Brussels, 7 July 2021
Case No: 84397
Document No: 1184301
Decision No: 181/21/COL

ESA | EFTA Surveillance Authority

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Norway's breach of Articles 7(1)(b) and 12(3) of Directive 2004/38/EC

1 Introduction

By letter dated 9 December 2019,[1] the Internal Market Affairs Directorate ("the Directorate") of the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that it had opened a complaint case against Norway concerning children's residence rights under EEA law.

In the complaint, dated 15 November 2019, it is alleged that Norway is breaching EEA law, firstly, by not recognising that children who have the nationality of an EEA State ("EEA national children") can have an independent right of residence pursuant to Article 7(1) of Directive 2004/38/EC[2] ("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 complainants in this case are a Peruvian mother ("the mother") and her younger son, who has Greek nationality ("the son"). This Peruvian mother and her two Greek sons (born in 2001 and 2007) came to Norway in 2015 with a Greek national (the mother's husband and the children's stepfather; "the husband"), and got residence permits as his family members under Directive 2004/38. The husband left Norway and his wife in August 2017 and notified the Norwegian immigration authorities that he no longer wished to be her reference person. The divorce proceedings between them are seemingly still ongoing before Greek courts. On 15 December 2017, after the husband had left Norway, but while they were still married, the mother applied for a residence permit under Directive 2004/38 as the primary carer of her younger son, who is an EEA national. For the purposes of the resources test she relied on the circumstance that she had two jobs and enough income to provide for both herself and her son. However, both the Directorate of Immigration (*UDI*) and the Immigration Appeals Board (*UNE*) rejected the application and ordered the applicant to leave Norway.[3]

By decision dated 10 April 2019, rejecting the mother's application for a residence permit, UDI found that the 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 mother nor the son could retain a right of residence in Norway under Section 113(3) or Section 114(3) of the Immigration Act (implementing Article 12(3) of the Directive) since the EEA national from whom they first derived a right of residence (the husband) was not the son's father but his stepfather.

The mother appealed UDI's decision on 15 May 2019. By decision of 13 November 2019, UNE upheld UDI's decision to reject the application for a residence permit. UNE found that the mother could not derive a right of residence from the 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 10 December 2019, UNE made a new decision in the case, rejecting the mothers'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. UNE further noted that the judgments of the Court of Justice of the European

[1] Doc No 1102678.

[2] 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.

[3] Your ref. 2015 024823 02.

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.

On 4 February 2020, UNE took a final decision in the case, where the previous conclusions were reiterated. However, UNE noted that a stepchild of an EEA national may retain a right to stay in a host EEA State when the EEA national leaves the territory of the host State, in accordance with Article 12(3) of Directive 2004/38 and Section 114(3) of the Immigration Act.

The Authority notes that in addition to submitting a complaint to the Authority, the complainants also brought legal proceedings before Oslo District Court against the Norwegian State, concerning the validity of UNE's decision of 4 February 2020. By request dated 18 November 2020, the Oslo District Court decided to stay the proceedings and referred several questions to the EFTA Court for an Advisory Opinion on the interpretation of Directive 2004/38 (Case E-16/20 *Q and Others*).[6] That case is currently pending before the EFTA Court.

The Authority understands that, by letter dated 2 June 2021, UNE informed the mother about her legal status in Norway while awaiting the outcome of the court proceedings. UNE noted that by decision of 11 February 2021, she had been granted leave to stay in Norway until the Oslo District Court has delivered its judgment. In addition, UNE stated that she was also allowed to work in Norway during the same period, citing in this respect e.g. Circular AI-3/2020.[7]

According to Circular AI-3/2020, which has been in force since 26 May 2020, the Norwegian Ministry of Labour and Social Affairs has instructed UDI and UNE to suspend the processing of all cases where people submit applications for residence permits in Norway as family members (third-country nationals) of EEA national children, without however specifying any timeframe as to how long this suspension of cases will last.

In the present case, the Authority has reached the conclusions firstly that, by not ensuring that EEA national children, who have sufficient resources through their primary carers, can benefit from the right of residence pursuant to Article 7(1)(b), and be accompanied by their primary carers, and secondly that, by excluding stepchildren of EEA nationals, together with their primary carers, 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,[8] the Directorate sent a request for information to Norway. The Norwegian Government replied by letter dated 16 December 2019,[9] 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.

