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Fundamental Rights of the Individual in EEA Law: The Tension between the ECHR Standards and the EU Charter

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I. INTRODUCTION

The European Economic Area (EEA) Agreement extends the European Union's (EU's) common market to the three non-Member States, Iceland, Norway and Liechtenstein (the EEA states).[1] Accordingly, the EU legislation in the fields of the four freedoms and competition (and state aid) is to be made a part of the legal order of these states, including in the field of freedom of persons. Moreover, the EEA Agreement and the Agreement between the EFTA [European Free Trade Association] States on the establishment of a surveillance authority and a Court of Justice of 2 May 1992 (SCA)[2] provide for institutions, separate from the EU institutions, the role of which is to ensure that EU legislation in these fields is implemented and enforced in the EFTA states in line with EU standards. In this regard the core concept is 'homogeneity', the content of which will be described in section II.

The EEA Agreement does not contain specific references to fundamental rights. Moreover, the EU Charter on Fundamental Rights[3] (the Charter) is not a part of the EEA legal system and creates no obligations for the EEA states to adhere to it as such, or adopt it into their national systems. Indeed, direct reference to the Charter to support or substantiate a presumption of protection of fundamental rights within the EEA, which is the same as or equivalent to the protection provided within the EU, would be not only legally wrong but also, in the wider political context, inappropriate.

* The views expressed in this chapter are personal.

[1] The Agreement on the European Economic Area of 2 May 1992 [1994] OJ L1/3. Presently only Iceland, Norway and Liechtenstein are on the EFTA side of the Agreement.

[2] Agreement between the EFTA States on the establishment of a surveillance authority and a Court of Justice [1994] OJ L344/1.

[3] Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

The title of this chapter refers to fundamental rights of the individual in EEA law and alleged tension between the standards of the European Convention on Human Rights (ECHR)[4] and the EU Charter. In line with that, it offers a general view of the potential problems. However, issues relating to freedom of movement and fundamental rights under the EEA Agreement are given special attention, as well as those caused by Union citizenship rights and Directive 2004/38,[5] as they are pertinent to this anthology.

It is suggested that academics tend to give too much weight to the possible problems and tensions this difference may create in the long run. It is argued that the EEA institutions, and the national legislator and judges at the national level, will, in most situations, find a way to achieve homogeneity without ever referring to the Charter, as the rights and principles contained therein are either embedded, or can without too many difficulties be incorporated, into the EEA system and the national legal systems of the EFTA states, through either legislation or judicial activity. This may mean that sometimes methods and judicial arguments used to arrive at a decision may differ from those applied by the EU institutions, including the Court of Justice of the European Union (CJEU), as there are differences in the legal nature of the EEA on one hand and the EU on the other. It is asserted, for the purpose of homogeneity and from the point of view of individuals and economic operators, who are the benefactors of the rights afforded, that what matters is the final outcome, not the way it is reached.

II. THE LEGAL CHARACTERISTICS OF THE EEA AGREEMENT

As related in section I, the participation of the EFTA states requires them to make sure that EU legislation in the fields of the four freedoms and competition is implemented into their national legal order, and, in accordance with the principle of homogeneity, to ensure that this legislation is applied, interpreted and enforced in compliance with EU standards in the field of the four freedoms.[6] It is moreover the role of the EEA Joint Committee to decide which secondary legislation shall be a part of the EEA. This would seem to be simple, but nevertheless problems regularly arise as to which EU secondary legislation is relevant for the EEA. One of them relates to Directive 2004/38, further discussed in section IV.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ETS No. 5).

[5] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of 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] OJ L158/3.

[6] For a general overview of the EEA Agreement see, eg, S Norberg et al, *The European Economic Area. EEA Law. A Commentary on the EEA Agreement* (Fritzes AB 1993).

The legal structure and nature of the EEA Agreement is shaped by characteristics. On the one hand the EU legislation should be implemented in the national legal system to enable individuals and economic operators to rely on it (direct effect). Moreover, this should be achieved without requiring the EFTA states to transfer sovereign powers to common institutions beyond the limits set by their constitutions. It follows that transfer of state powers to common institutions is limited to certain decisions of the EFTA Surveillance Authority (ESA) and the EFTA Court in competition cases. Moreover, the EEA Agreement does not provide for direct applicability of secondary EC legislation in the national legal order of the EFTA states. In addition, as regards the advisory opinion procedure under Article 34, this differs from the preliminary ruling procedure within the EU, in that the national courts in the EFTA states are never obliged to request advisory opinions and such opinions are never binding on the national courts.

Due to these differences, there have been problems in always achieving full homogeneity, but such problems have so far been overcome for the most part. In any case, the EEA Agreement has survived for almost 30 years now and served its purpose well without altering its main structure.

III. PROTECTION OF FUNDAMENTAL RIGHTS UNDER THE EEA AGREEMENT

The Charter is not binding upon the EFTA states. This does not mean that the EFTA states are not bound by fundamental rights when implementing and applying EU legislation at home or when the EEA institutions enforce it. The message is already clear in the preamble to the main text of the Agreement, where the Contracting Parties declare that they are convinced that it will contribute to the construction of a Europe based on peace, democracy and human rights. The presumption is therefore that the economic structure set up by the EEA Agreement is based on democratic principles and fundamental rights and principles. The question is only which fundamental rights standards apply when questions arise in practical situations. On this matter the EEA Agreement itself is silent. This will now be explored further.[7]

A. Human Rights Protection at the National Level

The standards that must be followed at the national level in the EFTA states are to be found first and foremost in the catalogues of human rights in the constitutions of these countries. In the case of Norway, Part E of the Constitution

[7] The present author has written on this subject earlier. See DT Björgvinsson 'Fundamental Rights in EEA Law' in *The EEA and the EFTA Court. Decentered Integration*, ed The EFTA Court (Hart Publishing 2014) 263. R Spano, 'The EFTA Court and Fundamental Rights' (2017) 13 *European Constitutional Law Review* 475.

(Articles 92–113);[8] and in case of Iceland, Chapter VII (Articles 65–76) of the Republic of Iceland.[9] In both countries the principle of constitutional review is firmly established, giving the general courts the power to strike down, or rather not to apply, legislation that is unconstitutional. It follows that all EEA legislation must in its content and application respect national constitutional standards on fundamental rights.

