ROYAL NORWEGIAN MINISTRY
OF LABOUR AND SOCIAL AFFAIRS

EFTA Surveillance Authority
Avenue des Arts 19H,
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Your ref	Our ref	Date
	19/4032-	6 October 2021

Reply - Reasoned opinion - Complaint against Norway concerning children's residence rights under EEA law

1. Introduction

Reference is made to the Reasoned Opinion (*"RDO"*) of 7 July 2021 from the EFTA Surveillance Authority (*"the Authority"*), and prior correspondence (Case 84397). The RDO concerns the interpretation of 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 (*"the Directive"*). The Ministry of Labour and Social Affairs hereby submits its reply to the RDO.

The Authority concludes 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) of the Directive, 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 the Directive.

The Authority requires Norway to take necessary measures to comply with the RDO within three months of its receipt, by 7 October 2021.

The Ministry recalls that the complaint case brought before the Authority on 9 December 2019, refers to decisions made by the Immigration Authorities (Directorate of Immigration, UDI, and the Immigration Appeals Board, UNE), rejecting an application for residence card to a third-country national (TCN) mother of an EEA national child. The same complaint case is

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also brought before Oslo District Court, which has requested an Advisory Opinion from the EFTA Court (case E-16/20 *Q and Others)*. This case is still pending before the EFTA Court.

The Ministry notes that the first question from the referring court focuses, in part, on the differences between EU and EEA law, and more particularly on the lack of EU citizenship in EEA law. The Ministry observes that the EFTA Court has provided some guidance in recent case law on how to address similar situations within the EEA legal order. However, the present case, E-16/20, concerns the legal status of children and their TCN parents under EEA law, a question upon which the EFTA Court has not commented before. The case therefore provides the Court with the opportunity to develop its reasonings on the matter.

In light of this, the Ministry recalls that in our reply to the letter of formal notice the Authority was requested to stay the infringement proceedings against Norway and await the outcome of the pending judicial proceedings.

The Ministry further recalls that on 26 May 2021, it instructed the UDI and UNE to suspend the processing of applications for residence permits to third country family members of EEA national children temporarily (Circular AI-3/2020), pending the outcome of the proceedings before the District Court and the EFTA Court.

Thus, all cases concerning residence cards to third country family members of EEA national children are currently put on hold. This decision clearly shows that the Ministry takes the issues raised by the Authority and by the complainant very seriously. However, it is our firm belief that we must allow for both the District Court and the EFTA Court to finish the proceeding brought before them before we conclude on the issues raised. Both national courts and the EFTA Court play important roles in the EEA legal system. Out of respect for the judiciary, the Ministry considers it pertinent to await their conclusions. Accordingly, we would once again urge the Authority to await the outcome of the pending judicial proceedings before deciding on the way forward in the infringement case against Norway.

In the following, the Ministry will first comment on the right of residence for an EEA National child and his/her TNC primary carer under Article 7 (1) (b) of the Directive and, secondly, on the retention of a right of residence for stepchildren under Article 12 (3) of the Directive.

2. Right of residence for an EEA national child and his/her third-country national primary carer

The wording of Section 112(1)(c) of the Immigration Act, corresponds to the wording of Article 7(1)(b) of the Directive. Article 7(1)(b) of the Directive concerns the right of residence for economically inactive EEA nationals and requires that the EEA national have sufficient resources and comprehensive sickness insurance.

The Ministry understands that the Authority essentially asks whether a TCN, who is a parent and primary carer of a child of EEA nationality fulfilling the conditions for residence in a host EEA State pursuant to Article 7(1)(b) of the Directive, is entitled to a derived right of residence in that State based on the Directive.

The Directive applies, pursuant to Article 3(1), to all EEA nationals who move or reside in an EEA State other than that of which they are a national, and to their "*family members*" as defined in Article 2(2).

Article 7(1)(b) of the Directive provides residence rights for the EEA national and his "*family members*". Further Article 7(2) confers residence rights also to "*family members*" who are not nationals of an EEA State.

It follows from the wording of Article 2(2) that a parent of an EEA national child does not fall within the scope of *"family member"* within Article 2(2). Article 2(2) (d), only includes "*dependent direct relatives in the ascending line…*". Consequently, a parent of an EEA-national child, is not a beneficiary of rights under Article 3(1) and cannot have derived rights of residence pursuant to Article 7(2). This interpretation of the Directive is confirmed by EU-case law. From this follows that a TCN parent cannot derive rights based on the Directive because they fall outside the personal scope of the Directive.

However, the Court of Justice of the European Union (*"the ECJ"*) has held that a parent caring for a child of Union citizenship may derive rights of residence under EU law. A refusal to allow a TCN parent, who is the carer of a minor of EU nationality, to reside with that child in the host Member State would deprive the child's right of residence of effectiveness. The Ministry observes that this reasoning by the ECJ, is not based on the Directive as a sole legal basis. Rather, the ECJ has based its reasoning on either Article 21 TFEU as the sole legal basis or Article 21 TFEU and the Directive combined as legal basis.

Firstly, in case C-200/02 *Zhu and Chen* para. 46, the Court referred to the child's right of residence under Article 18 EC (Article 21 TFEU) and Directive 90/364 and concluded that "*those same provisions*" allow a parent who is that minor's primary carer to reside with the child in the host Member State.