On 19 December 2019, the Directorate sent a pre-Article 31 letter to Norway,[10] presenting the Directorate's preliminary view that, by interpreting and applying national law in such a

[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] Case E-16/20 *Q and Others*, currently pending before the EFTA Court.
[7] Rundskriv fra Arbeids- og sosialdepartementet – AI-3/2020.
[8] Doc No 1102678.
[9] Doc No 1104457 / your ref. 19/4032-.
[10] Doc No 1103071.

way that (1) 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 (2) stepchildren of EEA nationals cannot 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. The Norwegian Government was invited to submit its observations on the content of the letter by 20 January 2020.

By letter of 10 January 2020,[11] the Norwegian Government noted that it had initiated a dialogue with UNE and UDI to address the issues raised in the Directorate's pre-Article 31 letter, but requested an extension of the time limit for submitting observations until 3 February 2020. By letter dated 13 January 2020,[12] the Directorate granted the requested extension.

By letter dated 3 February 2020,[13] the Norwegian Government stated that it was awaiting UNE's decision in the complainants' case concerning children's residence rights and asked the Authority for permission to await UNE's decision before starting the process of assessing the national practice.

On 12 February 2020, Norway sent another letter to the Authority,[14] noting that UNE had reached a final decision in the complainants' case on 4 February 2020. However, since UNE was an independent body, it was, in the Government's view, not correct to make any comments concerning the substance of UNE's final decision. The Government further stated that the questions raised in the pre-Article 31 letter were complex and it might thus take some time before it would be able to provide the Authority with its observations.

On 4 March 2020, the Directorate sent a formal letter to Norway,[15] noting that the Norwegian Government first requested an extension of the time limit until 3 February 2020, then asked for permission to await UNE's final decision in the complainants' case, but later stated that, despite UNE's final decision, it would not comment on the substance of that decision and that it would take some time for it to submit its observations, without specifying any time line in that respect. The Directorate referred to Articles 2 and 6 of the Surveillance and Court Agreement and Article 3 of the EEA Agreement and invited the Norwegian Government to submit the observations on the Directorate's pre-Article 31 letter as soon as possible, and at the latest by 19 March 2020.

By letter dated 17 March 2020,[16] the Norwegian Government requested further extension of the time limit due to the extraordinary situation concerning COVID-19. By letter of 19 March 2020,[17] the Directorate granted an extension of the time limit until 30 April 2020.

By letter dated 28 April 2020,[18] the Norwegian Government provided its comments on the Directorate's pre-Article 31 letter. In its letter, the Government acknowledged that stepchildren have a right to remain in Norway upon the EEA national's departure under Section 114(3) of the Immigration Act. With regard to the issue of whether EEA national children can have an independent right of residence under Article 7(1)(b) of Directive 2004/38, the Government noted that it shared the view of UNE that there are differences between EEA law and EU law when it comes to immigration, but stated that it was not certain whether Directive 2004/38 could serve as a legal basis for such an independent right for children, in the absence of Article 21 TFEU[19] in EEA law. The Government

[11] Doc No 1107105 / your ref. 19/4032-.
[12] Doc No 1107183.
[13] Doc No 1111762.
[14] Doc No 1114059.
[15] Doc No 1116170.
[16] Doc No 1122088.
[17] Doc No 1122090.
[18] Doc No 1131013.
[19] Treaty on the Functioning of the European Union.

further noted that essential elements covered by the Directorate's pre-Article 31 letter were at that moment being presented to national courts and to the EFTA Court in Case E-4/19 *Campbell*.

On 30 September 2020, the Authority issued a letter of formal notice to Norway.[20] In that letter, the Authority concluded that, by maintaining in force legal provisions such as Sections 112(1)(c), 113(3) and 114(3) of the Immigration Act, together with the relevant circulars, which have been interpreted and applied in such a way that: (1) 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 (2) stepchildren of EEA nationals cannot 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.