In addition, the ECHR has been implemented as law in these countries, and both countries are committed to follow the case law of the European Court of Human Rights (ECtHR). It follows that when questions arise as to the interpretation and application of the EEA Agreement at the national level, and whether it is in accordance with human rights standards, it should be measured against constitutional provisions on human rights as well as the ECHR as interpreted and applied by the ECtHR. Moreover, these countries are Contracting Parties to numerous human rights instruments on the international level, among others the International Covenant on Civil and Political Rights of 1966[10] and International Covenant on Economic, Social and Cultural Rights from 1966,[11] as well as the European Social Charter of 1996[12] and the ILO Conventions covering a wide area of social and labour issues, including basic human rights, minimum wages, industrial relations, employment policy and other issues.

Overall, the foregoing suggests that the EFTA states are prima facie well tooled to adapt to the Charter without ever referring to it directly, to make sure that implementation and application of EU legislation at the national level is aligned with the fundamental rights obligations stemming from EU legislation as interpreted in light of the Charter, to achieve homogeneity.

B. Fundamental Rights Standards when EU Legislation is Applied by the EEA Institutions

The issues relating to the protection of fundamental rights within the Community and on behalf of the Community institutions are well documented and there is no need to repeat them here.[13] In addition to the increased case law of the CJEU, where these issues have been addressed previously, the most important

[8] The Constitution of the Kingdom of Norway of 17 May 1814.

[9] Constitution of Republic of Iceland no 33, 17 June 1944, as amended.

[10] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[11] International Covenant on Economic, Social and Cultural Right (adopted 16 December 1966, entered into force 3 January 1966) 993 UNTS 3 (ICESCR).

[12] European Social Charter (Revised) Strasbourg, 3 May 1996, ETS 163.

[13] See, among others, F Jacobs, 'Interaction of the case-law of the European Court of Human Rights and the European Court of Justice: Recent developments' in *Dialogue between Judges* (European Court of Human Rights, 2005) 65; and A Rosas, 'Fundamental Rights in the Luxembourg and Strasbourg Courts' in C Baudenbacher, P Tresselt and T Orlygsson (eds), *The EFTA Court. Ten Years On* (Hart Publishing 2005) 161.

feature of the present situation is that the approach of the CJEU has been given expression in Article 6 TEU, providing that the Union recognises the rights, freedoms and principles set out in the Charter, which shall have the same legal value as the Treaties. Moreover, it states that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law.

As regards the applicable standards for the protection of fundamental rights under the EEA Agreement, the EFTA Court has in numerous judgments referred to the ECHR and the jurisprudence of the ECtHR. The EFTA Court set the stage in 1998 in the case of *TV 1000 Sverige*.[14] There, the Court referred to Article 10 ECHR and the *Handyside* judgment of the ECtHR[15] when interpreting Council Directive 89/552/EEC.[16] There have been many judgments since where the EFTA Court has referred to the ECHR and the case law of the ECtHR.[17]

Of importance is the judgment in the *Clauder* case,[18] where the Court reaffirmed its commitment to the ECHR and the case law of the ECtHR, stating:

> Finally, it should be recalled that all the EEA States are parties to the ECHR, which enshrines in Article 8(1) the right to respect for private and family life. According to established case-law, provisions of the EEA Agreement are to be interpreted in the light of fundamental rights (see, for example, Case E-2/03 *Ásgeirsson* [2003] EFTA Ct Rep 18, paragraph 23, and Case E-12/10 *EFTA Surveillance Authority v Iceland*, judgment of 28 June 2011 … The Court notes that in the European Union the same right is protected by Article 7 of the Charter of Fundamental Rights.[19]

Another important case is *Holship*.[20] In paragraph 123 of the judgment the EFTA Court states:

> Fundamental rights form part of the unwritten principles of EEA law. The Court has held that the provisions of the ECHR and the judgments of the ECtHR are important sources for determining the scope of these fundamental rights (see Case E-2/03 *Ásgeirsson* [2003] EFTA Ct Rep 185, paragraph 23). The fundamental rights guaranteed in the EEA legal order are applicable in all situations governed by EEA law. Where overriding reasons in the public interest are invoked in order to justify

[14] Case E-8/97 *TV 1000 Sverige* [1998] EFTA Ct Rep 68.

[15] *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976).

[16] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L298/23 (no longer in force).

[17] Case E-2/02 *Bellona (Access to Court Article 6 ECHR)*, [2003] EFTA Ct Rep 52; Case E-3/11 *Sigmarsson* [2011] EFTA Ct Rep 430; Case E-5/10 *Dr Kottke* [2009-2010] EFTA Ct Rep 320, para 26; Case E-2/03 *Ásgeirsson (length of proceedings under Article 6 ECHR)* [2003] EFTA Ct Rep 185; and the judgment of the ECtHR in *Pafitis and others v Greece* [1998] ECHR (Ser A) 15.

[18] Case E-4/11 *Clauder* [2011] EFTA Ct Rep 216, para 49.

[19] This approach is further confirmed in Case E-15/10 *Posten Norge* AS [2012] EFTA Ct Rep 246, para 86; Case E-18/11 *Irish Bank* [2012] EFTA Ct Rep 592, para 63; Case E-14/11 *Schenker* [2012] EFTA Ct Rep 1178, paras 166–167; Joined Cases E-3/13 and E-20/13 *Fred Olsen* [2014] EFTA Ct Rep 400, para 224; Case E-10/17 *Kystlink* [2018] EFTA Ct Rep 292; Case E-1/20 *Kerim* [2021] EFTA Ct Rep 12; and Case E-4/19 *Campbell* [2020] EFTA Ct. Rep 21.

[20] Case E-14/15 *Holship* [2016] EFTA Ct Rep 240.

> 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. Thus the national measures in question may fall under the exceptions provided for only if they are compatible with fundamental rights (see *Olsen and Others*, cited above, paragraph 226). 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 ECHR and the case law of the ECtHR (compare, for example, the ECtHR in *Sørensen and Rasmussen v Denmark*, cited above, paragraphs 54 and 58).

This case will be explored further in section IV.A.iv, as it eventually reached the ECtHR, which gave judgment on 10 June 2021.

From these references in the EFTA Court's case law to the ECHR, and the case law of the ECtHR, it would seem justified to draw at least two conclusions. First, in the implementation and enforcement of the EEA Agreement, fundamental rights will have to be respected. Second, the main legal criterion is the ECHR, as interpreted by the ECtHR.

Finally, as to the significance of the Charter in this regard, and the purpose and meaning of the tangible reference to the Charter in the *Clauder* case, one may perhaps draw the inference that the Charter carries importance in defining standards for the protection of fundamental rights within the EEA system, and even that, to some extent, the Charter is imported into the EEA by the jurisprudence of the EFTA Court.

