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Brussels, 19 December 2019
Case No: 84397
Document No: 1103071

EFTA SURVEILLANCE AUTHORITY

Norwegian Ministry of Labour and Social Affairs
Postboks 8019 Dep
0030 Oslo
Norway

Dear Sir or Madam,

Subject: Complaint against Norway concerning children's residence rights under EEA law

1 Introduction

On 9 December 2019, the Internal Market Affairs Directorate ("the Directorate") of the EFTA Surveillance Authority ("the Authority") opened a complaint case against Norway concerning children's residence rights under EEA law.

In the complaint, dated [redacted] 2019, it is alleged that Norway is breaching EEA law, firstly, by not recognising that EEA national children can have an independent right of residence pursuant to Article 7(1) of Directive 2004/38/EC[1] ("Directive 2004/38" or "the Directive") and, secondly, by excluding stepchildren of EEA nationals from the scope of Article 12(3) of the Directive.

The case of the complainants concerns a [redacted] mother and her two [redacted] sons (born in [redacted] and [redacted], who came to Norway in [redacted] with a [redacted] national (the mother's husband at the time and the children's stepfather), and got residence permits as his family members under Directive 2004/38. The reference person left Norway in [redacted]. The [redacted] mother then applied for a residence permit under Directive 2004/38 as her younger son's family member, who is an EEA national, since she has two jobs and has enough income to provide for both her and her children. However, both the Directorate of Immigration (UDI) and the Immigration Appeals Board (UNE) rejected the application and ordered the applicant to leave Norway.[2]

By decision dated [redacted] 2019, UDI rejected the application for a residece permit. UDI found that the applicant's son did not himself fulfil the conditions for a right of residence under Section 112(1) of the Immigration Act (implementing Article 7(1) of Directive 2004/38). UDI also concluded that neither the applicant nor her son could retain a right of residence in Norway under Section 113(3) or Section 114(3) of the Immigration Act

[1] Act referred to at point 1 of Annex V to the EEA Agreement (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) as adapted to the EEA Agreement by protocol 1 thereto.
[2] Your ref. 2015 024823 02.

(implementing Article 12(3) of the Directive) since the EEA national from whom they first derived a right of residence was not the child's father but his stepfather.

The applicant appealed UDI's decision on [redacted] 2019. By decision of [redacted] 2019, UNE upheld UDI's decision to reject the application for a residence permit. UNE found that the applicant could not derive a right of residence from her younger son, *inter alia* since a child does not exercise EEA rights himself/herself, but derives a right of residence from one or both parents. UNE also noted that according to the wording of Section 114(3) of the Immigration Act only children of an EEA national, and not stepchildren, retain a right of residence upon the EEA national's departure from the State.

On [redacted] 2019, UNE made a new decision in the case, rejecting the applicant's request to reverse its previous decision. UNE reiterated its previous conclusions that children cannot have an independent right of residence under EEA law and that stepchildren of EEA nationals cannot retain a right of residence upon the EEA national's departure.[3] UNE further noted that the judgments of the Court of Justice of the European Union ("the CJEU") in *Chen*[4] and *Baumbast*[5] do not have relevance for the outcome of the case since they are based on EU citizenship, which is not a part of EEA law and cannot be applied in Norway.

After having examined the case, the Directorate has reached the preliminary conclusion that, by not ensuring that EEA national children, who have sufficient resources through their primary carer, can benefit from the right of residence pursuant to Article 7(1)(b), and, by excluding stepchildren of EEA nationals from the scope of Article 12(3) of the Directive, Norway has failed to fulfil its obligations arising from Articles 7(1)(b) and 12(3) of Directive 2004/38.

2 Correspondence

By letter dated 9 December 2019,[6] the Directorate informed the Norwegian Government that it had opened a complaint case concerning children's residence rights under EEA law and requested information from the Norwegian Government. The deadline to respond was 16 December 2019.

Norway replied by letter dated 16 December 2019,[7] stating that it is the view of UNE that children cannot benefit from Article 7(1) of Directive 2004/38 and that stepchildren of EEA nationals fall outside the scope of Article 12(3) of the Directive.

3 Relevant national law

Section 112(1)(c) of the Norwegian Immigration Act provides that an EEA national has a right of residence for more than three months as long as the person in question is self-

[3] It should also be noted that UNE's head of department has commented on this case and the general interpretation of relevant legal provisions in relation to the case in the Norwegian media, stating that a [redacted]-year old child cannot provide for himself and can therefore not have a residence right in Norway. [redacted]

[4] Judgment of the CJEU in Case C-200/02 *Chen*, EU:C:2004:639.