By letter dated 30 November 2020,[21] the Norwegian Government replied to the Authority's letter of formal notice. The Norwegian Government recalled *inter alia* UNE's view that there are differences between EU and EEA law when it comes to granting free movement and residence rights to EEA national children. Moreover, the Government noted that in the legal proceedings before Oslo District Court an Advisory Opinion had been requested and that the case seemed to concern complex legal issues. Thus, the Government was of the view that it was necessary to await the outcome of the judicial proceedings and proposed that the Authority would stay the present infringement proceedings.

The Authority, however, does not consider it necessary, in particular for reasons of procedural efficiency, to await the judgment of the EFTA Court in *Q and Others* or the outcome of the proceedings before the referring national court. Therefore, and since the Norwegian Government's reply of 30 November 2020 has not changed the view of the Authority on the substance of the present infringement case, the Authority maintains its conclusions presented in the letter of formal notice and delivers this reasoned opinion.

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-supporting and can provide for any accompanying family member and is covered by a health insurance policy that covers all risks during the stay.[22]

UDI's guideline, RUDI-2011-37,[23] 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"*.[24]

Section 113 of the Immigration Act concerns the right of residence for more than three months for EEA national family members, while Section 114 deals with the same right for third-country national family members. Sections 113(3) and 114(3) of the Immigration Act provide that, in the event of an EEA national's departure from the country or death, the children of the EEA national and the person who has parental responsibility retain the

[20] Doc No 1140953.
[21] Doc No 1166262 – your ref. 19/4032.
[22] Based on an official translation of the Norwegian Government: https://www.regjeringen.no/en/dokumenter/immigration-act/id585772/
[23] Retningslinje fra Utlendingsdirektoratet – RUDI 2011-37 (previously, Rundskriv fra Utlendingsdirektoratet - UDIRS-2011-37), see Section 3.4.
[24] Unofficial translation of the Authority.

right of residence for as long as the child is enrolled at an approved educational institution.[25]

According to UDI's guideline, RUDI-2010-25,[26] 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.[27] However, no mention is made of stepchildren.

4 Relevant EEA law

Recital 6 in the preamble to Directive 2004/38 provides:

> *"In order to maintain the unity of the family in a broader sense […]."*

Recital 15 in the preamble to Directive 2004/38 states:

> *"Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis."*

Recital 31 in the preamble to Directive 2004/38 reads *inter alia* as follows:

> *"This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union."*

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 Directive 2004/38 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 Directive 2004/38 provides:

---

[25] Based on an official translation of the Norwegian Government: https://www.regjeringen.no/en/dokumenter/immigration-act/id585772/

[26] Retningslinje fra Utlendingsdirektoratet – RUDI-2010-25 (previously, Rundskriv fra Utlendingsdirektoratet - UDIRS-2010-25), see Section 4.1.1.

[27] Unofficial translation of the Authority.

> *"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 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 No 492/2011 *on freedom of movement for workers*[28] 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."*[29]

5 The Authority's 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 No 1612/68 *on freedom of movement for workers* (now Article 10 of Regulation No 492/2011).[30]

At the outset, the CJEU stated:

> *"In that respect, it must be borne in mind that the aim of Regulation No 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."*[31]

The CJEU found that, pursuant to Article 12 of Regulation No 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.[32]

---

[28] 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.
[29] This provision is identical to Article 12 of the previous Regulation No 1612/68.
[30] Case C-413/99 *Baumbast*, cited above, para. 49.
[31] Ibid, paras. 50-52.
[32] Ibid, para. 63.

Moreover, the CJEU concluded that this right under Article 12 of Regulation No 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."*[33]

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 No 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."*[34]

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 No 1612/68, that provision must be interpreted as entitling the parent who is the children's primary carer to reside with them.[35]

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 which those provisions are concerned should be made conditional upon the attainment of a minimum age."*[36]

[33] Ibid, paras. 56-57.
[34] Ibid, paras. 71-73.
[35] Ibid, para. 75.
[36] Case C-200/02 *Chen*, cited above, para. 20.

