ('the EFTA'). The current membership comprises 31 states, namely the 28 EU Member States and three of the four member states of the EFTA (Iceland, Liechtenstein and Norway).

[3] The two EEA Courts are the Court of Justice of the European Free Trade Association States, more commonly known as the EFTA Court, and the Court of Justice of the European Union (hereinafter 'the Court of Justice').

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Against this background, the EFTA Court has found itself in the challenging situation of having to navigate between multilevel normative frameworks of human rights protections due to the fact that the Charter does not apply to the EFTA pillar of the EEA. It is doctrinally and practically important for other European judges engaged with human rights issues, whether in the Court of Justice or in Strasbourg or, indeed, for judges and practitioners at the national level, to examine the way in which the EFTA Court has dealt with fundamental rights questions.

The article takes as its main focus an analysis of some important recent judgments of the EFTA Court and offers a reflection on the manner in which the Court has developed its fundamental rights case law, in particular in the EEA context where the EU pillar has now adopted the Charter as its benchmark for analysing human rights claims.[4]

The EFTA Court and fundamental rights

As a starting point, it is useful to recall the legal basis for fundamental rights under the EFTA Court's case law. The EFTA Court has long held that the EEA Agreement must be 'interpreted in the light of fundamental rights'[5] and that the provisions of the European Convention on Human Rights ('the Convention') and the case law of the Strasbourg Court are to be considered, as reiterated in several judgments, 'important sources' for the determination of the content of rights under EEA law.[6] Thus although the Convention does not form a part of the EEA Agreement as a binding source of legal norms in the context of the

[4] The 'Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms', 5 May 2010, point 2, describes the Charter as 'the principal basis on which [the Court of Justice and the national courts] carry out their task of ensuring that in the interpretation and application of the law of the Union fundamental rights are observed'. The 'Joint communication from Presidents Costa and Skouris', 24 January 2011, point 1, characterises the Charter as the 'reference text and the starting point for the CJEU's assessment of the fundamental rights which that legal instrument recognises'. *See also* Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon', 11(4) *Human Rights Law Review* (2011) p. 645 at p. 645, where the Charter is said to operate as the primary source of human rights in the EU.

[5] Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 18, para. 23; Case E-8/97 *TV 1000 Sverige* v *Norway* [1998] EFTA Ct. Rep. 68, para. 26; Case E-2/02 *Bellona* [2003] EFTA Ct. Rep. 52, para. 37; Case E-12/10 *ESA* v *Iceland* [2011] EFTA Ct. Rep. 117, para. 60; Case E-4/11 *Arnulf Clauder* [2011] EFTA Ct. Rep. 216, para. 49; Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, para. 63; Case E-14/11, *DB Schenker* v *EFTA Surveillance Authority (Schenker I)* [2012] EFTA Ct. Rep. 1178, paras. 166-7.

[6] *Ásgeirsson*, para. 28; Joined Cases E-3/13 and E-20/13 *Fred. Olsen* [2014] EFTA Ct. Rep. 400, para. 224.

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EEA Agreement,[7] the norms contained in the Convention have been said to reflect a 'common standard and a common denominator for a minimum standard for the protection of fundamental rights on a European level'.[8] The EFTA Court's fundamental rights case law is therefore largely based on elucidating, without an explicit and formally binding textual basis like the EU Charter, the content and scope of the fundamental rights that apply in the EEA. Before proceeding to analyse the case law and its different strands more closely, it is appropriate to make two further doctrinal remarks.

The normative foundations for fundamental rights in EEA law

First, the EFTA Court has stated explicitly that, as a starting point, fundamental rights are to be considered general and unwritten principles of EEA law. This was first set out in *TV 1000*,[9] and followed up in judgments such as *Bellona*[10] and *Ásgeirsson*.[11] In *TV 1000*, the Court referred to the landmark ruling of the Strasbourg Court in *Handyside* v *United Kingdom*[12] when interpreting the transmitting State principle established by Directive 89/552/EEC, relying on the Strasbourg Court's approach to varying conceptions of public morality.[13] Subsequently, *Bellona* concerned an action for nullity against a decision of the EFTA Surveillance Authority. The Court declared that access to justice constitutes an essential element of the EEA legal framework which is subject to those conditions and limitations that follow from EEA law.[14] It also emphasised its awareness of the ongoing debate with regard to the issue of the standing of natural and legal persons in actions against Community institutions, referring in particular to the opinion of Advocate General Jacobs in *Pequeños Agricultores*.[15] It found that this discussion was important considering the apparent increased significance of the judicial function resulting from the idea of human rights.[16] The Court nonetheless opined that the uncertainties inherent in the refashioning of fundamental Community law merit caution.[17]

[7] D.T. Björgvinsson, 'Fundamental Rights in EEA Law', in EFTA Court (ed.), *The EEA and the EFTA Court – Decentred Integration* (Hart 2014), p. 263 at p. 278.

[8] Björgvinsson, *supra* n. 7, p. 278.

[9] *TV 1000*, para. 68.

[10] *Bellona*.

[11] *Ásgeirsson*, 185.

[12] ECtHR 7 December 1976, Case No. 5493/72, *Handyside* v *United Kingdom*.

[13] *TV 1000*, para. 26.

[14] *Bellona*, para. 36.

