REPORT FOR THE HEARING

in Case E-16/23

APPLICATION to the Court 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 in the case between

EFTA Surveillance Authority

and

the Kingdom of Norway,

seeking a declaration that, by maintaining in force Section 112(1)(c) of the Immigration Act, together with the relevant guideline, 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 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.

I INTRODUCTION

1. The EFTA Surveillance Authority ("ESA") asserts that Section 112(1)(c) of the Immigration Act, together with the relevant guideline, have been interpreted and applied in such a way that EEA national children, who have sufficient resources through 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.

2. ESA's plea has two parts. The first part concerns the right of EEA national children to reside on the territory of another EEA State pursuant to Article 7(1)(b) of Directive 2004/38/EC. The second part concerns a derived right of residence for third-country nationals who are primary carers of an EEA national who has a right of residence pursuant to Article 7(1)(b).

3. Norway requests the EFTA Court to dismiss ESA's application as unfounded and order ESA to pay the costs of the proceedings.

II LEGAL BACKGROUND

EEA law

4. 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 (OJ 2004 L 158, p. 77; and Norwegian EEA Supplement 2012 No 5, p. 243) ("the Directive") was incorporated into the EEA Agreement by Decision No 158/2007 of the EEA Joint Committee of 7 December 2007 (OJ 2008 L 124, p. 20; and Norwegian EEA Supplement No 26, p. 17) ("the JCD"), which entered into force on 1 March 2009.

5. Together with the JCD, the Contracting Parties adopted a Joint Declaration by the Contracting Parties to Decision No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement ("the Joint Declaration"). The Joint Declaration reads:

> *The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.*
>
> *The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognize that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement*.

6. Recital 6 of the Directive reads:

> *In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order*

to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

7. Recital 31 of the Directive reads, in extract:

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

8. Article 2 of the Directive is entitled "Definitions", and provides in point (2) the following definition 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 dependents 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);

9. Article 7 of the Directive is entitled "Right of residence for more than three months". Article 7(1) and (2) provides, in extract:

1. 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; *or*

...

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the union citizen in the host Member State, provided that such union satisfies the conditions referred to in paragraph 1(a), (b) or (c).

10. Article 12 of the Directive is entitled "Retention of the right of residence by family members in the event of death or departure of the Union citizen" and provides in Article 12(3):

> *The Union citizen's departure from the 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.*

National law

11. Directive 2004/38/EC is incorporated into Norwegian law through the Act of 15 May 2008 No 35 relating to the admission of foreign nationals into the realm and their stay here (*lov 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her (utlendingsloven))* ("the Immigration Act").

12. Chapter 13 of the Immigration Act (Sections 109-125a) contains special rules for foreign nationals covered by the EEA Agreement.

13. Section 112 of the Immigration Act, which incorporates Article 7 of the Directive into Norwegian law, is entitled "Right of residence for more than three months for EEA nationals". Section 112(1)(c) provides:

> *An EEA national has a right of residence for more than three months as long as the person in question …*
>
> *(c) possesses sufficient funds to provide for himself or herself and any accompanying family members, and is covered by a health insurance policy that covers all risks during the stay.*

III PRE-LITIGATION PROCEDURE

14. On 15 November 2019, following a complaint to ESA, a case was opened against Norway concerning the recognition of children's residence rights under EEA law in Norway.

15. By letter dated 9 December 2019, ESA informed the Norwegian Government that it had opened a complaint case. ESA and the Norwegian Government have since engaged in extensive dialogue.

16. On 30 September 2020, ESA 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.

17. The Norwegian Government replied on 30 November 2020, stressing, inter alia, the Immigration Appeals Board ("UNE") view that there are differences between EU and EEA law as regards free movement and residence rights of EEA national children. Also in its reply, the Norwegian Government informed ESA of a request for an advisory opinion in the case *Q and Others*.

18. On 7 July 2021, ESA issued a reasoned opinion to Norway wherein ESA maintained its view 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 guidelines, 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. ESA required Norway to take the measures necessary to comply with the reasoned opinion by 7 October 2021. At that date Norway had not, in ESA's view, taken all the measures necessary for such compliance.

19. By letter dated 6 October 2021, the Norwegian Government replied to the reasoned opinion 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.