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*,[37] 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.[38]

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.[39]

The Court further held that, although the child's mother could not claim to be a dependent relative of the child in the ascending line 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.[40] 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"*.[41]

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

In *Alokpa*,[42] 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.[43]

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.[44]

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*

[37] 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.
[38] Case C-200/02 *Chen*, cited above, paras. 26-27, 30.
[39] Ibid, para. 41.
[40] Ibid, paras. 44-45
[41] Ibid, para. 45.
[42] Judgment of the CJEU in Case C-86/12 *Alokpa*, EU:C:2013:645.
[43] Ibid, para. 27. See also judgment of the CJEU in Case C-218/14 *Singh*, EU:C:2015:476, para. 74.
[44] Case C-86/12 *Alokpa*, cited above, paras. 24-26.

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 […]".[45]

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"*.[46]

Judgment of the CJEU in C-115/15 – NA

In this judgment, the CJEU clarified that Article 12 of Regulation No 1612/68 (now Article 10 of Regulation No 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.[47]

The CJEU 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 is the child's primary carer has a corresponding right of residence.[48]

The Court furthermore 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.[49]

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

In *Bajratari*,[50] the Court again confirmed that Article 21 TFEU and Directive 2004/38 confer residence rights on young children.[51] 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 derived from income obtained from the unlawful employment of his father, a third-country national without a residence card and work permit.[52]

Judgment of the CJEU in Case C-836/18 - RH

In its recent ruling in *RH,*[53] the CJEU referred *inter alia* to its previous rulings in *Chen* and *Bajratari* and confirmed its earlier position concerning the requirement of having sufficient resources. In *RH,* the Court was very clear on this matter and stated that the requirement concerning the sufficiency of resources, set out in Article 7 of Directive 2004/38, must be interpreted as meaning that, although the EEA national must have sufficient resources,

[45] Ibid, para. 28.
[46] Ibid, para. 29.
[47] Judgment of the CJEU in Case C-115/15 *NA*, EU:C:2016:487, para. 59.
[48] Ibid, paras. 64-65.
[49] Ibid, paras. 75-81.
[50] Judgment of the CJEU in Case C-93/18 *Bajratari*, EU:C:2019:809.
[51] Ibid, para. 27.
[52] Ibid, para. 53.
[53] Judgment of the CJEU in Case C-836/18 *RH*, ECLI:EU:C:2020:119.

"*there is not the slightest requirement under EU law, concerning their source, since they may be provided, in particular, by a member of that citizen's family*".[54]

Judgment of the CJEU in Case C-181/19 – Jobcenter Krefeld

In *Jobcenter Krefeld*,[55] where the CJEU was requested to interpret Regulation No 492/2011 and Directive 2004/38, the Court cited *inter alia* the ruling in *Baumbast* and recalled that, under Article 10 of Regulation No 492/2011 a child of a migrant worker or of a former migrant worker has an independent right of residence in the host EEA State, which also entails that the parent who is the primary carer should have a corresponding right of residence. In particular, the CJEU stated the following:[56]

> *"It is clear from that case-law, first, that the child of a migrant worker or of a former migrant worker has an independent right of residence in the host Member State, on the basis of the right to equal treatment as regards access to education, where that child wishes to attend general education courses in that Member State. Second, recognition that that child has an independent right of residence entails that the parent who has primary care of that child should be recognised as having a corresponding right of residence […]."*
>
> *The objective pursued by both Regulation No 1612/68 and Regulation No 492/2011, namely to ensure freedom of movement for workers, requires the best possible conditions for the integration of the worker's family in the host Member State, and a refusal to allow the parents caring for the children to remain in the host Member State while those children are attending school might deprive the children of a right granted to them by the EU legislature […].*
>
> *Accordingly, Article 10 of Regulation No 492/2011 grants to a child, in parallel with the right that child has to access to education, an independent right of residence that does not depend on the fact that the parent or parents who care for the child should continue to have the status of migrant worker in the host Member State. Likewise, the fact that the parent concerned loses that status has no effect on his or her right of residence, under Article 10 of Regulation No 492/2011, corresponding to that of the child of whom he or she is the primary carer […]."*

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:

> *"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*

[54] Ibid, para 31.
[55] Judgment of the CJEU in Case C-181/19 *Jobcenter Krefeld*, ECLI:EU:C:2020:794.
[56] Ibid, paras. 35-37.