Next, in case C-40/11 in *Iida* para. 69, the Court concluded at the outset that the parent could not derive residence rights based on the Directive, as the person concerned was not a family member under Article 2(2) but held with reference to *Zhu and Chen* that such residence rights could be based on Articles 20 or 21 TFEU.

Third, in case C-86/12 *Alokpa and Moudoulou,* the Court maintained in para. 29, its reference to the *combined* legal basis of Article 21 TFEU and the Directive:

"Thus, 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…"

Furthermore, when giving instructions as to how the national court should proceed, the Court went on to state the following in para.31:

" If the conditions set out in Article 7 (1) of Directive 2004/38 are not satisfied (by the Union citizen child), Article 21 TFEU must be interpreted as meaning that it does not preclude Mrs Alokpa (the parent) from being refused a right of residence in Luxembourg."

In other words, fulfilment of the conditions in the directive by the Union citizen is a prerequisite for derived rights by TCN parent, while *the*- or at least a necessary - legal basis for granting such a right is Article 21 TFEU.

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.

It must be acknowledged that the normative framework regarding the rights of residence for *economically inactive persons* and TCN within the EU and EEA are different. Within the EU, the right to move and reside freely in other Member States is conferred directly on EU citizens by Article 21 TFEU, whilst the Directive is intended to establish the conditions and limitations governing the exercise of those rights, as is required by that Treaty provision.

The Directive was made part of the EEA Agreement with the reservation that the concept of Union citizenship has no equivalence in the EEA Agreement and, that residence rights could thus only be recognised as regards TCN who are granted such rights by the Directive as "*family members"* of an EEA national. In the EU legal order, the right of residence of parent-carers of children who are not workers or former workers is not considered to be derived directly from secondary Union legislation in force, but rather from Article 21 TFEU. The question therefore arises as to how this case-law can be applied in the context of the EEA legal order, in circumstances where the EEA Agreement has no equivalent to Article 21 TFEU.

The Ministry observes that the Authority refers to guidance from the EFTA Court in recent case law on how to address similar situations within the EEA legal order. The RDO refers to the cases of E-28/15 *Jabbi* and E- 4/19 *Campbell*. The Ministry notes that the reasoning offered in *Jabbi* and *Campbell* was limited to the *"return situation"* at issue in those two cases. The Ministry`s assessment is that these cases concerned family members that fell within the personal scope of the Directive (spouses, cf. Article 2(2)). The question before the

EFTA Court was solely whether Article 7(1)(b) could be invoked against the host EEA State in those situations. By contrast, the question in the present infringement case is whether an EEA national child's TCN parent is entitled to residence rights based on the Directive, *even if he or she falls outside the personal scope of the Directive.* This poses a distinct legal question that has not been considered by the EFTA Court before. It must, consequently, be assessed on its own merits.

The present case E-16/20, therefore, provides the EFTA Court with the opportunity to develop it reasonings with regard to the legal basis in EEA law for the right of residence of an EEA national child and his/her TCN primary carer. The Ministry's main interest in the case that is pending is to obtain legal clarification of the rights for EEA-national children and derived rights for TCN parents. It is from this perspective that the Ministry has requested that the Authority would allow the judiciary time to complete the ongoing proceeding before deciding how to proceed in the infringement case.

The Ministry will take account of the Advisory opinion from the EFTA-Court in case E-16/20 when it is delivered.

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

The wording of Section 113(3) and 114(3) of the Immigration Act, is corresponding to the wording of Article 12(3) of the Directive, 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.

Sections 113(3) and 114(3) of the Immigration Act, which implement Article 12(3) of Directive into Norwegian law, states that the EEA-national children may retain a right of residence provided that the child is enrolled at an approved educational establishment. The provision does however not mention stepchildren of EEA nationals explicitly, and neither does UDI’s guidelines, RUDI-2010-25.

As mentioned, the Ministry agrees with the assessment of the Authority that also the children of the spouse or cohabitant of an EEA-national, may retain such residence rights on the basis of Article 12(3) of the Directive, provided that the child is enrolled at an approved educational establishment.

Therefore, the Ministry has decided to clarify the scope of the Immigration Act Section 113(3) and 114(3) by instructing the UDI on its interpretation. The instruction makes it clear that children of the spouse or cohabitant of an EEA-national falls within the scope of these provisions. See the enclosed instruction to UDI.

It is our assessment that this clarification of the application of Sections 113(3) and 114(3) of the Immigration Act, which implement Article 12 (3) of the Directive, fully and timely addresses the concerns expressed by the Authority concerning Article 12(3).

4. Concluding remarks

The Ministry recalls that the advisory opinion of the EFTA Court in case E-16/20 is expected shortly. In light of this, and for the reasons stated above, we consider it pertinent to await the advice of the Court before concluding on the question raised by the Authority on the right of residence for an EEA national child and his/her third-country national primary carer. We can assure the Authority that we will take due account of the advisory opinion from the Court. Accordingly, we would once again request the Authority to await the outcome of the pending judicial proceedings before deciding on the way forward on this aspect of the infringement case against Norway.

The Ministry remains at the Authrority`s disposal, should you have any further questions.

Yours sincerely

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Director General

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Deputy Director General

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