Before drawing such inferences, the judgment of the EFTA Court in *Enes Deveci* should be considered.[21] In that case, the defendant claimed inter alia that the respective EU provisions in dispute should be interpreted in accordance with the Charter, in particular Article 16 on the freedom to conduct a business. It was argued that even though the Charter had not been incorporated into the EEA Agreement, it would be consistent with the principle of homogeneity to give it interpretive effect. The Norwegian Government claimed that an automatic application of the Charter without its being incorporated in the EEA Agreement would challenge state sovereignty and the principle of consent as the source of international legal obligations. The Government contended that the Charter provided, in some respects, for fundamental rights beyond those common to the EEA states, and that this would be the case regarding Article 16 of the Charter. The Government went on to state that the right to conduct business is not, at least not in such a general manner, reflected in other international legal instruments by which the EEA states are bound, and argued that it warranted caution in equalling the scope of Article 16 of the Charter with fundamental rights common to the EEA States. The ESA, on the other hand, argued that the right to conduct a business is safeguarded in the EEA irrespective of the Charter's provisions, and submitted that one of the main objectives of the EEA Agreement is to contribute to trade liberalisation and to the fullest possible realisation of

[21] Case E-10/14 *Enes Deveci* [2014] EFTA Ct Rep 1364.

the four freedoms, for which the right to conduct a business is an indispensable prerequisite. The European Commission noted that that the CJEU found in the case of *Alemo-Herron and Others*[22] that Article 3 of the Directive must be interpreted in accordance with Article 16 of the Charter.

In response to these arguments, the EFTA Court stated in paragraph 64 of the *Enes Deveci* judgment:

> The Court finds no reason to address the question of Article 16 of the Charter. The EEA Agreement has linked the markets of the EEA/EFTA States to the single market of the European Union. The actors of a market are, inter alia, undertakings. The freedom to conduct a business lies therefore at the heart of the EEA Agreement and must be recognised in accordance with EEA law and national law and practices.

The arguments of the parties described above, and the response of the EFTA Court, range from overpowering the interpretive effect of the Charter for the purpose of fulfilling the principle of homogeneity, to almost ignoring it altogether as the EEA states have not consented to it and automatic application of it would challenge state sovereignty. The view the EFTA Court would seem to endorse is that, in all important respects, fundamental rights are sufficiently protected under the EEA Agreement and that the courts at the national level are sufficiently equipped to fulfil any commitment to fundamental rights and principles that are protected by the Charter without referring or relying on it directly.

IV. THE TENSION BETWEEN THE ECHR STANDARDS AND THE CHARTER

As noted in section III.B, the EFTA Court took the view in the *Enes Deveci* case that there was no reason to address the question of Article 16 of the Charter. One may still contest if this approach is sufficient in the long run to achieve homogeneity. After the entering into force of the Charter, the decisions of the CJEU increasingly refer to the Charter in cases relating to the interpretation and application of EU legislation on the four freedoms.[23] In that regard, Article 6 of the EEA Agreement and Article 3 of the SCA are important, as they commit the EEA institutions and the national courts of the EFTA states to have regard to the case law of the CJEU. The EFTA Court must therefore consider interpretative outcomes based on Charter provisions in rulings of the CJEU concerning interpretation and application of legislation that is also a part of the EEA Agreement. The matter is further complicated by the fact that the EU evolves while the EEA Agreement is relatively static, and will likely remain so, as it seems that neither the EEA states nor the EU is interested in either extending it or developing it any

[22] Case C-426/11 *Alemo-Herron and Others*, ECLI:EU:C:2013:521.

[23] See, eg, Spano (n 7). See also G de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20(2) *Maastricht Journal of European and Comparative Law* 168; and S O'Leary, 'Courts, Charters and Conventions: Making Sense of Fundamental Rights in the EU' (2016) 56 *The Irish Jurist* 4.

further, or using it as a steppingstone for future Member States on their way to full membership of the EU.

A. Content of the Charter and the ECHR

A brief account of the issue will have to suffice for the purpose of supporting the argument that the differences between the national constitutions of the EFTA states and the ECHR, on one hand, and the Charter, on the other hand, are not such that they cannot be overcome, and there is, for the purpose of homogeneity, no need for the EFTA states to incorporate the Charter, either as a part of the EEA Agreement or at the national level.

The Charter contains rights, freedoms and principles under six titles, namely: dignity, freedoms, equality, solidarity, citizens' rights and justice. The ECHR is more limited, in the sense that it is mostly confined to rights that have been termed civil and political rights. In this regard, Article 52 of the Charter is relevant.

As regards rights, it is stated in Article 52(1) of the Charter that any limitation on the exercise of the rights and freedoms recognised must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Similar limitation clauses are found in Articles 8(2), 9(2), 10(2) and 11(2) ECHR, and in Article 1 of Protocol 1 to the Convention. Moreover, it is stated in Article 52(3) of the Charter that, in so far as this Charter contains rights that correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by that Convention. It is added that this provision shall not prevent Union law from providing more extensive protection. Lastly, Article 52(4) stipulates that where the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

Also important for the purpose of comparison between the Charter and the ECHR is the distinction the Charter makes between rights and principles. Rights are directly enforceable, but as regards principles, it is stated in Article 52(5) that the provisions of this Charter that contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. These principles are judicially cognisable only in the interpretation of such acts and in ruling on their legality.

The distinction between rights and principle is not always clear. Examples of principles are Articles 25 (the rights of the elderly), 26 (integration of people with disabilities) and 37 (environmental protection). In some cases, a provision in the Charter may contain elements of both a right and of a principle, for

example Articles 23 (equality between women and men), 33 (family and professional life) and 34 (social security and social assistance).

i. Dignity

Title I (Articles 1–5) of the Charter contains provisions on dignity. The first to mention is protection of human dignity in Article 1, followed by the right to integrity of the person in Article 3. The ECHR contains no similar provisions. These principles or rights are implied automatically in any meaningful and sustainable concept of fundamental rights and principles. As such, they are firmly embedded in numerous international instruments to which the EFTA states adhere, including the ECHR, and in the jurisprudence of the ECtHR, as well as in the national constitutions and legislation. Any adjustment needed for the purpose of honouring commitments under the EEA Agreement flowing from these provisions of the Charter are easily accommodated within the ECHR framework as well as the national constitutions of the EFTA states. Other rights in this title of the Charter have clear counterparts in the ECHR. The right to life under Article 2 the Charter and Article 2 ECHR are in all important respects identical. The same goes for the prohibition of torture and inhuman or degrading treatment or punishment in Article of 4 the Charter and Article 3 ECHR, and the prohibition of slavery and forced labour in Article 5 the Charter and Article 4 ECHR.