> *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 introduced in primary law, there was no need to interpret secondary law in that regard […].*"[57]

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.[58]

Judgment of the EFTA Court in E-28/15 – Jabbi

In *Jabbi*,[59] the EFTA Court was faced with the question whether Articles 7(1)(b) and 7(2) of Directive 2004/38 confer derived rights of residence to a third-country national family member of an EEA national who, upon returning from another EEA State, is residing in his/her home EEA State. The Court stated:

> *"Directives 90/364/EEC, 90/365/EEC and 93/96/EEC were part of the EEA Agreement at the time of its entry into force and were referred to in Annex VIII to the EEA Agreement on freedom of establishment. Therefore, EEA law included the freedom of movement of persons as workers and as economically inactive EEA nationals, in both cases including their family members.*
>
> *[…]*
>
> *In the Court's further analysis, emphasis must be placed on the fact that the free movement of persons forms part of the core of the EEA Agreement. The case at hand must be distinguished from O. and B. to the extent that that judgment is based on Union citizenship. Therefore, it must be examined if homogeneity in the EEA can be achieved based on an authority included in the EEA Agreement. Such an examination must be based on the EEA Agreement, legal acts incorporated into it and case law.*
>
> *[…]*
>
> *When a EEA national makes use of his right to free movement, he may not be deterred from exercising that right by an obstacle to the entry and residence of a spouse in the EEA national's home State. Accordingly, when an EEA national who has availed himself of the right to free movement returns to his home State, EEA law requires that his spouse is granted a derived right of residence in that State (see, for comparison, Eind, cited above, paragraphs 35 and 36). Consequently, the possibility for individuals exercising their right of free movement to invoke this right against their home State has been recognised in the case law of the ECJ.*
>
> *This case law concerns EEA nationals having pursued an economic activity in another EEA State. However, economically inactive EEA nationals may enjoy their right under Article 7(1)(b) to reside in another EEA State provided that they have sufficient resources for themselves and their family members, so as to not become a burden on the social security assistance system of the host State, and possess comprehensive sickness insurance cover."*[60]

---

[57] Judgment of the EFTA Court in Case E-26/13 *Gunnarsson*, [2014] EFTA Ct. Rep. 254, paras. 75, 78-81.
[58] Ibid, para. 82.
[59] Judgment of the EFTA Court in Case E-28/15 *Jabbi*, [2016] EFTA Ct. Rep. 575.
[60] Ibid, paras. 61, 68, 77-78.

The Court then concluded, also with reference to Article 8 of the European Convention on Human Rights ("ECHR") on the right to family life, that, where an EEA national, pursuant to Article 7(1)(b) and Article 7(2) of the Directive, has created or strengthened a family life with a third country national during genuine residence in an EEA State other than that of which he is a national, the provisions of that directive will apply by analogy where that EEA national returns with the family member to his home State.

Judgment of the EFTA Court in E-4/19 – Campbell

In this case, the Court was asked by the Supreme Court of Norway whether the conclusion in *Jabbi*, concerning derived rights of residence for third-country national family members of EEA nationals upon return to the EEA nationals' home EEA State, should be overturned, in light of recent case law of the CJEU. The EFTA Court, however, confirmed its conclusion established in *Jabbi*. The Court stated:

> *"The Court's judgment in Jabbi is based on the specific legal context of the EEA Agreement. In that regard, the Court's interpretation of the Directive must take into account the context in which the Directive is situated in EEA law and the manner in which this context differs from the EU pillar.*
>
> *In the context of EEA law, the fact that no parallel to Article 21 TFEU exists in EEA law entails that the Directive must be interpreted differently in the EEA, in order to realize the objective of the Directive, which is, above all, to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the EEA States. Since the freedom of movement for persons is one of the foundations of the Directive, any limitations to that freedom must be interpreted strictly. In the light of the context and the aims pursued by the Directive, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their practical effect (compare, to that effect, Metock and Others, EU:C:2008:449, paragraphs 83 and 84).*
>
> *Recent case law of the ECJ referred to in the Supreme Court of Norway's request has upheld relevant findings of the judgment in O. and B. However, none of these judgments concern the interpretation of the Directive in the context of the EEA Agreement. The Court finds that the EEA legal context remains unaltered since Jabbi, and accordingly, as firmly supported by ESA and the Commission, the Court finds no reason to depart from the understanding of homogeneity and effectiveness as expressed in that judgment."*[61]