[15] Opinion of Advocate General Jacobs, ECJ 25 July 2002, Case C-50/00, *Unión de Pequeños Agricultores* v *Council of the European Union*, referenced in *Bellona* at para. 37.

[16] *Bellona*, para. 37.

[17] *Bellona*, para. 37.

In *Ásgeirsson*, one of the defendants in the national proceedings leading to the adjudication of the case before the EFTA Court had alleged that the reference of the case to the Court prolonged the duration of the proceedings, thus violating Article 6 of the Convention which guarantees the right to a fair and public hearing within a reasonable time. In response, the Court held that provisions of the EEA Agreement, as well as procedural provisions of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, are, as previously mentioned, to be interpreted in the light of fundamental rights and that the provisions of the Convention and Strasbourg jurisprudence are important sources for determining the scope of these rights.[18] The EFTA Court noted that the Strasbourg Court held in *Pafitis*[19] that a delay of two years and seven months caused by a reference by a national court to the Court of Justice could not be taken into account when assessing the length of proceedings.[20] It subsequently adopted similar reasoning, concluding that it must also apply to the procedure established under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.[21]

More recent confirmation that fundamental rights constitute the normative starting point for the determination of EEA law disputes is to be found in the EFTA Court's judgments in *Fred. Olsen* of 9 July 2014 and *Holship AS* of 19 April 2016. The judgment in *Holship AS* will be explored further below. In *Fred. Olsen*, the EFTA Court clearly set out that the fundamental rights encompassed in the legal order of the EEA Agreement are applicable in all situations governed by EEA law.[22] The Court, when requested to provide an advisory opinion, must therefore give all guidance necessary to the national court's determination of 'whether that legislation is compatible with the fundamental rights the observance of which the Court ensures'.[23] Confirming that the Convention system is crucial to the determination of the scope of these fundamental rights,[24] the Court then used the Strasbourg judgment in *Burden* v *United Kingdom*[25] to support its statement that taxation entails interference with the right to property.[26]

The EFTA Court has moreover alluded to this status of fundamental rights as the normative starting point in EEA law adjudication with sector-specific reasoning to the same effect, for example in its landmark *Posten Norge* judgment of 18 April 2012, where the Court found that the principle of effective judicial

[18] *Ásgeirsson*, para. 23.
[19] ECtHR 26 February 1998, Case No. 20323/92, *Pafitis* v *Greece*.
[20] *Ásgeirsson*, para. 23.
[21] *Ásgeirsson*, para. 24.
[22] *Fred. Olsen*, para. 225.
[23] *Fred. Olsen*, para. 225.
[24] *Fred. Olsen*, para. 224.
[25] ECtHR 29 April 2008, Case No. 13378/05, *Burden* v *United Kingdom* [GC], para. 59.
[26] *Fred. Olsen*, para. 228.

protection, including the right to a fair trial which is *inter alia* enshrined in Article 6 of the Convention, is a general principle of EEA law.[27] As a result, the Court rejected the submission that its review of the EFTA Surveillance Authority's decisions could extend only to those cases where it finds 'a complex economic assessment of the [EFTA Surveillance Authority] to be manifestly wrong'.[28] In doing so, it rejected the 'light judicial review weed which has crept into the EU garden',[29] and, as has been noted, went further than the Court of Justice in *KME*[30] in refusing to grant to the EFTA Surveillance Authority a wide sphere of discretion in complex economic assessments.[31] Instead, referring to the Strasbourg judgments in *Janosevic*[32] and *A. Menarini Diagnostics*,[33] the Court held that the right to a fair trial requires that it be able to quash the EFTA Surveillance Authority's decisions on questions of both law and fact,[34] thereby cultivating its own conception of the requisite level of judicial review in this context through reference to those external principles that it deems appropriate.[35]

In sum, the EFTA Court's conceptualisation of fundamental rights as *general and unwritten principles* of EEA law provides it with flexibility in the application of these rights to disputes that arise before it, allowing the Court to take account of the particular features of the EFTA pillar. However, it goes without saying that without a clear textual basis for fundamental rights, uncertainty as to the actual parameters of fundamental rights protection in EEA-related disputes before the EFTA Court can be a cause for concern. This then brings me to my second doctrinal remark, the normative impact of the EU Charter for EEA fundamental rights.

The normative impact of the EU Charter for EEA fundamental rights

The second, and perhaps conceptually more interesting, point is the normative impact of the EU Charter for the EFTA Court's fundamental rights case law.

[27] Case E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, para. 86; *see also* para. 93 of the same judgment, where the Court uses Art. 6 § 2 of the Convention to prop up the centrality of the presumption of innocence.

[28] *Posten Norge*, para. 102.

[29] I.S. Forrester, 'The Style of the EFTA Court', in *The EEA and the EFTA Court – Decentred Integration*, *supra* n. 7, p. 21 at p. 38.

[30] ECJ, C-389/10 P *KME Germany and Commission* [2011] ECR I-13125.

[31] ibid, referencing para. 102 of the *Posten Norge* judgment.

[32] ECtHR 23 July 2002, Case No. 34619/97, *Janosevic* v *Sweden*, § 81.

[33] ECtHR 27 September 2011, Case No. 43509/08, *A. Menarini Diagnostics S.R.L.* v *Italy*, § 59.

[34] *Posten Norge*, para. 100.