ii. Freedoms

Title II of the Charter sets out the protected freedoms. The right to liberty and security under Article 6 of the Charter has a clear counterpart in Article 5 ECHR, although the latter is much more detailed. The same goes for protection of private and family life under Article 7 of the Charter and Article 8 ECHR. As regards protection of private life, the Charter contains a provision in Article 8 on the protection of personal data not found in the ECHR. Nevertheless, protection of personal data is a part of the ECHR under Article 8 thereof,[24] as well as under the national constitutions and legislation that is largely based on EU law through the EEA Agreement. As regards the right to marry and right to found a family in Article 9 of the Charter, this right is set out in Article 12 ECHR.[25] Article 10 of the Charter on freedom of thought, conscience and religion, and Article 11 on freedom of expression and information are reflected in Articles 9 and 10 ECHR. The same goes for freedom of assembly and of association in

[24] See, eg, *Big Brother Watch and Others v the United Kingdom*, 25 of May 2021 (GC) in Cases 58170/13, 62322/14 and 24960/15 and *Ben Faiza v France*, 8 of February 2018 in Case 31446/12.

[25] On this right the Charter is somewhat wider in scope, as the wording in the ECHR refers in particular to 'men and women', meaning that the right of individuals of the same sex to marry is not directly protected under Art 12 ECHR.

Article 12 of the Charter and Article 11 ECHR. The freedom of the arts and sciences in Article 14 of the Charter has no counterpart in the ECHR, but for the most part they would be protected under Articles 9 and 10 of the Convention. The right to education in Article 14 of the Charter and Article 2 of Protocol 1 to the ECHR are mostly identical. As concerns Article 15 of the Charter on freedom to choose an occupation and the right to engage in work, the ECHR is silent. Nevertheless, the ECHR has in several judgments recognised to some extent the right to access to work.[26] The same applies to the right to conduct a business under Article 16 of the Charter.

The right to property under Article 17 of the Charter is similar to Article 1 of Protocol 1 to the ECHR. As to the right to asylum under Article 18 of the Charter, the EFTA states are contracting parties to the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and have implemented legislation to fulfil the obligations to honour their duties. As regards protection in the event of removal, expulsion or extradition in line with Article 19 of the Charter, it is provided for in Article 3 ECHR and in Article 3 of Protocol 4 (collective expulsion) to the ECHR.

iii. Equality

Title III of the Charter contains provisions on equality. Article 20 states that everyone is equal before the law. This provision has no counterpart in the ECHR. However, equality is of course a part of the general principles upon which the Convention rests, and finds expression, inter alia, in Article 14 and in Article 2 of Protocol 12, as well as in the national constitutions of the EFTA states. As regards non-discrimination under Article 21 of the Charter, there is an identical provision in Article 14 ECHR, as well as in Article 1 of Protocol 12. Article 22 of the Charter protects cultural, religious and linguistic diversity, and stipulates that the Union shall respect all such diversity. There is no similar provision in the ECHR. However, it can safely be assumed that this is accommodated in various provisions of the ECHR, in particular Article 9 on freedom of thought, conscience and religion, Article 10 on freedom of expression, Article 2 of Protocol 1 on the right to education, and Article 14 and Article 2 of Protocol 12. Article 23 of the Charter on equality between men and women has no counterpart in the ECHR but finds expression in Article 14 of the Convention and in Article 2 of Protocol 12, as well as in the national constitutions of the EFTA States. The same goes for the possibility to maintain and adopt measures providing for specific advantages in favour of the under-represented sex.

The next provision to mention is Article 24 of the Charter on the rights of the child, plus the rights of the elderly in Article 25 of the Charter and integration

[26] See, eg, *Thlimmenos v Greece* App no 34369/97 (ECtHR, Grand Chamber, 6 April 2000).

of persons with disabilities in Article 26.[27] Many of these rights or principles are also already part of the ECHR through the jurisprudence of the ECtHR. These principles are also protected in various international instruments to which the EFTA states are contracting parties, as well as under the national constitutions and legislation. The general framework for the protection of these rights or principles based on the ECHR and national constitutions, to fulfil obligations under the EEA Agreement, is in place. It leaves plenty of leeway for any adjustments or changes needed to fulfil obligations under the EEA Agreement flowing from EU law, including the Charter.

iv. Solidarity

Title IV of the Charter is entitled 'Solidarity'. It contains provisions on social rights, labour or workers' rights, environmental rights and consumer rights. The ECHR is primarily concerned with civil and political rights, and most of the provisions in Title IV of the Charter have no direct counterparts in the Convention. Nevertheless, even though these rights or principles are not specifically stipulated in the ECHR, they are to a great extent protected in the jurisprudence of the ECtHR. For assessing whether this is a potential source of tensions or discrepancies for the purpose of equivalent protection under the EEA Agreement to that offered in EU law, the following should be borne in mind.

Article 28 of the Charter protects the right of collective bargaining and action. There is no direct counterpart in the ECHR. However, there is clear case law on Article 11 (freedom of association and assembly) confirming that these rights are protected under the Convention.[28] These rights are also protected under national law in the EFTA states and in Iceland by the Constitution as interpreted in light of Article 11 as interpreted by the ECtHR, as well as in the ILO Conventions.

The *Holship* judgment[29] of the ECtHR is interesting in this context. It concerned the legality of a boycott as a trade union action under Article 11 ECHR against Article 31 EEA (freedom of establishment). One aspect of this judgment is whether it can be interpreted as a retreat from the *Bosphorus* case,[30] or for that

[27] See, eg, DT Björgvinsson, 'The Protection of the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights' in OM Arnardóttir and G Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities. European and Scandinavian Perspective* (Martinus Nijhoff Publishers 2009) 141.

[28] See *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008); and *Enerji Yapi-Yol Sen v Turkey* App no 68959/01 (ECtHR, 21 April 2009). See also DT Björgvinsson, 'The European Convention on Human Rights and Trade Union Rights' in S Borelli, A Guazzarotti and S Lorenzon (eds), *I diritti dei lavoratori nelle carte Europee deil diritti fondamentali – Conference Proceedings* (Jovene editore 2012) 27.