[5] Judgment of the CJEU in Case C-413/99 *Baumbast*, EU:C:2002:493.

[6] Doc No 1102678.

[7] Doc No 1104457 / your ref. 19/4032-.

supporting and can provide for any accompanying family member and is covered by a health insurance policy that covers all risks during the stay.[8]

Circular UDIRS-2011-37[9] further provides that *"a right of residence on the basis of sufficient resources requires that the EEA national can provide for himself with his own resources"*.[10]

Sections 113(3) and 114(3) of the Immigration Act provide that, in the event of an EEA national's departure from the realm, the children of the EEA national and the person who has parental responsibility retain the right of residence for as long as the child is enrolled at an approved educational institution.[11]

According to Circular UDIRS-2010-25,[12] the aim of Sections 113(3) and 114(3) is to prevent disruption in a child's school attendance in an educational system to which the child has adapted in order to have to reestablish in another country's educational system.[13] However, no mention is made of stepchildren.

4 Relevant EEA law

Article 2(2) of Directive 2004/38 contains the following defintion of "family member":

> *"(a) the spouse;*
>
> *(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;*
>
> *(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);*
>
> *(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);"*

Article 7(1)(b) of the Directive states:

> *"All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:*
>
> > *(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State;"*

Article 12(3) of the Directive provides:

> *"The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual*

[8] Based on an official translation of the Norwegian Government: https://www.regjeringen.no/en/dokumenter/immigration-act/id585772/
[9] Rundskriv fra Utlendingsdirektoratet - UDIRS-2011-37, see Section 3.4, p. 6.
[10] Unofficial translation of the Directorate.
[11] Based on an official translation of the Norwegian Government: https://www.regjeringen.no/en/dokumenter/immigration-act/id585772/
[12] Rundskriv fra Utlendingsdirektoratet - UDIRS-2010-25, see Section 4.1.1, p. 14.
[13] Unofficial translation of the Directorate.

custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies."

Article 10 of Regulation 492/2011 *on freedom of movement for workers*[14] states:

"The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions."[15]

5 The Directorate's preliminary assessment

5.1 Relevant case law of the CJEU and the EFTA Court

Judgment of the CJEU in C-413/99 - Baumbast

In *Baumbast*, the CJEU was *inter alia* confronted with the question whether a child and a stepchild of a German national, who had previously worked in the UK but then ceased working, could continue their education in the UK under Article 12 of Regulation 1612/68 *on freedom of movement for workers* (now Article 10 of Regulation 492/2011).[16]
At the outset, the CJEU stated:

"In that respect, it must be borne in mind that the aim of Regulation 1612/68, namely freedom of movement for workers, requires, for such freedom to be guaranteed in compliance with the principles of liberty and dignity, the best possible conditions for the integration of the Community worker's family in the society of the host Member State […].

[…], for such integration to come about, a child of a Community worker must have the possibility of going to school and pursuing further education in the host Member State, as is expressely provided in Article 12 of Regulation No 1612/68, in order to be able to complete that education successfully.

In circumstances such as those in the Baumbast case, to prevent a child of a citizen of the Union from continuing his education in the host Member State by refusing him permission to remain might dissuade that citizen from exercising the rights to freedom of movement laid down in Article 39 EC and would therefore create an obstacle to the effective exercise of the freedom thus guaranteed by the EC Treaty."[17]

The CJEU found that, pursuant to Article 12 of Regulation 1612/68, children of an EEA national who have installed themselves in an EEA State during the exercise by their parent of rights of residence as a migrant worker in that State are entitled to reside there in order to attend general educational courses. The Court further noted that the fact that the parent has ceased to be a migrant worker in the host State is irrelevant in that regard.[18]

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[14] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 *on freedom of movement for workers within the Union*, OJ L 141, 27.5.2011, p. 1-12.
[15] This provision is identical to Article 12 of the previous Regulation 1612/68.
[16] *Baumbast*, para. 49.
[17] Ibid, paras. 50-52.
[18] Ibid, para. 63.