Judgment of the EFTA Court in Case E-1/20 - Kerim

In its recent ruling in *Kerim*,[62] a case which concerned the question of what constitutes a marriage of convenience under Article 35(1) of Directive 2004/38, the EFTA Court recalled the importance of fundamental rights in interpreting and applying the Directive. In particular, the Court noted the following:[63]

> *"It must be recalled that any interpretation of the Directive must be exercised in the light of and in line with fundamental rights and freedoms (compare the judgment in O and Others, C-356/11 and C-357/11, EU:C:2012:776, paragraphs 79 and 80 and case law cited). It should be added that recital 5 of the Directive links the derived family rights to the EEA national's freedom and dignity while recital 6 confirms that "maintaining the unity of the family in a broader sense" is one of the objectives of the Directive."*

Thereafter, the EFTA Court stated *inter alia* that fundamental rights form part of the general principles of EEA law and referred in that context to Article 8(1) of the ECHR

[61] Judgment of the EFTA Court in Case E-4/19 *Campbell*, not yet reported, paras. 57-59.
[62] Judgment of the EFTA Court in Case E-1/20 *Kerim*, not yet reported.
[63] Ibid, para. 42.

concerning the right to respect for private and family life.[64] Furthermore, the EFTA Court noted the following:[65]

> *"[…], it must be noted that the EEA States, in particular their courts, must not only interpret their national law in a manner consistent with EEA law but are also under an obligation to ensure that the interpretation and application of acts incorporated into the EEA Agreement does not result in a conflict with fundamental rights protected by EEA law […]."*

Judgment of the EFTA Court in Case E-2/20 – The Norwegian Government v L

In the case *Norwegian Government v L*,[66] the EFTA Court dealt with interpretation of Directive 2004/38 in the light of an expulsion decision and a re-entry ban issued by the Norwegian immigration authorities to an EEA national who also had a family in Norway. The EFTA Court held *inter alia* that when assessing the proportionality of an expulsion measure, the relevance of family life is an important factor which must be taken into account.[67] The EFTA Court also explained that the criteria which should be considered in this respect includes for example the individual's family situation and whether there are children from the relationship, stepchildren or other dependants.[68] Moreover, the EFTA Court referred to the *principle of the child's best interests* in the context of Directive 2004/38 as follows:[69]

> *"These factors should also be assessed in the light of the principles of proportionality, of the child's best interests, and of fundamental rights […]. The principle of the child's best interests is all the more relevant in circumstances, such as those of the present case, where the other parent is 100 percent disabled which may have an impact on the care of the children in question. Therefore, L's family situation, including his common-law partner and children living in Norway, including step-children, is relevant to the overall assessment to be made by the national court."*

5.2 The legal assessment

There are two legal issues that have been raised in this case. First, whether persons in a situation such as the son 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 carers. Second, whether persons in a situation such as the complainants in this case, i.e. the mother and her younger 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 Authority 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 UDI's guideline, RUDI-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,

[64] Ibid, para. 43.
[65] Ibid.
[66] Judgment of the EFTA Court in Case E-2/20 *The Norwegian Government* v *L*, not yet reported.
[67] Ibid, para. 51.
[68] Ibid.
[69] Ibid, para. 52.

which are of a general nature, and is also confirmed in Norway's letter of 16 December 2019. It further follows from UDI's guideline, RUDI-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.

Although the Norwegian Government is not conclusive on this matter in its letter of 28 April 2020, the Government does state that it shares the observations of the immigration authorities that there are differences between EEA law and EU law when it comes to immigration and emphasises that the case law referred to by the Directorate in the pre-Article 31 letter concerns Article 21 TFEU, which does not form part of EEA law.

It follows from the above that, in the Norwegian Government's view, EEA national children in a situation such as the son 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 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.[70] 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).[71]

With regard to the legal situation in the EEA EFTA States, the Authority 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.[72] 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.[73] 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.[74] These considerations were confirmed by the EFTA Court in *Jabbi* and in *Campbell* the Court rejected Norway's arguments in relation to overturning the previously established case law. Any possible uncertainty on the applicability of Directive 2004/38 to economically inactive EEA nationals against their home State, despite the lack of citizenship in EEA law, has therefore been clarified by the EFTA Court's case law.