[29] *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v Norway* App no 45487/17 (ECtHR, 10 June 2021).

[30] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App no 45036/98 (ECtHR, 30 June 2005).

matter from the decision of the ECtHR in *Konkurrenten.no AS*,[31] in which the ECtHR had found that the presumption of Convention compliance created in *Bosphorus* did not apply to the EEA as claimed by the Norwegian Government. In the context of the EEA Agreement, a retreat from the *Konkurrenten* decision is possibly indicated by giving the references of the EFTA Court to fundamental rights more weight than before. Graver goes further in arguing that the judgment may signal a more assertive ECtHR towards the EU, for example, moving from the *Bosphorus* case. It may also indicate that the ECtHR does not regard the protection of labour rights and other rights covered by the ECHR as at least 'equivalent' to that for which the Convention provides, with implications for the application of the *Bosphorus* doctrine.[32]

Another way to interpret the judgment is that the ECtHR is moving closer to some kind of acceptance of presuming equivalent protection of fundamental rights based on the EEA Agreement. This is done by emphasising that fundamental rights form part of the unwritten principles of EEA law according to the case law of the EFTA Court. Moreover, it is stressed that this reflects the position that previously pertained under EU law, prior to successive EU Treaty amendments, according to which fundamental rights were first recognised as general principles of EU law. It is further added in *Konkurrenten.no*, that the fact that the EEA agreement does not include the EU Charter is not determinative of the question whether the *Bosphorus* presumption could apply when it comes to the implementation of EEA law, or certain parts thereof. Despite this, the ECtHR nonetheless decided in this case that it would proceed on the basis that the presumption does not apply. It is indicated, moreover, that this issue might be reviewed further in another case if necessary.

As regards the balancing exercise under Article 11(2) ECHR against Article 31 EEA, the ECtHR considered that the Supreme Court of Norway had engaged in an extensive assessment of the conflicting fundamental right to collective action relied on by the applicant unions and the fundamental economic freedom under EEA law on which the employer had relied. It had indicated that the boycott had, among other things, to be reconciled with the rights that followed from the EEA Agreement, and that in consideration of proportionality a fair balance had to be struck between those rights. Given the characteristics of the collective action, the breadth of the margin of appreciation was considered wide. Following the Supreme Court judgment, the relevant social partners had negotiated and concluded a new collective agreement: the restriction of the applicant unions' Article 11 rights had not as such prevented them from engaging in further collective bargaining. Against that background, the Court did not consider that sufficiently 'strong reasons' existed for it to substitute its views for that of the Supreme Court in the case.

[31] *Konkurrenten.no AS v Norway* App no 47341/15 (ECtHR, 5 November 2019).

[32] HP Graver, 'The *Holship* ruling of the ECtHR and the protection of fundamental rights in Europe' (2022) *ERA Forum* at https://doi.org/10.1007/s12027-022-00701-0.

The *Holship* saga offers interesting points relevant for the purpose of this chapter. The first is that in its Advisory Opinion, the EFTA Court relied to a great extent on the judgments of the CJEU in the *Viking* and *Laval* cases.[33] In these judgments, the collective actions by the trade unions were found to be unjustifiable restrictions on the freedom of establishment and the freedom to provide services. In addition, the Supreme Court of Norway relied on the Advisory Opinion to find that the blockade was unlawful. A further interesting point is the fact that the ECtHR gave a considerable weight to the fact that Norway was a Contracting Party to the EEA Agreement and that the boycott had, among other things, to be reconciled with the rights that flowed from the EEA Agreement.

The inference to be drawn from this saga is that the national constitutions are the point of departure without any reference to the Charter. The rights and obligations stemming from the EEA Agreement are then weighed against the national constitutions for the purpose of defining the width of the protection under the national constitutions, striving to find a fair balance from the point of view of Article 11 of the ECHR. What matters from the point of view both of the EEA Agreement and the ECtHR is the outcome, not the legal instruments directly referred to.

As regards environmental protection, provided for in Article 37 of the Charter, the ECHR does not refer directly to a right to a clean environment. However, there is plenty of case law from the ECtHR where environmental rights have been incorporated into the Convention through interpretation mainly of Article 8[34] and Article 1 of Protocol 1 on property rights.[35] From the point of view of the EFTA states, there are also numerous international instruments to work with in this field at the national level.

As for the rest of the provisions in Title IV of the Charter, the ECHR does not contain direct counterparts. These are: Article 27 of the Charter on workers' right to information and consultation within the undertaking; Article 29 on the right of access to placement services; Article 31 on fair and just working conditions; Article 32 on the prohibition of child labour and the protection of young people at work; Article 33 on reconciliation of family and professional life; Article 34 on social security and social assistance; Article 35 on health care; Article 36 on access to services of general economic interest; and Article 38 on consumer protection.

A thorough account of how these rights and principles are, in one way or another, already sufficiently protected under the EEA Agreement and the national legislation of the EFTA states, including based on the EU legislation that has already been implemented, requires more space than is available here.

[33] Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union*, ECLI:EU:C:2007:772; and Case C-341/05 *Laval un Partneri*, ECLI:EU:C:2007:809.

[34] See *Guerra and Others v Italy* App no 14967/89 (ECtHR, 19 February 1998).

[35] See *Öneryıldız v Turkey* App no 48939/99 (ECtHR, Grand Chamber, 30 November 2004).

In any event, they contain nothing that cannot be easily accommodated within the general framework upon which the EEA Agreement rests, and integrated into the national systems of the EFTA states if necessary to achieve homogeneity.

v. Justice

Title V of the Charter contains provisions on citizen's rights that are of central importance for the purpose of this chapter, and they will be dealt with in the next section. Title VI, however, contains provisions on 'justice', which relate to criminal proceedings and the criminal law. Article 47 protects the rights to an effective remedy and to a fair trial. They are equivalent to Article 13 and Article 6, respectively, of the ECHR. As regards the presumption of innocence and the right of defence in Article 48 of the Charter, these are also protected in Article 6 ECHR, as well as in the constitutions of the EFTA states.

In the field of criminal law, the principle of legality is provided for in Article 49(1) and (2) of the Charter, and in Article 7 ECHR. As for the *ne bis in idem* principle in Article 50 of the Charter, it is to be found Article 4 of Protocol 7 to the ECHR.[36]

As regards criminal law, it is stated in Article 49(3) of the Charter that the severity of penalties must not be disproportionate to the criminal offence. This is not provided for in the ECHR, nor directly in the national constitutions. Nevertheless, it is hard so see how this fact can stand in the way of achieving homogeneity or create a tension between the Charter and the ECHR.