[35] *See also* Eric Barbier de la Serre who suggests that it cannot be excluded that, following the *Posten Norge* judgment, the EU Courts will soon abandon the 'manifest error' standard, opining that the *KME* judgment may already be interpreted as a first step in this direction: E.B. de la Serre, 'Standard of Review in Competition Law Cases: Posten Norge and Beyond', in *The EEA and the EFTA Court – Decentred Integration*, *supra* n. 7, p. 417 at p. 425.

It was invited to examine the issue in the judgment in *Enes Deveci and Others* of 18 December 2014,[36] where the defendant claimed that Directive 2001/23/EC, safeguarding employees' rights in the event of transfers of undertakings, had to be interpreted in accordance with the freedom to conduct a business enshrined in Article 16 of the Charter. The core issue was whether the transferee was bound by collective agreements entered into by the transferor. The defendant argued that the Directive must be interpreted in accordance with the Charter and in particular with the freedom to conduct a business enshrined in Article 16. Although the Charter has not been incorporated into the EEA Agreement, the defendant found it relevant in accordance with the principle of homogeneity to the interpretation of the provision at issue, since in relation to that provision there are no differences in scope and purpose between EEA and EU law. Thus, the defendant argued, the interpretation sought by the appellants would result in the collective agreements of the transferor becoming the threshold from which subsequent collective agreements may only derogate in favour of the employees. This would ignore the interests of the transferee with regard to cost management and maintaining good industrial relations, hence restricting a transferee's freedom to conduct a business.[37]

While acknowledging the EFTA Court's settled case law on fundamental rights and the Convention as essential sources for determining the scope of these rights, the Norwegian government claimed that an automatic application of the Charter, which is not incorporated in the EEA Agreement, would infringe on State sovereignty and the principle of consent as the source of international legal obligations. In its view, the Charter provides, in some respects, for fundamental rights beyond those common to the EEA States, with Article 16 constituting one such example. The government argued that since the right to conduct business is not, at least not in such a general manner, reflected in other international instruments by which the EEA States are bound, the Court should be cautious in levelling the scope of Article 16 with fundamental rights common to the EEA States.[38]

At the hearing, the EFTA Surveillance Authority submitted that the EEA Agreement should be interpreted in the light of fundamental rights, and that the right to conduct a business is safeguarded in the EEA irrespective of the Charter. One of the Agreement's main objectives is to contribute to 'the fullest possible realisation of the four freedoms, for which the right to conduct a business is an indispensable prerequisite'.[39] Nonetheless, for the EFTA Surveillance

[36] Case E-10/14 *Enes Deveci* [2014] EFTA Ct. Rep. 1364.
[37] *Enes Deveci*, para. 40.
[38] *Enes Deveci*, para. 44.
[39] *Enes Deveci*, para. 52.

Authority, the Charter does not provide any additional guidance in the interpretation of the Directive.[40]

The Commission pointed out that the Court of Justice had held in *Alemo-Herron*[41] that Article 3 of the Directive must be interpreted in accordance with Article 16.[42] The Swedish government submitted that the wording of Article 3(3) of the Directive imposes an obligation on the transferee to observe the collective agreements concluded by the transferor only until the expiry of the collective agreement, as an alternative reading, binding the transferee indefinitely by collective agreements whose terms it could not affect, 'would adversely affect the very essence' of the freedom to conduct business.[43]

In its findings, the EFTA Court referred to *Alemo-Herron* when limiting the time period during which the transferee was bound by the collective agreement entered into by the transferor.[44] However, the EFTA Court expressly declined to address the position of Article 16 in the EEA, since the EEA Agreement has linked the markets of the EEA/EFTA States to the single market, and the actors of a market include undertakings.[45] For the EFTA Court, therefore, the freedom to conduct a business 'lies at the heart of the EEA Agreement', and must be recognised in accordance with EEA law and national law and practices.[46]

Thus the EFTA Court in *Enes Deveci*, perhaps prudently, found a way to evade addressing the issue of the normative impact of the EU Charter for EEA fundamental rights. However, it seems clear that the Court will, again, be faced with this question in the foreseeable future. It seems to me that any analysis of this issue must, at least as a starting premise, be predicated on the principle of homogeneity as set out in Article 6 of the EEA Agreement. This principle requires that the provisions of the Agreement are, in their implementation and application, to 'be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities'. Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice restates that '[i]n the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities'. Since the original proposition for an EU-EFTA Court was rejected by the Court of Justice in Opinion 1/91 on the

[40] *Enes Deveci*, para. 52.
[41] ECJ 18 July 2013, Case C-426/11, *Mark Alemo-Herron* v *Parkwood Leisure Ltd.*
[42] *Enes Deveci*, para. 55.
[43] *Enes Deveci*, para. 45.
[44] *Enes Deveci*, para. 63.
[45] *Enes Deveci*, para. 64.
[46] *Enes Deveci*, para. 64.

grounds that the autonomy of EU law could not allow for a common court superior to the Court of Justice (such considerations notably resurfaced in the polemical Opinion 2/13), it falls to the EFTA Court to adhere to the principle of homogeneity within its case law so that a uniform and coherent system of norms may be maintained. As commentators have noted, the EFTA Court uses the principle of homogeneity as an 'overarching constitutional principle' through which its general principles have been developed.[47]

