ROYAL MINISTRY
OF FOREIGN AFFAIRS

To the Court of Justice of the European Union
Registry

Oslo, 14 May 2012

WRITTEN OBSERVATIONS

BY

THE GOVERNMENT OF THE KINGDOM OF NORWAY

represented by Mr Erlend M. Leonhardsen, Adviser, Ministry of Foreign Affairs, Ms Beate Gabrielsen, Adviser, Ministry of Foreign Affairs, and Mr Marius Emberland, Advocate, Office of the Attorney General (Civil Affairs), acting as agents, in

Case C-46/12,

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v
Ankenævnet for uddannelsesstøtten

in which The Danish judicial body Ankenævnet for Uddannelsesstøtten has requested the Court of Justice of the European Union (hereinafter "the Court") to give a ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union (hereinafter "TFEU").The Government of the Kingdom of Norway, as party to the Agreement on the European Economic Area (hereinafter "the EEA Agreement") and pursuant to the third paragraph of Article 23 of the Protocol on the Statute of the Court of Justice of the European Union, hereby submits its written observations.

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I. Introduction

1. By a request lodged at the Court on 24 January 2012 Ankenævnet for Utdanningsstøtten has requested a preliminary ruling pursuant to Article 267 of the TFEU concerning the interpretation of Article 7 (1) c) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States (hereinafter "Directive 2004/38/EC").

2. The question referred to the Court concerns whether Article 7 (1) c) of Directive 2004/38/EC, read in conjunction with Article 24 (2) of that Directive, entails that a Member State, when determining whether a person is to be regarded as a worker with the right to be granted maintenance aid for studies, may take into account the fact that the person in question has entered the territory of the host Member State with the principal purpose of pursuing studies there, the result being that the host Member State is not obligated to grant maintenance aid for studies to that person.

3. The Norwegian Government (hereinafter also "the Government") recalls that Directive 2004/38/EC is adapted for the purposes of the EEA Agreement by EEA Joint Committee Decision No 158/2007 of 7 December 2007 and is referred to in point 1 of Annex V and point 3 of Annex VIII to the EEA Agreement. The Government takes this opportunity to note that differences of relevance for the question before the Court follow by the Joint Committee Decision as well as by the Declaration issued by the Parties to the Agreement in connection with that decision. Notably, the words "Union citizen(s)" shall be replaced by the words "national(s) of EC Member States and EFTA States"; and point 4 (d) of Annex VIII provides that the term "Treaty" in Article 24 (2) shall be understood as the "Agreement". This may result in the interpretation of the

provisions of Directive 2004/38/EC being different for the purposes of the EEA Agreement.

II. Observations

4. In essence, the question before the Court concerns the interpretation and application of the term "worker" in Article 24 (2) of Directive 2004/38/EC—persons with the right to maintenance aid for studies—in a situation where the person in question entered the host Member State for the principal purpose of following a course of study. In other words, the question concerns the meaning of the distinction between the two categories of persons in Article 7 (1) a) and c) respectively for the purposes of Article 24 (2).

5. The Government contends that Article 7 (1) c) of Directive 2004/38/EC, read in conjunction with article 24 (2), must be understood so as to allow a host Member State to exclude from maintenance aid for studies persons who have entered its territory for the purpose of following a course of study there.

6. Article 7 (1) c) of Directive 2004/38/EC establishes the right of residence for more than three months for Union Citizens who are not workers. According to this provision, the person in question must be enrolled at an educational institution for the principal purpose of following a course of study. In addition to this subjective requirement, the person must have comprehensive sickness insurance and must assure the relevant national authority that they have sufficient resources not to become a burden on the social security system of the host Member State during their residence.

7. Following Article 24 (2) of Directive 2004/38/EC, the host Member State is not obliged, prior to the acquisition of the right to permanent residence, to grant student maintenance support for studies to persons other than workers, self-

employed persons, persons who retain such status and members of their families.

