

Case No: 84397
Document No: 1379864
Decision No: 192/23/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 13 December 2023

to bring a matter against Norway before the EFTA Court in accordance with Article 31(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31(2) thereof,

Whereas:

On 21 November 2019, the Authority opened a complaint case against Norway concerning children's residence rights under EEA law. In the complaint, dated 15 November 2019, it was alleged that Norway was in breach of 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 *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* ("Directive 2004/38" or "the Directive")¹ and, secondly, by excluding stepchildren of EEA nationals from the scope of Article 12(3) of the Directive.

On 30 September 2020, after assessing the issue, the Authority issued a letter of formal notice,² concluding that Norway was in breach of EEA law by failing to ensure that (1) EEA national children can have a right of residence pursuant to Article 7(1)(b) of Directive 2004/38, and (2) stepchildren of EEA nationals can retain a right of residence under Article 12(3) of the Directive.

By letter dated 30 November 2020,³ the Norwegian Government replied to the Authority's letter of formal notice. The Norwegian Government recalled, *inter alia*, the view of the Immigration Appeals Board that there are differences between EU and EEA law when it comes to granting free movement and residence rights to EEA national children.

On 7 July 2021, the Authority issued a reasoned opinion to Norway.⁴ There, the Authority concluded that, by maintaining in force legal provisions such as Sections 112(1)(c),

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 Doc No 1140953.

³ Doc No 1166262.

⁴ Doc No 1184301.

113(3) and 114(3) of the Norwegian Immigration Act,⁵ together with the relevant guidelines, which had been interpreted and applied in such a way that: (1) EEA national children, who had sufficient resources through their primary carers, could not benefit from the right of residence pursuant to Article 7(1)(b) of Directive 2004/38 and be accompanied by their primary carers, and (2) stepchildren of EEA nationals, together with their primary carers, could not retain a right of residence under Article 12(3) of the Directive, Norway had failed to fulfil its obligations arising from Articles 7(1)(b) and 12(3) of Directive 2004/38, as interpreted in light of the fundamental right to family life and the principle of legal certainty.

The Norwegian Government replied to the reasoned opinion by letter of 6 October 2021, stating, *inter alia*:⁶

“Drawing the lines together, it follows from settled EU case law that a TCN parent to a minor with Union citizenship may not claim a derived right of residence based exclusively on the Directive. This follows from the fact that such a person falls outside the personal scope of Article 2(2) of the Directive. Such a right can only be derived from Article 21 TFEU in conjunction with the Directive. Therefore, in the absence of an equivalent to Article 21 TFEU in the EEA Agreement, it is uncertain whether a TCN parent may derive rights of residence based on the Directive and Article 7(2) thereof.”

In the letter, the Norwegian Government further noted that the Ministry of Labour and Social Affairs had, on 6 September 2021,⁷ adopted Circular AI-5/2021 instructing the Directorate of Immigration to recognise that stepchildren of EEA nationals fall within the scope of Article 12(3) of the Directive.

On 11 October 2022, the Norwegian Government replied to a supplementary request for information in the case.⁸ The letter clarified the Norwegian Government’s position that EEA national children can, in principle, enjoy a right of residence under Article 7(1)(b) of Directive 2004/38, provided that the conditions are fulfilled, whereas a third-country national parent cannot derive a right of residence based on the Directive. The case was discussed at the package meeting in Norway on 28 October 2022,⁹ where it was noted that the Immigration Appeals Board had now changed its position and agreed with the Norwegian Government and the Directorate of Immigration that EEA national children could, in principle, enjoy an independent right of residence under EEA law.

The Authority notes that, although both the Norwegian Government and the Directorate of Immigration had opened up for the possibility that EEA national children could, in principle, fall within the scope of Article 7(1)(b) of the Directive, the Immigration Appeals Board maintained its position that they could not until the package meeting in October 2022. Moreover, the Authority is not aware of any measures having been taken in Norway to ensure that the practice of the immigration authorities is compliant with EEA law on this issue.

The remaining issue in this case is thus that Norway does not, or at least did not at the time of the deadline provided in the reasoned opinion, ensure that EEA national children can benefit from the right of residence pursuant to Article 7(1)(b) of the Directive and be accompanied by their primary carers.

The Authority therefore considers that the matter should be brought before the EFTA Court.

⁵ Lov om utlendingers adgang til riket og deres opphold her (LOV-2008-05-15-35).

⁶ Doc No 1232830.

⁷ Before the end of the deadline provided in the reasoned opinion.

⁸ Doc No 1320742.

⁹ See the Authority’s follow-up letter of 15 December 2022, Doc No 1325668.

HAS ADOPTED THIS DECISION:

1. Proceedings should be commenced before the EFTA Court to seek a declaration that, by maintaining in force Section 112(1)(c) of the Immigration Act, together with the relevant guideline, which has been interpreted and applied in such a way that EEA national children, who have sufficient resources through their primary carers, cannot benefit from the right of residence pursuant to Article 7(1)(b) of Directive 2004/38 and be accompanied by their primary carers, Norway has failed to fulfil its obligations arising from Article 7(1)(b) of Directive 2004/38, as interpreted in light of the fundamental right to family life.
2. The Director of Legal and Executive Affairs is instructed to seize the EFTA Court, liaising with the Internal Market Affairs Directorate and subject to control by the competent College Member, and to represent the EFTA Surveillance Authority before the EFTA Court in these proceedings.

For the EFTA Surveillance Authority,

Arne Røksund
President

Stefan Barriga
Responsible College Member

Árni Páll Árnason
College Member

Melpo-Menie Joséphidès
Countersigning as Director,
Legal and Executive Affairs

This document has been electronically authenticated by Arne Roeksund, Melpo-Menie Josephides.