Moreover, the CJEU concluded that this right under Article 12 of Regulation 1612/68 must be interpreted as meaning that it is granted both to the descendants of the EEA worker and to those of his spouse. The Court went on to state: *"To give a restrictive interpretation to that provision to the effect that only the children common to the migrant worker and his spouse have the right to install themselves with them would run counter to the aim of Regulation No 1612/68 noted above."*[19]

The CJEU also faced the question whether, where children have the right to reside in a host State in order to attend general educational courses pursuant to Article 12 of Regulation 1612/68, that provision must be interpreted as entitling the parent who is the primary carer of those children to reside with them.

In that respect the Court held:

> *"In circumstances such as those of the main proceedings, where the children enjoy, under Article 12 of Regulation No 1612/68, the right to continue their education in the host Member State although the parents who are their carers are at risk of losing their rights of residence as a result, […], it is clear that if those parents were refused the right to remain in the host Member State during the period of their children's education that might deprive those children of a right which is granted to them by the Community legislature.*
>
> *Moreover, in accordance with the case-law of the Court, Regulation No 1612/68 must be interpreted in the light of the requirement of respect for family life laid down in Article 8 of the European Convention. That requirement is one of the fundamental rights which, according to settled case-law, are recognised by Community law […].*
>
> *The right conferred by Article 12 of Regulation No 1612/68 on the child of a migrant worker to pursue, under the best possible conditions, his education in the host Member State necessarily implies that that child has the right to be accompanied by the person who is his primary carer and, accordingly, that that person is able to reside with him in that Member State during his studies."*[20]

The CJEU thus concluded that where children have the right to remain in a host EEA State in order to attend general educational courses pursuant to Article 12 of Regulation 1612/68, that provision must be interpreted as entitling the parent who is the children's primary carer to reside with them.[21]

Judgment of the CJEU in C-200/02 - Chen

In *Chen*, the CJEU was faced with the question whether a young minor can claim an independent right of residence. The Court noted as a general point that a young child can take advantage of the rights of free movement and residence guaranteed by EU law. The Court further stated:

> *"The capacity of a national of a Member State to be the holder of rights guaranteed by the Treaty and by secondary law on the free movement of persons cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally […]. Moreover, […] it does not follow either from the terms of, or from the aims pursued by, Article 18 EC and 49 EC and Directives 73/148 and 90/364 that the enjoyment of the rights with*

[19] Ibid, paras. 56-57.
[20] Ibid, paras. 71-73.
[21] Ibid, para. 75.

which those provisions are concerned should be made conditional upon the attainment of a minimum age."[22]

The Court then noted that the child was entitled to rely on Article 18(1) EC (now Article 21 TFEU) and that that right was recognised subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect. The Court referred to Article 1(1) of Directive 90/364 *on the the right of residence*,[23] applicable to economically inactive persons, and noted, with regard to the requirement of sufficient resources, that it is sufficient for EEA nationals to 'have' the necessary resources, irrespective of their origin.[24]

The CJEU thus concluded that Article 18 EC and Directive 90/364 confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State.[25]

The Court further held that, although the child's mother could not claim to be a family member of the child within the meaning of Directive 90/364, with a view of having a derived right of residence in the UK, a refusal to allow the primary carer, irrespective of nationality, of a child to whom Article 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host State would deprive the child's right of residence of any useful effect.[26] The Court further held, with a reference to *Baumbast*, that it is *"clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence"*.[27]

Judgment of the CJEU in C-86/12 – Alokpa

In *Alokpa*,[28] the CJEU was confronted with similar circumstances as those in *Chen*, i.e. a third-country national mother of EEA national children.

With reference to *Chen*, the Court confirmed that the expression 'have' sufficient resources in Article 7(1)(b) of Directive 2004/38 must be interpreted as meaning that it suffices that such resources are available to the EEA national, and that that provision lays down no requirement whatsoever as to their origin, since they could *inter alia* be provided by a third-country national parent of the minor children.[29]

The Court moreover confirmed that such a third-country national parent does not fall within the definition of a family member in Article 2(2) of Directive 2004/38, since the parent is not dependant on the children (as required by Article 2(2)(d)) but the other way around.[30]

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[22] *Chen*, para. 20.
[23] Directive 90/364 *on the right of residence* was made part of the EEA Agreement on 1 January 1994. The Directive was repealed and replaced by Directive 2004/38.
[24] *Chen*, paras. 26-27, 30.
[25] Ibid, para. 41.
[26] Ibid, paras. 44-45
[27] Ibid, para. 45.
[28] Judgment of the CJEU in Case C-86/12 *Alokpa*, EU:C:2013:645.
[29] Ibid, para. 27. See also judgment of the CJEU in Case C-218/14 *Singh*, xxxx, para. 74.
[30] Ibid, paras. 24-26.