B. Citizens' Rights

Title V of the Charter contains provisions on the rights of Union citizens. They relate to the basic political rights, such as in Article 39 on the right to vote and to stand as a candidate at elections to the European Parliament, and in Article 40 on the right to vote and to stand as a candidate at municipal elections. Moreover, there is the right to good administration in Article 41 and to access to documents in Article 42, and the right to refer to the European Ombudsman, as well as the right to petition and the right to diplomatic and consular protection, in Articles 42–46. These rights relating to Union citizenship are mostly irrelevant for the citizens of the EFTA states, who are not Union citizens.

An exception is the right to freedom of movement and of residence. This right is enshrined in Article 45 of the Charter, which provides in Article 45(1) that every citizen of the Union has the right to move and reside freely within the territory of the Member States. Moreover, it is stated in that paragraph that freedom of movement and residence may be granted, in accordance with

[36] In Art 2 and Art 3 of Protocol 7 ECHR there are further 'criminal law' rights that are not to be found in the Charter.

the Treaties, to nationals of third countries legally resident in the territory of a Member State.

Problems have arisen in this field, mainly related to incorporation of Directive 2004/38 into the EEA Agreement, as the Directive repeatedly refers to Union citizens.[37]

From the outset, since the concept of Union citizenship does not apply in the EEA/EFTA states, those states were hesitant incorporate it. On the other hand, the EU rejected an approach whereby the provisions of the Directive linked to Union citizenship would have been excluded from incorporation into EEA law. To resolve the problem, a Joint Declaration was annexed to Decision 158/2007 of the EEA Joint Committee, stating:

> The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice 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. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.[38]

For the purpose of incorporation of the Directive 2004/38, the geographical scope of it was expanded to include the EEA/EFTA states. Moreover, through the Decision of the EEA Joint Committee, the Directive was incorporated into the EEA Agreement as a whole with, inter alia, the amendment that the words 'Union citizen[s]' should be replaced by the words 'national[s] of EC Member States and EFTA States'. In addition, the Decision outlines the fields in which the incorporation takes effect. According to Articles 1 and 2 of the Decision, the Directive shall apply, as appropriate, in the fields covered by Annex VIII and Annex V to the Agreement. It is to be noted that these Annexes concern not

[37] The Directive was incorporated into Annex V to the EEA Agreement, concerning the free movement for workers, and into Annex VIII, concerning freedom of establishment, by Decision of the EEA Joint Committee 158/2007 (JCD).

[38] Joint Declaration by the Contracting Parties to Decision of the EEA Joint Committee No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement.

only nationals of an EFTA state having the legal position of migrant workers or the self-employed, but also their family members, as defined in the Directive. Moreover, Annex VIII also relates to services and includes rules on the movement and residence of non-economic agents. Overall, this means that not only in the framework of EU law but also in that of EEA law, Directive 2004/38 applies to the movement of natural persons in a rather broad sense (workers, the self-employed, service providers and recipients, and non-economically active persons under certain conditions), though according to the Decision only 'as appropriate'.[39]

Scholars have noted that, as a result of its incorporation into EEA law, Directive 2004/38 now applies in two different legal contexts, namely, EU law and EEA law.[40] The problem lies in the fact that while the EEA Joint Committee limits the application of the Directive to the scope of the two Annexes, at the same time, it states that Union citizenship and immigration policy are not part of EEA law. It could be argued that this political compromise made in relation to Directive 2004/38 does not sit well with the principle of homogeneity, as it creates a certain discrepancy with regard to the scope of the Directive within the EU, on one hand, and the EFTA states, on the other.

In a series of judgments, the EFTA Court has been confronted with interpretation of the Directive in the context of the EEA Agreement.[41] We shall first look at the *Wahl* judgment. The facts of the case are that in February 2010, the Icelandic authorities denied the plaintiff, a Norwegian national and member of the Hells Angels, entry into Iceland on the basis of an 'open danger assessment' because of the plaintiff's presumed role in the final accession stage of an Icelandic motorcycle club as a new chapter of Hells Angels. The plaintiff's administrative appeal against the decision was rejected, as was the appeal before a district court. The plaintiff appealed the district court's decision to the Supreme Court, which made a request for an Advisory Opinion and referred questions, inter alia, on Article 27 of the Directive. In paragraph 74 in its judgment the EFTA Court referred to Joint Committee Decision 158/2007 ('the Decision') and to the Joint Declaration, and went on, stating *obiter* with regard to Article 24 of Directive 2004/38 on equal treatment:

> [T]hese exclusions have no material impact on the present case. Nevertheless, the impact of the exclusions must be assessed on a case-by-case basis and may vary accordingly. In this regard, it must be noted that, as is apparent from Article 1(a) and recital 3 in its preamble, the Directive aims in particular to strengthen the right of

[39] See in more detail C Tobler, 'Free Movement of Persons in the EU v. in the EEA: of Effect-Related Homogeneity and a Reversed Polydor Principle' in N Cambien, D Kochenov and E Muir (eds), *European Citizenship under Stress. Social Justice, Brexit and Other Challenges* (Brill 2020) 482.

[40] C Burke, ÓÍ Hannesson and K Bangsund, 'Schrödinger's Cake? Territorial Truths for Post-Brexit Britain' in M Kuyer, and W Werner (eds), *Netherlands Yearbook of International Law 2016: The Changing Nature of Territoriality in International Law* (Springer 2017) 287, 309.

[41] See Case E-15/12 *Wahl* [2013] EFTA Ct.Rep 534; Case E-26/13 *Gunnarsson* [2014] EFTA Ct Rep 254; and Case E-28/15 *Jabbi* [2016] EFTA Ct Rep 575.

> free movement and residence of EEA nationals … To this end, it lays down the conditions governing the exercise of the right of free movement and residence within the territory of the EEA. The impact of the exclusion of the concept of citizenship has to be determined, in particular, in cases concerning Article 24 of the Directive which essentially deals with the equal treatment of family members who are not nationals of a Member State and who have the right of residence or permanent residence.

Tobler interprets this statement with regard to Article 24 in the EEA context as possibly being the point where the *Polydor* principle enters EEA law, referring to the judgment of the European Court of Justice in *Van Duyn*.[42] Under this principle, the provisions of agreements concluded by the EU with non-Member States are not automatically to be interpreted in the same manner, even if they are very similar or even identical; rather, relevant differences in the context may lead to a different interpretation. The cited statement in the judgment is somewhat unclear as to its meaning. However, this is developed further in subsequent case law.