8. Directive 2004/38/EC thus distinguishes between citizens moving to another Member State with the principal purpose of undertaking education and citizens moving to another Member State as workers. The Government submits that the Directive should be interpreted so that only persons belonging to the latter category obtains the right to be granted student maintenance support.

9. In the view of the Government, this interpretation is supported both by the preparatory work of Directive 2004/38/EC and the jurisprudence of the Court. Furthermore, it constitutes the most reasonable understanding of the wording of Article 7 (1) litra c) of the Directive when read in conjunction with Article 24(2).

10. The importance of taking into account the main purpose of the Union citizen's migrant activity in order to determine whether she or he has the right to student maintenance support is underlined, for instance, by the Commission. In its Explanatory Memorandum under the commentary to Article 24 (2) (ex article 21 (2)) of the finalized Directive it notes that:

> "...host Member States are not required to provide maintenance grants to Union citizens *coming to the country to study as their principal occupation.* Maintenance grants count as social assistance in the broad sense of the term and, therefore, students are not eligible for it under the terms of this Directive, since they are required to assure the relevant national authorities that they have sufficient resources to avoid being a burden on the public finances of the host Member State"[1]

[1] COM(2001) 257, at 18. (our emphases).

11. Furthermore, it follows from the Explanatory Memorandum to the Amended proposal for Directive 2004/38/EC that the text in Article 7 (1) c) was intended to be in line with Directive 93/96/EC (which it repealed) on the right of residence for students.[2] Thus, the word "student" was omitted, but Article 7 (1) c) was not intended to extend the rights of persons covered.

12. For this reason, it is relevant to note, firstly, that the preamble to Directive 93/96/EC states that students must not become an unreasonable burden on the public finances of the host Member State, and, secondly, that the Directive explicitly did not apply to students who enjoyed the rights of residence by virtue of the fact that they were or had been effectively engaged in economic activity. These students, according to Article 1 of Directive 93/96/EC, enjoyed their rights from other acts of Community law.

13. For students covered by Directive 93/96/EC, however, it followed explicitly from Article 3 that it did not establish any entitlement to the payment of maintenance grants by the host Member States. However, according to Article 2 (2) of Directive 93/96/EC they did enjoy certain rights afforded to migrating workers, namely such rights as were set out in Articles 2, 3 and 9 of Directive 68/360/EEC, which applied accordingly. Pursuant to these provisions, students had the right to leave and enter Member States territories for the purpose of taking up activities as employed persons. However, none of the applicable provisions in Directive 68/360/EEC concerned maintenance grants,[3] and it followed as mentioned above explicitly from Article 3 that the students did not have any right to maintenance grants even if exercising their right to take up activity as employed persons.

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[2] COM/2003/0199 (amendment 28)

[3] Rather, they were related to the right to leave and enter Member States territories for the purpose of taking up activities as employed persons provided that the person in question were able to produce a valid identification document.

14. The Government is of the opinion that the distinction between persons with a right to work but who has been accepted to pursue a course of study in the host Member State as their principal activity—who were covered by Directive 93/96/EC—and workers—who acquired their rights from other provisions of Community law—is maintained in Article 7 c) and a) respectively of Directive 2004/38/EC; and that the clear exclusion of the former from the right to maintenance grants in Directive 93/96/EC, who nonetheless acquire certain other rights otherwise enjoyed by workers, must be followed accordingly.

15. This interpretation is also supported by case law of the Court.

16. Thus, the Court's judgment 21 June 1988 in Case 197/86, *Brown v. Secretary of State for Scotland,* remains the leading authority to the effect that under EU law persons who undertake work in another Member State for the purpose of qualifying for a course of study in that Member State do not enjoy all the rights offered to those who migrate to that Member State in order to work.[4] In *Brown* a national of another Member State entered into employment in the host State for a period of eight months with a view to undertake university studies there subsequently in the same field of activity as his work. He would not have been hired by his employer had he not already been accepted for admission to the university. The Court concluded that he should be regarded as a "worker" within the meaning of Article 7 (2) of Regulation No 1612/68. However, even though the person should be regarded as a "worker", this expansion of the scope *ratione personae* of the Regulation provision did not automatically entail a corresponding expansion of the scope *ratione materiae* of the Regulation when it could be established that the person had acquired the status as worker exclusively as a result of being accepted for admission at an educational