However, the Court also stated, with reference to *Chen*:

> *"[A] refusal to allow a parent, whether a national of a Member State or of a third country, who is the carer of a minor child who is a Union citizen to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence […]".*[31]

The Court thus concluded, again with reference to *Chen*, that, *"while Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor child who is a national of another Member State and who satisfies the conditions of Article 7(1)(b) of that directive, the same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State"*.[32]

Judgment of the CJEU in C-115/15 – NA

In this judgment, the CJEU clarified that Article 12 of Regulation 1612/68 (now Article 10 of Regulation 492/2011) does not require that the parent, the former migrant worker, should still reside in the host State on the date when the child begins to attend school or university, nor that the parent should continue to be present within that State throughout the period of attendance at school or university.[33]

The Court also confirmed the conclusion in *Baumbast* that the child of a migrant worker or former migrant worker has an independent right of residence, when that child wishes to continue his or her education in the host State and that the parent who the child's primary carer has a corresponding right of residence.[34]

The CJEU also confirmed the ruling in *Chen*, by finding that Article 21 TFEU confers on a minor EU citizen a right of residence in the host State, provided that that citizen satisfies the conditions set out in Article 7(1) of Directive 2004/38. If so, those same provisions allow the parent who is the primary carer of that EU citizen to reside with that citizen in the host State. In reaching that conclusion, the Court held that the children in the case could benefit from a right of residence in the UK, under Article 21 TFEU and Directive 2004/38, provided that the conditions of Article 7(1) of the Directive were fulfilled, either by the children themselves or through their third-country national mother.[35]

Judgment of the CJEU in C-93/18 – Bajratari

In *Bajratari*,[36] the Court again confirmed that Article 21 TFEU and Directive 2004/38 confer residence rights on young children.[37] The Court also concluded that Article 7(1)(b) of Directive 2004/38 must be interpreted as meaning that an EEA national minor has sufficient resources not to become an unreasonable burden on the social assistance system of the host Member State during his period of residence, despite his resources being

[31] Ibid, para. 28.
[32] Ibid, para. 29.
[33] Judgment of the CJEU in Case C-115/15 *NA*, EU:C:2016:487, para. 59.
[34] Ibid, paras. 64-65.
[35] Ibid, paras. 75-81.
[36] Judgment of the CJEU in Case C-93/18 *Bajratari*, EU:C:2019:809.
[37] Ibid, para. 27.

derived from income obtained from the unlawful employment of his father, a third-country national without a residence card and work permit.[38]

Judgment of the EFTA Court in E-26/13 – Gunnarsson

In this case, the EFTA Court was faced with the question whether Article 7(1)(b) of Directive 2004/38 (and a corresponding provision of the previous Directive 90/365) could be applied to pensioners against their home EEA State. The Court stated:

> *"As is clear in particular from recital 3 of its preamble, Directive 90/365 extends the right to reside in another EEA State to persons who have ceased their occupational activity, including those who have not carried on any economic activity in another EEA State during their working life. Directive 90/365, as well as Directives 90/366/EEC, which gave a right of residence to students, and Directive 90/364/EEC, which conferred that right on other economically inactive persons, were referred to in Annex VIII to the EEA Agreement on freedom of establishment. Therefore, those directives conferred rights on economically inactive individuals from when the EEA Agreement entered into force in 1994.*
>
> *[…]*
>
> *The substance of Article 1 of Directive 90/365 has been maintained in Article 7(1)(b) of Directive 2004/38. The Court finds that there is nothing to suggest that the latter provision must be interpreted more narrowly than the former with regard to a right to move within the EEA from the home State. […]*
>
> *Moreover, it is of no consequence that the rights of economically inactive persons in Directive 2004/38 were adopted by the Union legislature on the basis of Article 21 TFEU on Union Citizenship. That concept was introduced in the EU pillar through the Maastricht Treaty, which entered into force on 1 November 1993. However, the rights of economically inactive persons in Directive 90/365, and also Directives 90/366/EEC (students) and 90/364/EEC (other economically inactive persons), 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. When Directive 90/365 as well as Directives 90/364/EEC and 90/366/EEC were made part of the EEA Agreement in 1994, these directives conferred rights on economically inactive persons.*
>
> *According to the Joint Committee Decision and the accompanying Joint Declaration by the Contracting Parties, the concept of Union Citizenship has no equivalence in the EEA Agreement, and the EEA Agreement does not provide a legal basis for political rights of EEA nationals. Therefore, the incorporation of Directive 2004/38 cannot introduce rights into the EEA Agreement based on the concept of Union citizenship. However, individuals cannot be deprived of rights that they have already acquired under the EEA Agreement before the introduction of Union Citizenship in the EU. These established rights have been maintained in Directive 2004/38.*
>
> *Nor can it be decisive that, in the EU pillar, the ECJ has based the right of an economically inactive person to move from his home State directly on the Treaty provision on Union Citizenship, now Article 21 TFEU, instead of on Article 1 of Directive 90/365 or Article 7 of Directive 2004/38. As the ECJ was called upon to rule on the matter only after a right to move and reside freely was expressly*