20. In its reply to the reasoned opinion, the Norwegian Government noted that Article 7(1)(b) of the Directive was correctly implemented in Section 112(1)(c) of the Immigration Act and that an EEA national fulfilling the requirement in Article 7(1)(b) has a right to reside in Norway.

21. The Norwegian Government furthermore informed ESA that the Ministry of Labour and Social Affairs ("the Ministry") had adopted Circular AI-5/2021 on 6 September 2021, instructing the Directorate of Immigration ("UDI") to recognise that stepchildren of EEA nationals fall within the scope of Article 12(3) of the Directive.

22. The case was also discussed at the annual meeting between ESA and Norwegian ministries in Norway on 28-29 October 2021. The Norwegian Government confirmed that EEA national children may have a right of residence pursuant to Article 7(1)(b) of

the Directive but maintained that there is no legal basis in EEA law to grant their primary carers a corresponding right.

IV PROCEDURE AND FORMS OF ORDER SOUGHT BY THE PARTIES

23. On 20 December 2023, ESA submitted an application ("the Application") to the Court, 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 ("SCA"), seeking a declaration that Norway has failed to fulfil its obligations arising from Article 7(1)(b) of the Directive.

24. ESA requests the Court to:

(i) Declare that Norway, 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, 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 and

(ii) Order Norway to bear the costs of these proceedings.

25. On 5 January 2024, the Court set 5 March 2024 as the deadline for Norway to submit its defence.

26. On 5 March 2024, Norway submitted its Statement of Defence ("the Defence"), pursuant to Article 107 of the Rules of Procedure ("RoP"). The Norwegian Government requests the Court to:

(i) Dismiss the Application of the EFTA Surveillance Authority as unfounded.

(ii) Order the EFTA Surveillance Authority to pay the costs of the proceedings.

27. On 7 March 2024, the Court set 8 April 2024 as the deadline for the submission of ESA's reply. On the same date, the Court set a deadline of 7 May 2024 for the Governments of the EFTA States, the Union and the European Commission to submit statements of case or written observations.

28. On 8 April 2024, ESA submitted its reply ("the Reply").

29. On 9 April 2024, the President set 7 May 2024 as the deadline for the submission of the rejoinder ("the Rejoinder").

30. On 7 May 2024, Norway submitted its Rejoinder. On the same date, the Government of Iceland submitted its written observations pursuant to Article 20 of the Statute.

V WRITTEN PROCEDURE BEFORE THE COURT

31. Pleadings have been received from:

- the applicant, ESA, represented by Marte Brathovde, Erlend Møinichen Leonhardsen, Hildur Hjörvar and Melpo-Menie Joséphidès, Department of Legal & Executive Affairs, acting as Agents; and

- the defendant, Norway, represented by Kristin Hallsjø Aarvik, advocate, Jon-Christian Rynning, trainee lawyer at the Office of the Attorney General for Civil Affairs, and Marie Munthe-Kaas, adviser at the Ministry of Foreign Affairs, acting as Agents.

32. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

- the Government of Iceland, represented by Ms Inga Þórey Óskarsdóttir, legal adviser, Ministry for Foreign Affairs and Mr Arnar Sigurður Hauksson, legal adviser, Ministry of Justice, acting as Agents.

VI SUMMARY OF PLEAS IN LAW AND ARGUMENTS SUBMITTED

The applicant

Introduction

33. ESA contends that children have an independent right to free movement, explaining that the wording of Article 7(1)(b) of the Directive does not exclude children from its scope.

34. ESA explains that Article 7(1)(b) of the Directive establishes a right of residence for EEA nationals on the territory of another EEA State for more than three months, provided that the EEA nationals have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host State during the period of residence and have comprehensive sickness insurance cover in the host State.

35. ESA asserts that EEA national children do not benefit from the right of residence pursuant to Article 7(1)(b) of the Directive because of how Norway has interpreted and applied Section 112(1)(c) of the Immigration Act. And thus ESA seeks a declaration that Norway has failed to fulfil the obligation arising from Article 7(1)(b) of the Directive by maintaining in force Section 112(1)(c) of the Immigration Act.