[70] Case C-200/02 *Chen*, cited above, para. 20.
[71] See e.g. Case C-200/02 *Chen*, cited above, paras. 20, 26-27, 30 and 41; Case C-86/12 *Alokpa*, cited above, paras. 27 and 29; Case C-115/15 *NA*, cited above, paras. 75-81, and C-93/18 *Bajratari*, cited above, para. 27.
[72] Case E-26/13 *Gunnarsson*, cited above, para. 82.
[73] Ibid, paras. 75, 79-80.
[74] Ibid, para. 81.

With reference to the above, the Authority concludes 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. This was recently confirmed in *RH*, where the CJEU held that, although the EEA national must have sufficient resources, there is not the slightest requirement under EEA law concerning their source, since they may be provided, in particular, by a member of the EEA national's family.[75] The Court has also specifically stated that the resources can be provided by a child's third-country national primary carer.[76]

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, regardless of nationality, 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.[77] The Authority notes that the Court reached the same conclusion in *Baumbast* with regard to Article 12 of Regulation No 1612/68 *on the freedom of movement for workers*, which was also recently confirmed in *Jobcenter Krefeld* (concerning Article 10 of Regulation No 492/2011).[78] 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.[79] 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 No 1612/68 (Article 10 of Regulation No 492/2011).

In light of the above, it is the Authority's view 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 carers, regardless of the carers' nationality. 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, is therefore incompliant with EEA law.

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

With regard to the second issue raised in this case, the Authority 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 be settled with that EEA national in a 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.

[75] Case C-836/18 *RH*, cited above, paragraph 31.
[76] See e.g. Case C-200/02 *Chen*, cited above, para. 30; Case C-86/12 *Alokpa, cited above,* para. 27; Case C-115/15 *NA*, cited above, paras. 77-78; and C-93/18 *Bajratari*, cited above, para. 53. See also Case C-218/14 *Singh*, cited above, para. 74.
[77] See e.g. Case C-200/02 *Chen*, cited above, paras. 44-45; Case C-86/12 *Alokpa*, cited above, para. 28; and Case C-115/15 *NA*, cited above, paras. 79-80.
[78] Case C-413/99 *Baumbast*, cited above, paras. 71-73 and Case C-181/19 *Jobcenter Krefeld*, cited above, paras. 35-37.
[79] Ibid, para. 71; Case C-200/02 *Chen*, cited above, para. 44; Case C-86/12 *Alokpa*, cited above, para. 28; and Case C-115/15 *NA*, cited above, para. 80.

As noted above, the CJEU concluded in *Baumbast* that Article 12 of Regulation No 1612/68 (now Article 10 of Regulation No 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.[80]

The CJEU has established that Article 12 of Regulation No 1612/68 (Article 10 of Regulation No 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.[81] 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 CJEU affirmed this approach in its recent judgment in *Jobcenter Krefeld*.[82]

The Authority notes that the above case law of the CJEU is based on an interpretation of Article 12 of Regulation No 1612/68 (Article 10 of Regulation No 492/2011), which concerns the freedom of movement for workers, and does not concern EU citizenship.

The circumstances governed by Article 12 of Regulation No 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 Authority further notes that the aim of those two provisions appears to be similar. In that context, reference is also made to UDI's guideline, RUDI-2010-25, which states that the aim of Sections 113(3) and 114(3) of the Immigration Act 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.

The Authority recalls that recital 15 in the preamble to Directive 2004/38, which refers to the right to family life and human dignity, emphasises that in certain circumstances family members already residing within the territory of the host Member State shall retain their right of residence exclusively on a personal basis.