[38] Ibid, para. 53.

introduced in primary law, there was no need to interpret secondary law in that regard […]."[39]

The EFTA Court thus concluded that Article 1(1) of Directive 90/365 and Article 7(1)(b) of Directive 2004/38 confer on pensioners a right of residence in the host EEA State and a right to move freely from the home EEA State.[40]

5.2 The Directorate's assessment

Based on the above, the Directorate has identified two main legal issues raised by this case. First, whether persons in a situation such as the [redacted] child in this case have an independent right of residence in Norway under Article 7(1)(b) of Directive 2004/38 and are allowed to be accompanied by their primary carer. Second, whether persons in a situation such as the complainants in this case, i.e. the [redacted] mother and her [redacted] son, are able to retain a right of residence under Article 12(3) of Directive 2004/38, despite the child being a stepchild of an EEA national.

Children's right of residence under Article 7(1)(b) of Directive 2004/38

With regard to the first issue, the Directorate notes that Section 112(1)(c) of the Immigration Act, which implements Article 7(1)(b) of Directive 2004/38 into national law, as further defined by Circular UDIRS-2011-37 and as interpreted and applied by the immigration authorities, does not allow for EEA national children to benefit from the right of residence in Article 7(1)(b) of Directive 2004/38 even though they have sufficient resources through their primary carer.

The wording of Section 112(1)(c) of the Immigration Act, much like the wording of Article 7(1)(b) of Directive 2004/38, does not exclude children from its scope. However, the Norwegian immigration authorities have taken the view that children cannot independently exercise EEA rights, as their right of residence is derived from their parents. This is clear from the statements made by UNE in the case of the complainants, which are of a general nature, and is also confirmed in Norway's letter of 16 December 2019. It further follows from Circular UDIRS-2011-37 that the immigration authorities are of the view that the condition of sufficient resources can only be fulfilled if the EEA national can provide for himself with his own resources. This approach seems to preclude the condition of sufficient resources being considered fulfilled if a child possesses sufficient resources indirectly, through the primary carer.[41]

It follows that EEA national children in a situation such as the [redacted] child in this case cannot benefit from the right of residence in Article 7(1)(b) of Directive 2004/38 in Norway. It must therefore be assessed whether this approach is compatible with EEA law.

Article 7(1)(b) of Directive 2004/38 concerns the right of residence for economically inactive EEA nationals and, as already mentioned, there is nothing in the wording of that provision which excludes children from its scope.

It follows from the case law of the CJEU, that the Court does not consider that children are excluded from the scope of Article 7(1)(b) of Directive 2004/38. In *Chen*, the CJEU made a general statement to the effect that neither the provisions on the freedom of movement

[39] Judgment of the EFTA Court in Case E-26/13 *Gunnarsson*, [2014] EFTA Ct. Rep. 254, paras. 75, 78-81.
[40] Ibid, para. 82.
[41] See also statements made by UNE's head of department in the Norwegian media, referred to *supra*.

for workers nor the provisions of secondary legislation concerning residence rights of economically inactive persons require a certain minimum age of the persons enjoying rights under those provisions.[42] Moreover, although the Court has used the citizenship provision in Article 21 TFEU as the main legal basis for residence rights of children, the reasoning of the Court makes clear that it does not consider children excluded from the scope of the relevant secondary legislation (Article 7(1)(b) of Directive 2004/38 or Article 1(1) of Directive 90/364).[43]