36. ESA explains that its dialogue with Norway on children's residence rights began following a complaint to ESA dated 15 November 2019. In the specific complaint case, UDI refused an application for a residence permit in Norway for a Peruvian mother and her son of Greek nationality pursuant to the Directive on the grounds that the son could not himself fulfil the conditions for a right of residence under Section 112(1) of the Immigration Act. UDI's decision was upheld by the Immigration Appeals Board ("UNE"). UNE found that the mother could not derive a right of residence from her son by reason of the fact, inter alia, that a child does not exercise EEA rights themselves, but derives a right of residence from one or both parents.

First part of the plea

37. By the first part of its plea, ESA submits that Norway has breached Article 7(1)(b) of the Directive by interpreting and applying Section 112(1)(c) of the Immigration Act together with the relevant guideline in such a way that EEA national children, who have sufficient resources through their primary carers, cannot benefit from their right of residence under Article 7(1)(b) of the Directive.

The relevance of the absence of an Article 21 TFEU equivalent in the EEA Agreement

38. ESA maintains that it is settled case law of the Court of Justice of the European Union ("the ECJ") that the capacity of an EU national to enjoy a right to free movement guaranteed by EU law, both those guaranteed by Treaty and secondary law, cannot be made conditional on the person concerned reaching the age required to able to exercise those rights personally.[1] This means that children have an independent right to free movement under both primary and secondary EU law.

39. ESA contends that, in cases where the ECJ has acknowledged a child's independent right to free movement, the ECJ has relied on the relevant provision of secondary law in combination with Article 21 TFEU, which has no equivalent in the EEA Agreement.

40. ESA observes that, in its dialogue with ESA regarding the case underlying the Application, the Norwegian Government has maintained that the absence of an Article 21 TFEU equivalent in the EEA Agreement places children, as regards their independent right of residence, in a different legal position in the EFTA pillar to that which applies in the EU pillar.

41. ESA maintains, however, that the Court has already concluded that the absence of an Article 21 TFEU equivalent in the EEA Agreement is not determinative for the rights of EEA nationals under EEA law, citing the cases of *Gunnarsson*, *Jabbi* and *Campbell* in which the Court found that EEA nationals could base their rights on Article 7(1)(b) of the Directive. Further, the Court has never indicated that the absence of a

[1] Reference is made to the judgments of 19 October 2004 in *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 20, and of 10 October 2013 in *Alokpa*, C-86/12, EU:C:2013:645, paragraph 29. Reference is also made to the Commission Notice "*Guidance on the right of free movement of EU citizens and their families*", C(2023) 8500 final, 6 December 2023, p. 21.

parallel provision to Article 21 TFEU in the EEA context means that the rights which the ECJ inferred from that provision could not exist in the EEA legal order.

42. ESA submits that, insofar as the ECJ's judgments conferring independent rights of residence on children rely on Article 21 TFEU, in order to ensure a homogeneous interpretation and application of the rights of free movement and residence in the EEA as a whole, such a right is in the EEA EFTA States based on Article 7(1)(b) of the Directive.

43. ESA submits that any possible uncertainty with regard to the Directive's applicability to economically inactive EEA nationals asserting rights against their home State has been clarified, and removed, through the Court's case law.

44. According to ESA, in *Gunnarsson*,[2] the Court noted that it could not be decisive that in the EU the ECJ had based the right of an economically inactive person to move from their home State directly on Article 21 TFEU and not on Article 7 of the Directive.

45. ESA observes further that, as the Court noted in *Gunnarsson*, the introduction of Union citizenship cannot have the effect of depriving individuals of rights which they had acquired beforehand under the EEA Agreement.[3] The Court concluded that Article 7(1)(b) of the Directive had to be interpreted in such a way that it confers a right also to economically inactive EEA nationals, because it is of no consequence that the rights of economically inactive persons in the Directive were adopted by the Union legislature on the basis of Article 21 TFEU.[4] ESA maintains that this approach was confirmed in *Jabbi* and *Campbell*.[5]

46. Furthermore, according to ESA, as established by the Court in *Jabbi* and reaffirmed in *Campbell*, the fact that no parallel to Article 21 TFEU exists in EEA law entails that the Directive must be interpreted differently in order to ensure the same result in the EEA, and in order to realise 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 provided that the conditions of Article 7(1)(b) of the Directive are fulfilled.[6]