The next case to mention is the judgment of the EFTA Court in *Clauder*, cited in section III.B. The case related to the interpretation of Directive 2004/38, in particular its Article 16 on the right of residence for family members of EEA nationals holding a right of permanent residence in Liechtenstein and the condition of sufficient resources. The Liechtenstein authorities had based their refusal of the plaintiff's reunification with his second wife (a German citizen) on the argument that Mr Clauder could not prove that he had sufficient financial resources for himself and his wife without having recourse to social welfare benefits. From the wording of Article 16 of the Directive, whether such persons must also fulfil the residence condition (which Ms Clauder did not) relates specifically and exclusively to 'family members who are not nationals of a Member State'.

Mr Clauder, the ESA and the Commission asserted that the Directive, in particular Article 16(1) in conjunction with Article 7(1), should be interpreted as meaning that an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host state, may claim the right to family reunification even if the family member will also be claiming social welfare benefits.

In its judgment, the EFTA Court found, relying on the right to protection of family life under Article 8 ECHR and the aim of strengthening free movement rights, that no such conditions relating to sufficient resources applied to EEA nationals. It follows from the judgment of the EFTA Court that there is a right to immediate permanent residence, even where the family member will be claiming social welfare benefits (see paragraphs 44–50).

It has been argued that the EFTA Court, based on the concept of homogeneity, has integrated the main features of Union citizenship rights into its interpretation of it for the purpose of the EEA Agreement. According to Fløistad, the EFTA Court in the *Clauder* case took an innovative step towards free movement

[42] Case C-41/74 *Van Duyn v Home Office*, ECLI:EU:C:1974:133. See also Tobler (n 39).

rights for economically inactive citizens in the EEA Agreement, in fact comparable to the CJEU citizenship case law in the EU legal order.[43] Similarly, Jay writes about the active, pro-integrationist stance of the EFTA Court, and suggests that in the *Clauder* case the Court essentially assimilated the nationality of an EEA/EFTA state with Union citizenship for the purposes of free movement and residence.[44] Hannesson and Burke talk about citizenship by the back door.[45] Tobler argues that the *Clauder* case is special, in that the EFTA Court was faced with the gap in Article 16 of Directive 2004/38 with respect to family members with EU nationality. It was, moreover, a gap that had not yet been filled by the CJEU. Rather, the situation was one of 'first go' for the EFTA Court, which gave it the chance to shape the interpretation of EEA law, at least for the time being.[46] On the *Clauder* case, the present writer sides with Tobler when she asserts that it represents a sensible approach to filling the gap in Article 16 of the Directive 2004/38. After all, in a situation where the Directive clearly states certain conditions for third-country family members only, it is quite legitimate to assume that the legislator did not wish the same conditions to apply to EU nationals, and it would be unreasonable to assume that EU family members would not enjoy permanent residence at all.[47] Many other have expressed themselves on the issue.[48] These will not be identified further here.

The next judgments to consider are the *Gunnarsson* case[49] and *Jabbi*.[50] They are different from *Clauder* in the sense that there is previous case law of the CJEU to take note of.

In the *Gunnarsson* case, the applicant was an Icelandic citizen. He and his wife were resident in Denmark from 24 January 2004 to 3 September 2009. Mr Gunnarsson paid tax in Iceland on his income. However, he was prevented from utilising his wife's personal tax credit while they resided in Denmark. Under the Icelandic tax legislation applicable at the time, they had to reside in Iceland in order to pool their personal tax credits. The EFTA Court found that such less favourable tax treatment of a pensioner and his wife, who had exercised the right to move freely within the EEA, was not compatible with Article 7(1)(b) and (d) of Directive 2004/38. To support this, the EFTA Court pointed out that Article 1(1) and (2) of the former Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have

[43] A Fløistad, 'Article 28 Free Movement of Workers' in F Arnesen et al (eds), *Agreement on the European Economic Area: A Commentary* (Bloomsbury 2018) 369, para 15.

[44] MA Jay, 'Homogeneity, the Free Movement of Persons and Integration Without Membership: Mission Impossible?' (2012) 8 *Croatian Yearbook of European Law and Policy* 77, 87.

[45] C Burke and ÓÍ Hannesson, 'Citizenship by the Back Door? Gunnarsson' (2015) 52(4) *CML Rev* 1111.

[46] Tobler (n 39) 491.

[47] ibid 492.

[48] See, for a further account of different opinions on the matter, ibid.

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

[50] Case E-28/15 *Jabbi* [2016] EFTA Ct Rep 575.

ceased their occupational activity[51] applied in the EEA before Directive 2004/38. It found that the substance of Article 1(1) and (2) of Directive 90/365 had been maintained in Article 7(1)(b) and (d) of Directive 2004/38.

Moreover, the Court found that it was of no consequence that the rights of economically inactive persons according to Directive 2004/38 were adopted by the Union legislature on the basis of Article 21 of the Treaty on the Functioning of the European Union on Union Citizenship, introduced in the EU pillar through the Maastricht Treaty. It noted, however, that the rights of economically inactive persons in Directive 90/365 were adopted on the basis of Article 235 EEC prior to the introduction of the concept of Union citizenship. This provision conferred on the EU legislature a general power to take the appropriate measures necessary for the operation of the common market where no specific legal basis existed in the Treaty, and that when Directive 90/365 was made part of the EEA Agreement in 1994, it conferred rights on economically inactive persons.

Furthermore, when Directive 2004/38 was incorporated into the EEA Agreement, the EEA Joint Committee and the Contracting Parties underlined that the concept of Union citizenship had no equivalence in the EEA Agreement, and the EEA Agreement did not provide a legal basis for political rights of EEA nationals. Therefore, the Court held that the incorporation of Directive 2004/38 could not introduce rights into the EEA Agreement based on the concept of Union Citizenship. However, individuals could not be deprived of rights that they had already acquired under the EEA Agreement before the introduction of Union Citizenship in the EU, and which were maintained in Directive 2004/38.