With regard to the legal situation in the EEA EFTA States, the Directorate notes that the EFTA Court has already found that Article 7(1)(b) of Directive 2004/38 can be applied to economically inactive EEA nationals, despite the fact that the concept of citizenship does not exist in EEA law.[44] In *Gunnarsson*, the EFTA Court further noted that Directive 90/364 granted rights to economically inactive EEA nationals before the introduction of citizenship in the EU and that those rights have been maintained in Directive 2004/38.[45] The Court moreover held that it is not decisive that the CJEU has based rights of economically inactive persons on the Treaty provisions on EU citizenship instead of the relevant provisions of secondary legislation.[46]

The Directorate is thus of the view that Article 7(1)(b) of Directive 2004/38 confers a right of residence on EEA national children, provided that the conditions of Article 7(1)(b) are fulfilled.

In that regard, it is established case law of the CJEU that the condition of sufficient resources in Article 7(1)(b) of Directive 2004/38 is fulfilled when an EEA national possesses sufficient resources, irrespective of the origin of those resources. The Court has specifically stated that the resources can be provided by a child's third-country national primary carer.[47]

It also follows from the CJEU case law that when an EEA national child has an independent right of residence in a host State, under Article 21 TFEU and Article 7(1)(b) of Directive 2004/38, a necessary corallary of that right is that the child's primary carer must be allowed to reside with the child in the host State, even if that primary carer does not fall within the definition of a family member in the relevant secondary legislation.[48] The Directorate notes that the Court reached the same conclusion in *Baumbast* with regard to Article 12 of Regulation 1612/68 *on the freedom of movement for workers*.[49] This approach of the CJEU appears to be based on the principle of effectiveness, as the Court states that a refusal to allow a primary carer of a child to reside with the child in the host State would deprive the child's right of residence of any useful effect.[50] The approach also applies irrespective of whether the legal basis of the child's right is Article 21 TFEU and Article 7(1) of Directive 2004/38 or Article 12 of Regulation 1612/68 (Article 10 of Regulation 492/2011).

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[42] *Chen*, para. 20.
[43] See e.g. *Chen*, paras. 20, 26-27, 30 and 41; *Alokpa*, paras. 27 and 29; *NA*, paras. 75-81; and *Bajratari*, para. 27.
[44] *Gunnarsson*, para. 82.
[45] Ibid, paras. 75, 79-80.
[46] *Gunnarsson*, para. 81.
[47] See e.g. *Chen*, para. 30; *Alokpa*, para. 27; *NA*, paras. 77-78; and *Bajratari*, para. 53. See also judgment of the CJEU in Case C-218/14 *Singh*, EU:C:2015:476, para. 74.
[48] See e.g. *Chen*, paras. 44-45; *Alokpa*, para. 28; and *NA*, paras. 79-80.
[49] *Baumbast*, paras. 71-73
[50] *Baumbast*, para. 71; *Chen*, para. 44; *Alokpa*, para. 28; and *NA*, para. 80.

In light of the above, it is the preliminary view of the Directorate that EEA national children, who have sufficient resources through their primary carer, can have an independent right of residence in a host EEA State under Article 7(1)(b) of Directive 2004/38, and must also be allowed to be accompanied by their primary carer. Norway's interpretation and application of the relevant provisions of national law implementing Article 7(1)(b) of the Directive, according to which EEA national children cannot have an independent right of residence under Article 7(1)(b) of the Directive, even though they possess sufficient resources through their primary carer, thus appears to be in breach of EEA law.

Retention of a right of residence under Article 12(3) of Directive 2004/38

With regard to the second issue raised by this case, the Directorate notes at the outset that Article 2(2)(c) of Directive 2004/38 makes clear that an EEA national's stepchildren (the children of the spouse) are considered to be family members within the meaning of the Directive and as such are allowed to settled with that EEA national in an host EEA State. However, Article 12(3) of the Directive on the retention of the right of residence after the EEA national's departure only refers to the EEA national's children.

As noted above, the CJEU concluded in *Baumbast* that Article 12 of Regulation 1612/68 (now Article 10 of Regulation 492/2011) on the right of children to reside and remain in a host State should be interpreted as also including an EEA worker's stepchildren (children of the spouse) even though the wording of Article 12 only referred to the children of the EEA worker.[51]

The CJEU has established that Article 12 of Regulation 1612/68 (Article 10 of Regulation 492/2011) grants an independent right to children and stepchildren of an EEA worker to remain in the host State and continue to pursue their studies there, even after the EEA worker has left the host State.[52] As noted above, the Court has also made clear that the primary carer of such children, irrespective of nationality, has a right to reside with them in the host State during their studies.

