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Norwegian Ministry of Labour and Social Affairs  
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Dear Sir/Madam,

**Subject: Assessment of marriages of convenience in Norway**

Reference is made to previous correspondence in the case, in particular discussions at package meetings and Norway's replies to the Authority's follow-up letters.

Reference is also made to the EFTA Court's judgment of 9 February 2021 in Case E-1/20 *Kerim*, as well as the judgment of the Norwegian Supreme Court in the same case of 1 July 2021<sup>1</sup>.

In *Kerim*, the EFTA Court was faced with questions concerning the relevant criteria for the assessment of marriages of convenience under Article 35 of Directive 2004/38. The Court recalled that the assessment of abuse of rights under EEA law is based on a cumulative test combining objective and subjective elements. The Court then stated:

*"The Directive's autonomous concept of a marriage of convenience as an example of an abuse of rights must therefore involve bad faith by the party concerned and at the same time artificially create the conditions required for obtaining such a benefit that result in failing to achieve the purpose of the Directive."*<sup>2</sup>

The Court also emphasised the importance of fundamental rights, in particular Article 8 of the European Convention on Human Rights ("ECHR"), as interpreted by the European Court of Human Rights ("ECtHR"). In that context, the EFTA Court noted that *"in order to distinguish a 'genuine marriage', that is, a marriage that does not constitute an abuse of rights under Article 35 of the Directive, from a marriage of convenience, regard must be had to the right to respect for private and family life under Article 8 ECHR [...]"*<sup>3</sup>

It is clear from the Court's subsequent reasoning that assessing the genuineness of a marriage is an important factor in the assessment of marriages of convenience. The Court for example noted that *"a marriage of convenience means a marriage that fails to satisfy the genuine marriage test, as it represents an artificially established condition on the basis of which a third-country national is to obtain an improper benefit"*<sup>4</sup>. The Court further concluded that:

<sup>1</sup> HR-2021-1435-A (sak nr. 19-163380SIV-HRET).

<sup>2</sup> Judgment of the EFTA Court in Case E-1/20 *Kerim*, not yet reported, paragraph 40.

<sup>3</sup> Ibid, paragraph 45.

<sup>4</sup> Ibid, paragraph 49.

*“[I]n circumstances in which reasonable doubts exist as to whether the marriage in question is in fact genuine, it is necessary for the national authorities to establish, on the basis of a case-by-case examination, that at least one spouse in the marriage has essentially entered into it for the purpose of improperly obtaining the right of free movement and residence by the third-country national spouse rather than for the establishment of a genuine marriage.”<sup>5</sup> (emphasis added)*

Similarly, the Court also stated:

*“It will be necessary for the national authorities of the EEA State in question to establish, using appropriate evidence, whether the nature of the marriage in question is not genuine, and whether the intention of the parties involved has been to enter into the marriage essentially for the purpose of improperly securing the right of free movement and residence of the third-country national, or whether the intention involved other purposes shared by both spouses relating to a genuine marriage.”<sup>6</sup> (emphasis added)*

It can be deduced from the foregoing that the assessment of marriages of convenience involves, in principle, a two-fold test. First, it must be established that reasonable doubts exist as to whether the marriage is in fact genuine and, second, if that is the case, it must be assessed whether the essential purpose of the marriage was to improperly secure a right of residence.

With regard to the question whose subjective intention is relevant in the assessment of marriages of convenience, the EFTA Court stated:

*“Since, as stated above, a genuine marriage is predicated upon the good faith of both spouses, a statement from the EEA national relating to the nature of the marriage and the purpose of entering into the marriage must be considered and taken into account in the overall assessment.”<sup>7</sup>*

The Court then concluded:

*“[...] in circumstances in which reasonable doubt exists as to whether the marriage in question is in fact genuine, facts must be established as assessed in their entirety, which includes taking into account the subjective intention of an EEA national for entering into a marriage with a third-country national.”<sup>8</sup>*

It follows that the subjective intention of both parties should be taken into account in the assessment of whether a marriage is of convenience, as an EEA national's intention can shed a light on the nature of the marriage.

The Norwegian Supreme Court delivered its judgment in the *Kerim* case on 1 July 2021 and upheld the Borgarting Appeal Court's decision to reject Kerim's claims.

Despite the aforementioned emphasis by the EFTA Court on the assessment of the genuineness of the marriage, no such assessment is apparent in the Supreme Court's reasoning. Instead, the focus appears to be only on the assessment of whether the essential purpose (as opposed to the sole purpose) of the marriage was to obtain a right of residence. The Supreme Court thus concluded that a marriage of convenience existed if the essential purpose of the marriage was to obtain a right of residence, thereby also confirming the position taken by the Appeal Court in the case.

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<sup>5</sup> Ibid, paragraph 50.

<sup>6</sup> Ibid, paragraph 55.

<sup>7</sup> Ibid, paragraph 57.

<sup>8</sup> Ibid, paragraph 58.

With regard to the relevance of Article 8 ECHR, the Supreme Court merely stated in general terms that the provision only applies when there is an established close and personal relationship between the parties, thereby not applying to marriages of convenience, without acknowledging the need of assessing whether such relationship (genuine marriage) is established in each case.

Lastly, as regards the issue of whose intention is relevant, the Supreme Court concluded that it was sufficient that one of the parties – in practice normally the applicant – had the intention to obtain a right of residence for the applicant. The Supreme Court thus upheld the Appeal Court's conclusion although the Appeal Court had expressly stated that it is the applicant's intention with the marriage which is relevant in the assessment.

In light of the above and in order for the Authority to further examine and assess the case, the Norwegian Government is invited to provide the following information:

1. Please describe the current practice in Norway in relation to the assessment of marriages of convenience under EEA law, including concerning the relevance of the genuineness of the marriage, Article 8 ECHR and whose intention is relevant in the assessment.
2. Is the Norwegian Supreme Court's approach in the *Kerim* case, as described above, a confirmation of the approach applied by the immigration authorities relating to the assessment of marriages of convenience under EEA law?
3. Does the Norwegian Government consider the Supreme Court's approach in the *Kerim* case, as described above, to be in line with the position taken by the EFTA Court in the same case?
4. Does the Norwegian Government intend to make any amendments to Section 120(6) of the Immigration Act or to internal guidelines of the immigration authorities in light of the EFTA Court's judgment in *Kerim*?

The Norwegian Government is invited to submit the above information, as well as any other information it deems relevant to the case, so that it reaches the Authority by 7 October 2021.

Yours faithfully,

Gabrielle Somers  
Deputy Director  
Internal Market Affairs Directorate

*This document has been electronically authenticated by Gabrielle Somers.*