Scholars have commented on this approach of the EFTA Court and criticised it for different reasons.[52] Burke and Hannesson, for example, criticise the EFTA Court for, among other things, the 'complete absence of a convincing and explicit methodology', including the fact that the Court relied on selected CJEU case law only, to the exclusion of other, more recent case law.[53] They note that as a result of the judgment, there is now a significant cleavage between the EU and the EEA regime in relation to the interpretation of an identical norm. At the same time, they note that had the EFTA Court transposed CJEU case law, EFTA nationals would not have been afforded equal protection in their home states on the basis of EEA law when compared to their counterparts in EU Member States relying on EU law. Therefore, the judgment could be justified, regardless of the legally rather stretched teleology, as it is termed, used to underpin it. Tobler notes that in this lies the key to the EFTA Court's approach. Rather than opting for a homogeneous interpretation of Article 7 of Directive 2004/38, in the sense

[51] Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28.

[52] A thorough analysis of the reasoning in the opinion and discussion of different scholarly views is to be found in Tobler (n 39) 492–503.

[53] Burke and Hannesson (n 45).

of following the interpretation in the relevant CJEU case law, 'the EFTA Court consciously deviates from that interpretation in order to arrive, not at the same interpretation, but rather, through different interpretation, at the same overall level of protection under EU law and under EEA'.[54] It should be added that the Supreme Court of Iceland did not follow the Advisory Opinion in judgment 92/2013. This has nothing do with the overall approach of the EFTA Court and its methodology in reaching its conclusion; rather, it was not possible to set aside clear provisions of national legislation.[55]

The facts in *Jabbi* were that the plaintiff was a Gambian national. In 2012 he married a Norwegian citizen, in Spain. They stayed together in Spain from September 2011 to October 2012, after which his wife returned to Norway. In November 2012, the plaintiff applied for residence in Norway as the spouse of Norwegian citizen. The application was dismissed by the immigration authorities. The plaintiff then instigated proceedings before Oslo District Court. He claimed that he had 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 decided to refer to the EFTA Court the question whether Article 7(1)(b) in conjunction with Article 7(2) of the Directive conferred a derived right of residence to a third-country national, a family member of an EEA national who, upon returning from another EEA state, is residing in the EEA State of which the EEA national is a citizen.

Referring to its *Gunnarsson* judgment, 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. A right to move freely from the home EEA state to another EEA state pursuant to Article 7(1)(b) of the Directive 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 for a third-country national spouse. Therefore, it found the provisions of the Directive to apply by analogy where the EEA national returns to his home state with a third-country national family member. However, 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 EEA national must have resided in the host state for a continuous period exceeding three months before returning to the home state. Moreover, EEA states may deny a derived right in cases of abuse of rights or fraud, such as marriages of convenience. Finally, restrictions on rights granted by the Directive may be justified by reasons of public policy, public security or public health. Here again, Tobler remarks that the EFTA Court's approach could be seen to reflect a new, reversed version of the *Polydor* principle, where different contexts of the same provision must lead to different interpretations,

[54] Tobler (n 39).
[55] See the judgment of the Supreme Court of Iceland of 2 October 2013 in Case no 92/2013.

where that is necessary in order to achieve the same overall result in terms of the level of people's protection.[56]

The last case to mention is *Campbell* (cited in section III.B). In its judgment, the EFTA Court found that the EEA legal context had remained unaltered since *Jabbi*, and accordingly found no reason to depart from the understanding in that judgment of homogeneity and effectiveness. With regard to an EEA national who has not pursued an economic activity, the Court found that Article 7(1)(b) and (2) of the Directive were applicable to the situation where that EEA national returns to the EEA state of origin together with a family member, such as a spouse who is a national of a third country.

Finally, a few words on whether the Nordic cooperation model creates specific problems to the rights granted by EEA law. This is discussed by Hannesson and Burke in chapter 10 of this volume. They offer an analysis of issues related to the implementation of Directive 2004/38 in Iceland. They note that certain frictions between EEA law and the Nordic welfare states have been brought to light in connection with their residence-based welfare rights, and add that this certainly is the case in Iceland, where significant adaptations to Directive 2004/38/EC in particular have been necessary. Their final conclusion is that with respect to the vast majority of other rights, and particularly social security, however, the practice of the Icelandic authorities in giving effect to the EEA Agreement's provisions in circumstances in which there is a conflict between these and the Nordic Convention, entails that as a general rule there is little distinction between Nordic nationals and nationals of other EEA states in how they are treated.

What this discussion shows is that the concept of Union citizenship may cause some discrepancies. The decision of the Supreme Court of Iceland not to follow the Advisory Opinion, as it could not have been accommodated within the Icelandic legal framework, admittedly further confirms this point. However, the findings of the Supreme Court relate more to a question of limits of judicial power, as nothing prevents the Icelandic legislator from aligning the national legislation with the EFTA Court's opinion, only depending on a political willingness to do so. This issue relates to the interpretation of Article 3 of the EEA Agreement, and whether a clear provision of national law could be set aside on the basis of the EFTA Court's opinion. The preceding discussion indicates that problems stemming from Title V of the Charter can be overcome by political compromises, as well as through legislative, administrative and judicial activity on the basis of the principle of homogeneity and by taking the rights of individuals and their equal rights seriously, regardless of their status as EFTA state nationals or Union citizens. This is not to say that all problems are necessarily over, rather that the EFTA Court and the national legislator, and national courts, for that matter, in the EFTA states, are well equipped to reach the end results that participation in the internal market requires of them.

[56] See a detailed analysis of the Court's reasoning in Tobler (n 39) 500 et seq.

V. SUMMARY AND CONCLUSIONS

Tensions between the EEA Agreement, national constitutions and the Charter have arisen and may arise in the future. This is mainly due to two factors. The first is the difference in the legal nature of the EEA Agreement compared to the EU legal system. Second, the reach of the Charter is wider, compared to the ECHR and national constitutions, in terms of the rights and principles specifically listed.

On the first point, it should be reiterated that, despite the differences in legal nature of the EEA Agreement on the one hand and the EU on the other, it has survived and served its purpose well in most respects. There have been difficulties due to these differences, as the examples given in this chapter show, and it is to be expected that these difficulties will continue. So far, they have been overcome without any major long-lasting problems, through political compromises, as in the case of incorporation of Directive 2004/38, and judicial activity and interpretations at the national level and by the EFTA Court, albeit being somewhat stretched at times, with the aim of achieving homogeneity between the two systems. What matters from the point of view of individuals and economic operators is the outcome and whether rights are equally protected, not the way in which it is reached.

As to the second point, it is argued, moreover, that on the basis of the national constitutions, various international instruments, and in particular by their commitment to the ECHR and the case law of the ECtHR, the EFTA states have the right tools to adjust, for the purpose of honouring any commitment under the EEA Agreement, to any obligations flowing from the provisions of the Charter, in the field of the four freedoms, as interpreted by the CJEU.