It is clear that, following the coming into force of the Charter, the rulings of the Court of Justice have been increasingly infused with Charter-related references and analyses where fundamental rights arguments have fallen to be considered.[48] It will thus be difficult for the EFTA Court, moving forward, not to take account of the interpretative outcomes based on Charter provisions that derive from these rulings, at least to the extent that they have a direct bearing on the interpretation and application of corresponding norms within the EFTA pillar. However, if the Court of Justice does not fully enforce the requirement of coherence between the Charter and the Convention, as mandated by Article 52 § 3 of the Charter,[49] the EFTA Court may be confronted with opposing viewpoints of the Luxembourg Court, on the one hand, and the Strasbourg Court, on the other, as to the interpretation of certain fundamental rights which have a basis in both the Charter and the Convention. In such situations, it is important to recall that the Convention sets minimum standards of European human rights protection.[50] Accordingly, States who have signed up to the EEA Agreement and the Convention, whether on the EFTA or EU side, cannot allow protections to slip below this level. General principles of EU law, which may have a bearing on the EFTA pillar through the principle of homogeneity applied by the EFTA Court, do not, as such, provide a justification for disregarding these minimum standards as interpreted by the Strasbourg Court.[51]

[47] C. Lebeck, 'General Principles', in *The EEA and the EFTA Court – Decentred Integration*, *supra* n. 7, p. 253 at p. 257. Indeed, in Carl Lebeck's formulation, the need for legal homogeneity is 'an effect of the aim of creating a system of uniform rules in the absence of a common institutional structure' (as ordained by Opinion 1/91) – *ibid*, p. 257.

[48] *See*, for example, Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', 20(2) *Maastricht Journal of European and Comparative Law* (2013) p. 168 and Siofra O'Leary, 'Courts, Charters and Conventions: Making Sense of Fundamental Rights in the EU', 56 *The Irish Jurist* (2016) p. 4.

[49] Art. 52 § 3 of the Charter provides: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

[50] As set out in Art. 53 of the Convention and recognised by Art. 52 § 3 of the Charter.

[51] *See* most recently ECtHR 23 May 2016, Case No. 17502/07, *Avotiņš* v *Latvia.*

The three strands of fundamental rights case law of the EFTA Court

Upon closer review of the recent fundamental rights case law of the EFTA Court, it is possible to categorise the jurisprudence into roughly three strands. First, there are judgments where the EFTA Court treats the Convention system as the dispositive normative basis for its resolution of a case; second, where reference to fundamental rights has been used by the EFTA Court as a tool to operationalise the principle of homogeneity between EEA and EU law; and, third, where a fundamental freedom is restricted to further an aim based on fundamental rights.

The Convention system as the dispositive normative basis for the EFTA Court's adjudication

The first category contains cases where the EFTA Court directly refers to and treats the Convention and the case law of the Strasbourg Court as the dispositive normative basis for its resolution of a case. From the perspective of a Strasbourg judge, this is of course the preferred approach, namely, one where the EFTA Court adopts a clear and transparent articulation of the Convention elements adduced by the parties to a case. Although the Convention does not formally constitute part of the EEA legal order, the norms contained in the Convention do fall within the bracket of general unwritten principles of EEA law.[52] The EFTA Court's acknowledgment of the Strasbourg system as 'an important motor of human rights' can hence hardly be deemed controversial[53] – nor can it come as a surprise considering the jurisprudence indicated above. Here, reference can in particular be made to the aforementioned *Posten Norge* judgment of 2012 as regards both the applicability of the criminal limb of Article 6 of the Convention and the standard of judicial review required when the EFTA Surveillance Authority imposes fines for the infringement of competition rules.

Also notable in this context is the case of *Arnulf Clauder*, in which the EFTA Court gave an Advisory Opinion on questions referred to it by the Administrative Court of Liechtenstein concerning Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states. According to Article 16 of the Directive, EEA nationals who have resided legally for a continuous period of five years in an EEA State shall have the right of permanent residence there. The complainant, a German national who had a right to permanent residence in Liechtenstein,

[52] Björgvinsson, *supra* n. 7, p. 278.

[53] N. Wahl, 'Uncharted Waters: Reflections on the Legal Significance of the Charter under EEA Law and Judicial Cross-Fertilisation in the Field of Fundamental Rights' in *The EEA and the EFTA Court – Decentred Integration*, *supra* n. 7, p. 281 at p. 287.

married a German national. He then applied for a family reunification permit, which was rejected on the basis that he could not prove that he had sufficient financial resources for himself and his wife without having recourse to social welfare. He contested the rejection before the national court, claiming that under the Directive it was not necessary to demonstrate sufficient means of subsistence.

The Court undertook an analysis of the right to family life, highlighting in particular the adherence of all the EEA States to the Convention, and thus to Article 8 § 1, the right to respect for private and family life provision, also noting the equivalent Article 7 under the EU Charter.[54] This led the Court to surmise that Article 16(1) is to be 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 such benefits.[55] In doing so, the Court made clear that fundamental rights considerations are crucial to the formulation of its response to the referring court's questions;[56] in particular, recognition of the importance of ensuring the protection of the family life of EEA nationals tends to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by EEA law.[57] Thus a fundamental rights approach supported the Court's conclusion that precluding an EEA national from founding a family in his host State would impair his right to move and reside freely within the EEA, conflicting with the Directive's objective and depriving it of its full effectiveness.[58]

Reference to fundamental rights as a tool to operationalise the principle of homogeneity between EEA and EU law

Secondly, reference to fundamental rights, as provided for by the Convention, has been used by the EFTA Court as an important and rather creative tool to operationalise the principle of homogeneity between EEA and EU law, both as regards substantive norms as well as rules of procedure. Particularly pertinent in this respect is the judgment in *Irish Bank* of 28 September 2012.