[4] See also Paul Craig and Gráinne de Búrca, *Eu Law: Text, Cases and Materials* (Oxford University Press 5th ed 2011) at p. 725.

institution.[5] In other words, even though he was a "worker", he was not automatically entitled to a maintenance grant. Rather, the Court held that he was not entitled to student support as his employment was "merely ancillary to the studies".[6]

17. In the view of the Government, the *ratio* of *Brown* remains crucial under the Directive 2004/38/EC. Consequently, the term "worker" in Article 24 (2) of Directive 2004/38/EC must be interpreted to the effect that a person is not entitled to maintenance grant for studies when he or she undertakes employment which is "merely ancillary to the studies".

18. In Case C-413/01 *Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst*, the Court in its judgment 6 November 2003 elaborated further on the distinction between the scope *ratione personae* and the scope *ratione materiae* as it observed that for the purpose of the former, *i.e.* whether a person was to be regarded as a worker, the concept of worker had "a specific Community meaning" which must be defined in accordance with objective criteria, which "not in any way [were] related" to factors relating to the conduct of the person concerned before and after the period of employment.[7]

19. However, for the purpose of the scope *ratione materiae* the Court noted that a situation whereby a national of a Member State entered another Member State for "the sole purpose of enjoying", after "a very short period of occupational activity, the benefit of the student assistance system in that State" was not covered by Community law.[8]

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[5] Case 197/86 *Brown*, para. 27
[6] Case 197/86 *Brown*, para. 27.
[7] C-413/01 *Ninni-Orasche* paras. 23, 28.
[8] Para. 36.

20. In order to determine whether this subjective criterion concerning the intention behind the entry into another Member State by a national of a Member State is satisfied, the result of which is that the person in question does not acquire rights he would not otherwise have enjoyed, the Court pointed to several factors that could be indicative of the intent of the person. Among these were whether "immediately after the employment relationship had ended" the person concerned "obtained a diploma entitling her to enrol at a university in the host Member State"; whether "the search for a new job began immediately after the employment relationship had come to an end"; and "the nature and level of the new employment sought".[9]

21. Finally, the conclusion that Directive 2004/38/EC allows a host Member State to exclude from maintenance aid for studies persons who have entered its territory for the purpose of following a course of study there, follows from an interpretation of Article 7 (1) a) and c) in light of Article 24 (2) of the Directive that makes those provisions effective. An interpretation to the contrary would make devoid of meaning the distinction between workers and persons enrolled at a private or public establishment for the principal purpose of following a course of study in Article 7 (1) a) and c) respectively. On the one hand it would substantially depreciate the content of the requirement in Article 7 (1) c) upon persons belonging to the latter category to provide sufficient resources for themselves and their families so as not to become a burden on the social assistance system of the host Member State during their period of residence. On the other, it would make devoid of meaning the relationship between Article 7 (1) and Article 24(2), in which persons other than workers, i.e. persons required to provide sufficient resources for themselves and their families so as not to become a burden on the social assistance system of the host Member

[9] Paras 45 – 48.

State during their period of residence according to Article 7 (1) c), explicitly are excluded from the right of maintenance aid for studies.

22. To conclude, the question put before the Court is essentially a question *ratione materiae* of the exception clause in Article 24 (2) of Directive 2004/38/EC with respect to the term "persons other than workers". A non-extensive interpretation of this term will neither entail the expulsion of the person, nor will it deny him of all the rights in the Directive 2004/38/EC. As a consequence, the Court's interpretation of the term "worker" in Community legislation such as Regulation 1612/68[10] is relevant only *ratione personae* since in that context the failure to adopt a similarly broad interpretation would have left the persons without any rights at all. In other words, for the purposes of Regulation 1612/68 the question resolved by the Court was whether the regulation applied at all. In the present case, the Court is asked to resolve a different question altogether, namely whether a person either belongs in the category of "persons other than workers" with a certain set of rights under the applicable European Union law, or a whether he belongs in the category of "workers", with another set of rights under the applicable European Union law.

