

EFTA COURT

Action brought on 20 December 2023 by the EFTA Surveillance Authority against Norway

(Case E-16/23)

An action against Norway was brought before the EFTA Court on 20 December 2023 by the EFTA Surveillance Authority, represented by Marte Brathovde, Erlend Møinichen Leonhardsen, Hildur Hjörvar and Melpo-Menie Joséphidès, acting as Agents of the EFTA Surveillance Authority, Avenue des Arts 19H, B-1000 Brussels, Belgium.

The EFTA Surveillance Authority requests the EFTA Court to:

- 1. Declare 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/EC and be accompanied by their primary carers, Norway has failed to fulfil its obligations arising from Article 7(1)(b) of Directive 2004/38/EC, as interpreted in light of the fundamental right to family life.**
- 2. Order Norway to bear the costs of these proceedings.**

Legal and factual background and pleas in law adduced in support:

- By the present Application, the EFTA Surveillance Authority (the Authority) seeks a declaration from the Court 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/EC (the Directive) and be accompanied by their primary carers, Norway has failed to fulfil its obligations arising from Article 7(1)(b) of Directive 2004/38/EC, as interpreted in light of the fundamental right to family life.
- By letter of 9 December 2019, the Authority informed the Norwegian Government that it had opened a complaint case against Norway concerning the recognition of children's residence rights under EEA law in Norway. The case was opened following a complaint to the Authority dated 15 November 2019. The Authority and the Norwegian Government have since engaged in extensive dialogue on the matter.

- On 30 September 2020, the Authority issued a letter of formal notice to Norway whereby it concluded that Norway, 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 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 the Directive and that stepchildren of EEA nationals cannot retain a right of residence under Article 12(3) of Directive 2004/38/EC, had failed to fulfil its obligations arising from Articles 7(1)(b) and 12(3) of the Directive, as interpreted in light of the fundamental right to family life and the principle of legal certainty.
- By letter dated 30 November 2020, the Norwegian Government replied, recalling inter alia the view of the Immigration Appeals Board that there are differences between EU and EEA law as regards free movement and residence rights of EEA national children.
- On 7 July 2021, the Authority delivered a reasoned opinion to Norway, maintaining its views put forward in the letter of formal notice. The Authority required Norway to take the necessary measures to comply with the reasoned opinion by 7 October 2021 (the Compliance Deadline).
- The Norwegian Government answered by letter of 6 October 2021, maintaining that a third-country national parent of a minor with Union citizenship cannot claim a derived right of residence based on the Directive alone, because such persons fall outside the personal scope of Article 2(2) of the Directive. Norway maintained that such a right may only be derived from Article 21 TFEU in conjunction with the Directive. The Norwegian Government therefore concluded that, in the absence of an equivalent to Article 21 TFEU in the EEA Agreement, it is uncertain whether a third-country national parent may derive rights of residence based on the Directive and Article 7(2) thereof.
- In its answer to the reasoned opinion, Norway also informed the Authority of the adoption of Circular AI-5/2021 on 6 September 2021 instructing the Directorate of Immigration to recognise that stepchildren of EEA nationals fall within the scope of Article 12(3) of Directive. Following these changes, the Authority considered that there was no longer a breach of Article 12(3) of the Directive.
- The Authority states that the failure of the Norwegian Government to recognise the independent right of residence of children under EEA law and their right to be accompanied by their primary carers pursuant to Article 7(1)(b) of the Directive persisted at the Compliance Deadline and therefore submits the present application to the Court.