In the case, the EFTA Court was confronted with an admissibility question on a request for an advisory opinion where the Supreme Court of Iceland had, on appeal, amended the questions as formulated by the District Court. The case concerned winding-up proceedings commenced in October 2008 by the defendant, Kaupthing Bank. Following the District Court's reference for an Advisory Opinion, the defendant appealed the decision to refer to the Supreme

[54] *Clauder*, para. 49.
[55] *Clauder*, para. 50.
[56] *Clauder*, para. 50.
[57] *Clauder*, para. 35.
[58] *Clauder*, para. 46.

Court of Iceland. The latter upheld the decision to make a reference to the EFTA Court, but substantially amended the questions posed.

The plaintiff in the case, relying on the judgment of the Court of Justice in *Cartesio* of 2008,[59] had invited the EFTA Court to disregard the appellate ruling of the Supreme Court, amending the questions, as the principle of homogeneity required a harmonious interpretation of Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice and Article 267 of the Treaty on the Functioning of the European Union ('the TFEU'). This would thus afford the Icelandic District Court access to the referral mechanism provided for under EEA Law in the same way as its counterparts in EU Member States have access to the preliminary reference procedure.

The EFTA Court declared that the procedural provisions of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice are to be interpreted in the light of fundamental rights just like the provisions of the EEA Agreement, citing its own pertinent case law, the Convention and the Strasbourg Court's jurisprudence as relevant sources in this respect.[60] The Court then referred to Article 6 of the Convention and the Strasbourg Court's *Ullens de Schooten* case law,[61] where it was found that the decision to refuse a motion for a preliminary reference to the Court of Justice, which was not reasoned, might violate Article 6.[62] Since *Ullens de Schooten* dealt with Article 267(3) of the TFEU, which concerns the duty to refer in the EU

[59] ECJ 16 December 2008, Case C-210/06, *Cartesio*.

[60] *Irish Bank*, para. 63.

[61] *Irish Bank*, para. 64.

[62] *See*, in particular, ECtHR 20 September 2011, Case Nos. 3989/07 and 38353/07, *Ullens de Schooten and Rezabek* v *Belgium*; ECtHR 10 April 2012, Case No. 4832/04, *Vergauwen* v *Belgium*, paras. 89-90, ECtHR 8 April 2014, Case No. 17120/09, *Dhahbi* v *Italy* and ECtHR 21 July 2015, Case No. 38369/09, *Schipani* v *Italy*. In *Ullens de Schooten*, the Strasbourg Court concluded that the Convention does not guarantee any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling. Nonetheless, it noted that Art. 6 § 1 of the Convention obliges domestic courts to give reasons for any decision refusing to refer a question, particularly where the applicable law permitted such a refusal only in exceptional circumstances. However, that obligation was not absolute, as was clear from the Court of Justice's *CILFIT* case law. Domestic courts are not required to refer in those instances where they establish that the question 'is irrelevant', that 'the Community provision in question has already been interpreted by the Court [of Justice]' or that 'the correct application of Community law is so obvious as to leave no scope for any reasonable doubt'. Since the Belgian courts had provided reasons for their refusal, citing the *CILFIT* exceptions, and having regard to the proceedings as a whole, the Court concluded that there had been no violation of the applicants' Art. 6 § 1 fair hearing rights. Nevertheless, the Court maintained that refusal by a domestic court to grant a request for such a referral may, in certain circumstances, in particular in cases of arbitrariness, infringe the fairness of proceedings, regardless of whether the preliminary ruling is given by a domestic or a Community court. Thus the refusal must not be based on reasons other than those set out in, and must be duly reasoned in accordance with, the applicable

(there is no such duty in the EEA), the EFTA Court explicitly acknowledged the differences between Article 267 TFEU's procedure of preliminary reference and Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, which were based on the 'less far-reaching' depth of integration of the EEA Agreement.[63] Nevertheless, the Court was clearly 'flirting' with the idea of extending the *Ullens de Schooten* case to the advisory opinion procedure.[64] On this basis, the EFTA Court held that the same considerations may also apply when a court or tribunal against whose decisions there is no judicial remedy under national law overrules a lower court's decision to refer the case to another court or, alternatively, upholds the decision to refer, but nevertheless to amend, the questions asked by the lower court.[65]

The Strasbourg Court's case law in *Ullens de Schooten*, and later cases applying that holding,[66] have not been particularly well received in some quarters in Luxembourg.[67] I therefore think it wise to refrain from stating a viewpoint on the substance and scope of the EFTA Court's analysis in *Irish Bank* and its possible implications for similar factual scenarios. It is, however, safe to say that *Irish Bank* demonstrates the EFTA Court's willingness to utilise fundamental rights-type reasoning to bolster a finding that strongly promotes the primordial objective of homogeneity between the two EEA pillars and the protection of fundamental rights enabling the avoidance of conflicts between EU and EEA law.[68]

Another example of this nature, although not as explicit as *Irish Bank*, is the judgment of the EFTA Court in *Yankuba Jabbi* of 26 July 2016.[69] In a request for an advisory opinion, the EFTA Court was called on to interpret certain provisions of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states

rules. In sum, domestic courts must adequately explain any refusal to refer a preliminary question, especially where the applicable law permits refusal only in exceptional circumstances.