23. This is a different legal activity than when the Court determined, in its earlier jurisprudence, who was a "worker" for the purposes of Article 7 (1) Regulation 1612/68. In choosing between two applicable legal terms with mutually exclusive legal consequences, one should not seek assistance in jurisprudence concerning the outer limits of a legal provision such as Article 7 (1) Regulation 1412/68 - outside the boundaries of which few if any rights and freedoms of Community law existed. In the present case, a person cannot be both a "worker" and a "person other than a worker" for the purposes of Article 24 (2) of Directive 2004/38/EC. Relying solely on the broad interpretation of the term

[10] E.g. case 197/86 *Brown* para. 21.

"worker" in earlier jurisprudence both for purposes of *ratione personae* and *ratione materiae* will mean that the term "persons other than workers" will essentially be rendered meaningless save for the instance when a student does not work at all during his studies. That, the Government contends, cannot be the correct interpretation.

24. The Government recalls that many European student support schemes, like Norway's, are designed to make room for the students to undertake a certain amount of work besides the education. As long as the income does not exceed a certain amount, the student support provided by the State is not affected. In Norway, nearly 60 per cent of full time students work part time during their education.

25. Given that the work performed in these situations are often of a rather marginal character, these students almost always operate near the outer limits of the concept of a Union worker as defined in the case law of the Court.[11] If persons thus engaged in both marginal forms of employment and full-time studies are to be considered as workers entitled to student maintenance support regardless of whether they entered the host Member State in order to exercise their rights as migrating workers or to study, and regardless of whether they sought to exercise their rights as workers immediately after being accepted as students, it will entail several negative consequences.

26. Firstly, it would mean that every citizen of the Union, in principle, would be entitled to a grant of maintenance aid for studies in Norway only by taking up work after being admitted to a private or public educational establishment there. This would entail, secondly, a risk that students would overwhelmingly apply to study in Member States granting the highest maintenance aid for studies solely

[11] See e.g. Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035, paras. 11-12. For a similar consideration, *see Opinion of Advocate General Geelhoed* - Case C-209/03 (Bidar), delivered on 11 November 2004, para. 14.

in order to obtain such grants, which, again, would entail a massive cost increase for these Member States' student support schemes. This consequence, thirdly, being an unreasonable burden on individual Member States, would not only run counter to the spirit of Directive 2004/38/EC,[12] it would also appear not to be in conformity with the purpose of the requirement in Article 7 (1) c) second paragraph that students and their family members must assure host Member States that they have sufficient resources not to become a burden on the social assistance system of the host Member State. Fourthly, this would lead to a diminishing difference between the terms "persons other than a worker" and "worker" with the consequence that Article 24 (2) of Directive 2004/38/EC would lose most, if not all, of its legal significance. Finally, it would also mean that for the purposes of that Article in so far as it is not rendered completely devoid of any meaning altogether, Member States will be left without the ability to rely on the most reasonable, visible and objective criterion to distinguish between on the one hand workers for the purpose of Article 7 (1) a) with a right to maintenance aids for studies, and on the other hand persons other than workers for the purpose of Article 7 (1) c), who have no such right.

27. Pursuant to the Observations set out above the Government submits respectfully the following.

III. Answer to the question

28. The Government of the Kingdom of Norway proposes that the Court of Justice of the European Union answers the question from the referring court in this manner:

> Article 7 (1) c) of Directive 2004/38/EC, read in conjunction with Article 24 (2) of that Directive, entails that a Member State, when determining whether

[12] As expressed, for instance, in Recital 21 of its preamble.

a person is to be regarded as a worker with the right to be granted maintenance aid for studies, may take into account the fact that the person in question has entered the territory of the host Member State with the principal purpose of pursuing studies there, the result being that the host Member State is not obligated to grant maintenance aid for studies to that person.

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Oslo, 14 May 2012

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