The Authority also notes that in the recent judgment of the EFTA Court in *The Norwegian Government v L*, the Court held *inter alia* that, when assessing the proportionality of an expulsion measure in the context of Directive 2004/38, the individual's family situation must be considered and this includes taking into account "*whether there are children from the relationship, stepchildren, or other dependants […]*".[83] The EFTA Court also referred to the child's best interests principle and stated explicitly that that principle was relevant in the context of stepchildren.[84] In the Authority's view, these statements from the EFTA Court, where no distinction is made between children or stepchildren when it comes to granting protection under Directive 2004/38, support the conclusion that stepchildren should be covered by Article 12(3) of the Directive.

Lastly, the Authority also emphasises that EEA law must be interpreted in light of fundamental rights, as frequently confirmed by the EFTA Court, in particular the right to respect for family life.[85] For example, in *Kerim*, the EFTA Court recalled that any

[80] Case C-413/99 *Baumbast*, cited above, paras. 56-57.
[81] Ibid, para. 63; and Case C-115/15 *NA*, cited above, para. 59.
[82] Case C-181/19 *Jobcenter Krefeld*, cited above, paras. 35-37.
[83] Case E-2/20 *The Norwegian Government* v *L*, cited above, para. 51.
[84] Ibid, para. 52.
[85] Case E-2/03 *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-4/11 *Clauder*, [2011] EFTA Ct. Rep. 216, para. 49; Case E-14/15 *Holship*, [2016]

interpretation of the Directive must be exercised in the light of fundamental rights and freedoms and added *inter* alia that recital 6 of Directive 2004/38 confirmed that "*maintaining the unity of the family in a broader sense*" is one of the objectives of the Directive.[86]

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 do UDI's guideline, RUDI-2010-25. In dealing with the complainants' case, the immigration authorities repeatedly made general statements to the effect that stepchildren of EEA nationals could not be covered by those provisions.[87]

Although UNE, in its final decision in the complainants' case dated 4 February 2020, did appear to accept the possibility that a stepchild of an EEA national may, in certain circumstances, retain a right to stay in a host EEA State when the EEA national leaves the territory of the host State, the previous conclusions on not granting the complainants residence permits were upheld. The Authority further notes that the statements from the Norwegian Government have been conflicting, as the Government acknowledged, in its letter of 28 April 2020, that Article 12(3) of Directive 2004/38 could also cover stepchildren of EEA nationals, after initially having stated in its letter of 16 December 2019 that stepchildren were not covered. However, the Authority is not aware of any measures being taken to ensure that the practice of the immigration authorities reflects this new position of the Norwegian Government, for example by amending UDI's guideline, RUDI-2010-25. In light of the general statements made by UDI and UNE in the complainants' case, it thus appears that, in the absence of a clearer legal framework, the provisions currently in force have the effect of not covering stepchildren. Lack of clarity on this point would also appear at odds with the fundamental principle of legal certainty.

In light of the above, the Authority concludes 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 and application of the provision as excluding stepchildren of EEA nationals and therefore refusing such children a right to remain in Norway, together with the children's primary carer, upon the EEA national's departure, is therefore incompatible with EEA law.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Norway the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

> That, by maintaining in force legal provisions such as Sections 112(1)(c), 113(3) and 114(3) of the Immigration Act, together with the relevant guidelines,[88] which have been interpreted and applied in such a way that:

EFTA Ct. Rep. 240, para. 123; Case E-28/15 *Jabbi,* cited above, para. 81; Case E-1/20 *Kerim*, cited above, paras. 42-43; and Case E-2/20 *The Norwegian Government v L*, cited above, para. 50.

[86] Case E-1/20 *Kerim*, cited above, para. 42.

[87] See UDI's decision of 10 April 2019 and UNE's decisions of 13 November 2020 and 10 December 2020.

[88] Retningslinje fra Utlendingsdirektoratet – RUDI 2011-37 (previously, Rundskriv fra Utlendingsdirektoratet - UDIRS-2011-37), see Section 3.4, and Retningslinje fra

(1) 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, and

(2) stepchildren of EEA nationals, together with their primary carers, 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, as interpreted in light of the fundamental right to family life and the principle of legal certainty.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion within *three months* of its receipt.

Done at Brussels,

For the EFTA Surveillance Authority

Bente Angell-Hansen President	Frank J. Büchel Responsible College Member	Högni S. Kristjánsson College Member

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

This document has been electronically authenticated by Bente Angell-Hansen, Melpo-Menie Josephides.