[63] *Irish Bank*, para. 57.

[64] Björgvinsson, *supra* n. 7, p. 277.

[65] *Irish Bank*, para. 64.

[66] Most recently confirmed in ECtHR 23 May 2016, Case No. 17502/07, *Avotiņš* v *Latvia* [GC], para. 110; alongside the authorities mentioned above, *see also* ECtHR 30 July 2015, Case No. 30123/10, *Ferreira Santos Pardal* v *Portugal*.

[67] *See*, in contrast, T. Lock, *The European Court of Justice and International Courts* (Oxford University Press 2015) at p. 214, who sees the *Ullens de Schooten* line of case law as demonstrative of Strasbourg's willingness to strengthen the jurisdiction of the ECJ.

[68] C. Lebeck, 'General Principles' in *The EEA and the EFTA Court – Decentred Integration*, *supra* n. 7, p. 253.

[69] JB Bierbach, '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*', 13(2) *EuConst* (2017) p. 383-399.

(a Directive previously examined by the Court in *Arnulf Clauder*, as outlined above). On the basis of the EU citizenship clause of Article 21 of the TFEU, the Court of Justice had in a previous judgment found that where a Union citizen has created and strengthened family ties with a third country national during a period of genuine residence, pursuant to and in conformity with the conditions set out in the 2004 Directive, in a Member State other than that of which he is a national, the provisions of the Directive would apply by analogy where that Union citizen returns, with the family member, to his Member State of origin.[70]

The plaintiff, Mr Jabbi, was a Gambian national who had married a Norwegian citizen, Ms Amoh, in Spain. They had lived there together from September 2011 to October 2012, after which time Ms Amoh returned to Norway. In November 2012, the plaintiff applied for spousal residence in Norway. After the application was dismissed by the immigration authorities, the plaintiff commenced proceedings before the Oslo District Court, claiming a derived right of residence in Norway as a result of his wife's stay in Spain and subsequent return to Norway. The District Court referred the question to the EFTA Court of whether Article 7(1)(b) in conjunction with Article 7(2) of the Directive confers a derived right of residence on 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.

The EFTA Court pointed out that, pursuant to Article 7(1)(b), all EEA nationals have the right of residence on the territory of another EEA State for more than three months if they have sufficient resources for themselves and their family members, and comprehensive sickness insurance coverage in the host State, during the period of residence.[71] Pursuant to Article 7(2), that right of residence shall extend to third country national family members accompanying or joining the EEA national in the host State.[72] Referring to its *Gunnarsson* judgment,[73] the Court held that the home EEA State may not deter its nationals from moving to another EEA State in the exercise of the freedom of movement under EEA law.[74] The Court held that a right to move freely from the home EEA State to another EEA State cannot be fully achieved if the EEA national may be deterred from exercising the freedom by obstacles raised by the home State to the right of residence of a spouse.[75] The provisions of the Directive will therefore apply by

[70] 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*, referred to at *Yankuba Jabbi*, para. 65.

[71] *Yankuba Jabbi*, para. 72.

[72] *Yankuba Jabbi*, para. 72.

[73] Case E-26/13, *Gunnarsson* [2014] EFTA Ct. Rep. 254.

[74] *Yankuba Jabbi*, para. 75.

[75] *Yankuba Jabbi*, para. 79.

analogy where the EEA national returns to his home State with a third country national family member.[76]

The problem faced by the EFTA Court was thus the emerging gap in primary law between the two EEA pillars, as manifested for example with the advent of EU citizenship under Article 21 of the TFEU, which is not provided for in the EFTA pillar. Irrespective of this fundamental normative difference, the EFTA Court found that by directly interpreting the 2004 Directive, through the prism of firm adherence to the principle of homogeneity, the same outcome could be achieved in the EFTA pillar. Indeed, the principles of dynamism and homogeneity with EU law have been afforded significant weight by the EFTA Court in the interpretation of the 'complex legal construction' of the EEA,[77] the consideration of homogeneity openly said to carry substantial weight.[78]

The Court in *Yankuba Jabbi* supported its findings with a direct reference to the right to family life under Article 8 of the Convention.[79] It is nonetheless noteworthy that the EFTA Court did not provide any references to Strasbourg case law in support of its analysis that the plaintiff could have relied on Article 8 in the particular context in question. In this respect, it would have been preferable if the use of Article 8 had been complemented with references to rulings considered relevant by the EFTA Court to the question presented.

Restriction of a fundamental freedom to further an aim based on fundamental rights

The third strand of the EFTA Court's fundamental rights jurisprudence is to be found in an area that may perhaps be considered somewhat problematic from a pure fundamental rights perspective. Reference is here made to the recent judgment of the Court in *Holship Norge AS* of 19 April 2016 which, at least to some extent,[80] is inspired by the *Viking Line*[81] and *Laval*[82] case law of the Court of Justice.[83]

[76] *Yankuba Jabbi*, para. 82.