The Directorate notes that the above case law of the CJEU is based on an interpretation of Article 12 of Regulation 1612/68 (Article 10 of Regulation 492/2011), which concerns the freedom of movement for workers, and not on EU citizenship.

The circumstances governed by Article 12 of Regulation 1612/68 are very similar to those governed by Article 12(3) of Directive 2004/38 on the retention of the right of residence for an EEA national's children and their primary carer, upon departure of the EEA national from the host State. The Directorate further notes that the aim of those two provisions appears to be similar. In that context, reference is also made to Circular UDIRS-2010-25, which states that the aim of Sections 113(3) and 114(3) is to prevent disruption in a child's school attendance in an educational system to which the child has adapted in order to have to reestablish in another country's educational system. Those considerations necessarily apply both to children and stepchildren of an EEA national, who have settled in the host State as the EEA national family members and have established themselves in the host State's educational system.

[51] *Baumbast*, paras. 56-57.
[52] *Baumbast*. para. 63; and *NA*, para. 59.

Sections 113(3) and 114(3) of the Immigration Act, which implement Article 12(3) of Directive 2004/38 into Norwegian law, do not mention stepchildren of EEA nationals, and neither does Circular UDIRS-2010-25. The immigration authorities have also made clear that stepchildren of EEA nationals cannot benefit from those provisions.[53]

In light of the above, the Directorate takes the preliminary view that Article 12(3) of the Directive should be interpreted as also covering stepchildren of EEA nationals, who have settled with the EEA national in the host State and who attend school there. Norway's interpretation of the provision as excluding stepchildren of EEA nationals and therefore refusing such children a right to remain in Norway upon the EEA national's departure, as well as the children's primary carers, thus appears to be incompatible with EEA law.

Lastly, the Directorate would like to emphasise that EEA law must be interpreted in light of fundamental rights, as frequently confirmed by the EFTA Court.[54] In that respect, the Court has held that the European Convention on Human Rights is an important source and has also made a reference to the EU Charter of Fundamental Rights,[55] which is one of the instruments that protects the rights of the child, in its Article 24.

6 Conclusion

Accordingly, the Directorate's preliminary conclusion is that, by interpreting and applying Sections 112(1)(c), 113(3) and 114(3) of the Immigration Act, together with the relevant circulars,[56] in such a way that (1) EEA national children, who have sufficient resources through their primary carer, cannot benefit from the right of residence pursuant to Article 7(1)(b) of Directive 2004/38, and (2) that stepchildren of EEA nationals cannot retain a right of residence under Article 12(3) of the Directive, Norway has failed to fulfil its obligations arising from Articles 7(1)(b) and 12(3) of Directive 2004/38.

In light of the above, the Norwegian Government is invited to submit its observations on the content of this letter by *20 January 2020*. After that date, the Authority will consider, in light of any observations received from the Norwegian Government, whether to initiate infringement proceedings in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and Court of Justice.

Yours faithfully,

Gunnar Thor Petursson
Director
Internal Market Affairs Directorate

This document has been electronically authenticated by Gunnar Thor Petursson.

[53] Your ref. 2015 024823 02. See also Norway's letter of 16 December 2019.
[54] Case E-2/02 *Ásgeirsson*, [2003] EFTA Ct. Rep. 18, para. 23; Case E-12/10 *ESA v Iceland*, [2011] EFTA Ct. Rep. 117, para. 60; Case E-15/10 *Posten Norge AS*, [2012] EFTA Ct. Rep. 246, para. 85; Case E-14/15 *Holship*, [2016] EFTA Ct. Rep. 240, para. 123; and Case E-28/15 *Jabbi*, [2016] EFTA Ct. Rep. 575, para. 81.
[55] Case E-4/11 *Clauder*, [2011] EFTA Ct. Rep. 216, para. 49.
[56] Rundskriv fra Utlendingsdirektoratet - UDIRS-2011-37, Section 3.4, p. 6 and Rundskriv fra Utlendingsdirektoratet - UDIRS-2010-25, Section 4.1.1, p. 14.