[77] K. Fløistad, 'Free movement of persons in the European Economic Area (EEA) – different from the EU?', *EU Law Analysis*, 27 July 2016, <http://eulawanalysis.blogspot.co.uk/2016/07/free-movement-of-persons-in-european.html>, visited 17 July 2017.

[78] *Yankuba Jabbi*, para. 60.

[79] *Yankuba Jabbi*, para. 81.

[80] Case E-14/15 *Holship Norge AS* v *Norsk Transportarbeiderforbund* [2016].

[81] ECJ 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti*.

[82] ECJ 18 December 2007, Case C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*.

[83] The Court, however, makes textual reference solely to the findings in *Viking Line*, also drawing inspiration from the Opinion of Advocate General Poiares Maduro in *Viking Line*, *see Holship Norge AS*, paras. 40 and 125.

The fundamental rights question that *Holship* centred around was: how are the two EEA Courts to deal with a claim that one of the four freedoms has been restricted to further an aim which is based on fundamental rights?

The case dealt with a boycott by a trade union of Holship, a Norwegian forwarding agent providing services, notably, in Norway, in the form of the cleaning of fruit crates prior to their transportation by ships. The boycott sought to procure acceptance of the Framework Agreement on a Fixed Pay Scheme for Dockworkers ('the Framework Agreement'), which applies to 13 ports in Norway, including Drammen. Pursuant to the Framework Agreement, the Administration Office for Dock Work in Drammen is a non-profit making and *sui generis* entity. The Framework Agreement contains a priority clause in accordance with which, unless the Administration Office lacks capacity to take on the assignment, unloading and loading operations of ships must be carried out by dockworkers employed by the Administration Office.

Since Holship was not a party to the Framework Agreement, it used its own employees to carry out its operations in Drammen. In order to compel Holship to join the Framework Agreement, the union gave Holship notice of a boycott and sought a court order declaring it to be lawful. The union was successful before the Drammen District Court and the Borgarting Court of Appeal, which both declared the boycott lawful, deeming it to fall outside the scope of Articles 53 and 54, and to be consistent with Article 31 of the EEA Agreement. Holship challenged the judgment of the Court of Appeal before the Supreme Court of Norway, which made a reference to the EFTA Court.

One of the questions presented to the Court was whether it would constitute a restriction on the freedom of establishment under Article 31 of the EEA Agreement for a trade union to use a boycott against a company, whose parent company is based in another EEA State, in order to produce acceptance of a collective agreement requiring the company to use personnel other than its own in the provision of its services. The EFTA Court answered affirmatively that such an action would constitute a restriction on the freedom of establishment.[84]

The Court then went on to refer to its settled case law that such restrictions may be justified either by Article 33 of the EEA Agreement, or by 'overriding reasons of general interest'.[85] The Court then stated that where overriding reasons in the public interest are invoked in order to justify measures which are liable to obstruct the exercise of the right of establishment, such justification, provided for by EEA law, must be interpreted in the light of the general principles of EEA law, in particular fundamental rights.[86] Accordingly, 'the national measures in question

[84] *Holship Norge AS*, para. 120, echoing the ECJ's conclusion in *Viking Line*, para. 74, which relates to collective action including boycotts.

[85] *Holship Norge AS*, para. 121.

[86] *Holship Norge AS*, para. 123.

may fall under the exceptions provided for only if they are compatible with fundamental rights'.[87] Interestingly, the Court then stated that it would be for the referring court to assess whether certain overriding reasons in the public interest are compatible with fundamental rights in the light of Article 11 of the Convention and the case law of the Strasbourg Court.[88] This point will be further explored below.

The EFTA Court subsequently noted that it is not sufficient that a measure of industrial action is taken in support of the legitimate aim of protection of workers in the abstract; it must rather be assessed whether the measure at issue genuinely aims to protect workers. The absence of such an assessment may create an environment where the measures allegedly taken with reference to the protection of workers primarily seek to prevent undertakings from lawfully establishing themselves in other EEA States.[89] The EFTA Court further recalled that for a restriction to be justified 'it does not simply suffice that it pursues a legitimate aim' - rather, a restrictive measure must 'guarantee the achievement of the intended aim and must not go beyond what is necessary in order to achieve that objective'[90]; it must be impossible to obtain the same result through less restrictive rules.[91]

When analysing this case law, it is tempting to consider the entire logic behind the four freedom/fundamental rights restriction paradigm as reflecting the views expressed by Swiss Professor Walter Kälin in an article published no less than 25 years ago on the EEA Agreement and the European Convention on Human Rights, in which he stated that the fundamental freedoms

> serve not only to underpin the basic principles for the setting up of a homogeneous economic space in Europe; they also constitute *individual rights* enforceable against member States *as well as* against EC and EEA organs, which means they occupy a position at least comparable to that of human rights.[92]

To proceed on the basis, as a normative starting point in the adjudication of human rights cases, that the freedoms of establishment, movement of capital, services and goods are hierarchically of the same value as fundamental human

[87] *Holship Norge AS*, para. 123.

[88] *Holship Norge AS*, para. 123, citing ECtHR 11 January 2006, Case Nos. 52562/99 and 52620/99, *Sørensen and Rasmussen* v *Denmark* [GC].

[89] *Holship Norge AS*, para. 125.

[90] *Holship Norge AS*, para. 130. The ECJ, for its part, requires that a restriction on freedom of establishment 'would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it' (*Viking Line*, para. 75).

[91] *Holship Norge AS*, para. 130.

[92] W. Kälin, 'The EEA Agreement and the European Convention for the Protection of Human Rights', 3(2) *European Journal of International Law* (1992) p. 341.

rights may be somewhat problematic, at least from the perspective of a Strasbourg judge. This line of case law might to some extent be difficult to reconcile with the traditional analytical framework in the Convention system, whereby the human right, the general rule under the Convention, is analysed in EEA law as a restriction of one of the four freedoms. In this way, the application of the human right itself has to be justified on the basis of a genuinely demonstrated aim and a proportionality test. Under Convention case law, a trade union boycott, or the right to strike, is protected in principle by Article 11 of the Convention, as confirmed in the case of *National Union of Rail, Maritime and Transport Workers* v *United Kingdom* of 8 April 2014.[93]

The applicant in that case, a trade union with a membership of over 80,000 individuals employed in different sectors of the transport industry, complained about statutory restrictions on the right to strike and, in particular, the ban on secondary industrial action. The Strasbourg Court held that there had been no violation of Article 11 since it was not apparent from the facts raised by the applicant union that the general prohibition on secondary strikes had had a disproportionate effect on their Article 11 rights.[94] The United Kingdom had therefore remained within its margin of appreciation, which was widened as the accessory, rather than core, aspects of the trade union's activity were affected.[95] While the invocation of an undertaking's freedom of establishment can, on the facts, be considered to justify a restriction of that Article 11 right, it is usually not examined the other way around.

The relevance of this case law of the Strasbourg Court lies in the fact that in *Holship*, the EFTA Court, as mentioned above, makes clear that it is for the referring Court to assess whether certain overriding reasons in the public interest are compatible with fundamental rights in the light of Article 11 of the Convention and the case law of the Strasbourg Court.[96]

[93] ECtHR 8 April 2014, Case No. 31045/10, *National Union of Rail, Maritime and Transport Workers* v *United Kingdom*. It is also noteworthy that in another case, *Kudrevičius*, a claim concerning the conviction of five farmers for rioting following a protest staged during a dispute with the Government over the price of agricultural produce, the Court relied on the wide discretion enjoyed by the contracting states in respect of trade union action as set out in *National Union of Rail, Maritime and Transport Workers*. As a consequence, the Grand Chamber found that Lithuania was clearly entitled to consider that the interests of protecting public order outweighed those of the applicant farmers in resorting to roadblocks as a means to achieve a breakthrough in their negotiations with the Government, *see* ECtHR 15 October 2015, Case No. 37553/05, *Kudrevičius* v *Lithuania* [GC], para. 175.

[94] *National Union of Rail, Maritime and Transport Workers*, para. 104.

[95] For a discussion of the effect of the core/secondary activity distinction on the margin of appreciation in this sphere, *see National Union of Rail, Maritime and Transport Workers*, paras. 87-8.

[96] *Holship Norge AS*, para. 123. The Norwegian Supreme Court, sitting in its Plenary formation, subsequently delivered judgment in the case on 16 December 2016, *see HR-2016-2554-P* (no. 2014/2089).

Conclusion

In the light of the above it is possible to conclude this article with some general reflections on the state of the EFTA Court's jurisprudence in the field of human rights.

First, the EFTA Court is confronted with a normative framework in the field of human rights which, after 2009, is somewhat differently constituted to the one forming the basis of assessment in the Court of Justice. It remains to be seen how this situation will play out. It can however be maintained that the EFTA Court has, on balance, largely managed to navigate these treacherous jurisprudential waters with skill so as to maintain the requisite level of fundamental rights protection under the EEA Agreement and, indeed, has sometimes even gone beyond the requirements that can necessarily be inferred from Strasbourg case law. In some cases where the Court has referred to a provision of the Convention in support of its findings, it might have been useful for the Court to articulate in a more transparent manner the relevant Strasbourg case law which it relied on for its findings, not least to guide the national judges in future cases.

Second, as elaborated above, following the coming into force of the Charter, the rulings of the Court of Justice have become increasingly infused with Charter-related references and analyses where fundamental rights arguments have needed to be considered. It will thus be difficult for the EFTA Court, moving forward, not to take account of the interpretive outcomes based on Charter provisions that derive from these rulings, at least to the extent that they have a direct bearing on the interpretation and application of corresponding norms within the EFTA pillar. Should the EFTA Court be confronted with opposing viewpoints from its sister Court in Luxembourg on the one hand, and the Strasbourg Court on the other, it is important to recall that States who have signed up to the EEA Agreement and the European Convention on Human Rights, whether on the EFTA or EU side, cannot allow protections to slip below the level required by the Convention.

Third, and finally, I would submit that the fundamental premise behind the work of all three European Courts should be the same. Minimum human rights protection afforded by the EFTA Court, the Court of Justice and the Strasbourg Court should not differ, but should remain uniform in scope and substance. This alone can ensure our shared aim of safeguarding the rights of individuals and undertakings, wherever on our territories they may be situated.

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