47. ESA contends, with regard to the condition of "sufficient resources" in Article 7(1)(b) of the Directive, that it is settled case law of the ECJ that the condition is fulfilled when an EU national possesses sufficient resources, irrespective of the origin of those resources.[7]

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[2] Reference is made to the judgment of 27 June 2014 in *Gunnarsson*, E-26/13.
[3] Reference is made to the judgment in *Gunnarsson*, E-26/13, cited above, paragraph 80.
[4] Reference is made to the judgment in *Gunnarsson*, E-26/13, cited above, paragraphs 79, 81 and 82.
[5] Reference is made to the judgments of 26 July 2016 in *Jabbi*, E-28/15, paragraphs 78 to79, and of 13 May 2020 in *Campbell*, E-4/19, paragraph 59.
[6] Reference is made to the judgment in *Campbell*, E-4/19, cited above, paragraph 57.
[7] Reference is made to the judgments in *Zhu and Chen*, C-200/02, cited above, paragraph 30; *Alokpa*, C-86/12, cited above, paragraph 27; of 30 June 2016 in *NA*, C-115/15, EU:C:2016:487, paragraphs 77 to 78; and of 2 October 2019 in *Bajratari*, C-93/18, EU:C:2019:809, paragraph 53.

48. In ESA's submission, the sole purpose of this condition is to meet the legitimate concern of the host State that the individuals concerned do not become an unreasonable burden on public finances. In that connection, ESA asserts that the ECJ has specifically stated that the resources can be provided by a child's third-country national primary carer.[8] ESA contends that the "sufficient resources" condition must be interpreted in the same way in the EEA.

49. ESA submits that Article 7(1)(b) of the Directive confers an independent right of residence on children under EEA law, provided that the conditions of Article 7(1)(b) of the Directive are fulfilled, and furthermore, that the condition of having "sufficient resources" does not have to be fulfilled by the EEA nationals themselves and can be fulfilled, inter alia, indirectly through a primary carer.

Consistent and general administrative practice evidence the breach of Norway's obligations under Article 7(1)(b) of the Directive

50. ESA submits three main types of evidence with which it seeks to demonstrate a consistent and general administrative practice by Norway interpreting and applying Section 112(1)(c) of the Immigration Act 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:

(i) The relevant guideline from UDI;

(ii) Decisions of the immigration authorities, including the decisions in the complainant's case; and

(iii) Statements of a general nature from the Norwegian immigration authorities and the Ministry, both in its dialogue with ESA and in its pleadings before the Court, the ECJ and domestic courts.

51. ESA contends, with respect to point (i), that, at the deadline for compliance with the reasoned opinion, the relevant guideline from UDI on how to apply Section 112(1)(c) of the Immigration Act provided that "a right of residence on the basis of sufficient resources requires that the EEA national can provide for himself with his own resources". This excluded the possibility of children fulfilling the criteria under Article 7(1)(b) of the Directive indirectly through the resources of their primary carer.

52. ESA contends, with respect to point (ii), that the decision by UDI and UNE in the complaint case underlying the Application, as well as decisions by UNE made available to ESA by the Norwegian Government confirm the Norwegian practice of not allowing EEA national children to benefit from the right of residence under Article 7(1)(b) of the Directive, even though they have sufficient resources through their primary carer, by:

[8] Reference is made in addition to the judgments of 16 July 2015 in *Singh*, C-218/14, EU:C:2015:476, paragraph 74, and of 27 February 2020 in *RH*, C-836/18, EU:C:2020:119, paragraph 31.

(a) Maintaining that children do not have a right of residence pursuant to Section 112 of the Immigration Act/Article 7(1)(b) of the Directive;

(b) Maintaining that children do not exercise EEA rights themselves; and

(c) Requiring that children must possess the resources themselves in order to fulfil the "sufficient resources" requirement.

53. ESA contends, with respect to point (iii), that this consistent and general practice contained in the guidelines and decisions by the immigration authorities has been confirmed through statements of a general nature by UNE and the Ministry. First, UNE has stated that it is of the view that children, as a matter of principle, are excluded from the scope of Article 7(1)(b) of the Directive. Second, UNE has in its decisions held, inter alia, that it "considers that it is clear that the Directive has not been implemented in such a way that the complainant can derive any rights from this" and that "it disagrees with the complainant, who argues that it follows from the case law of the ECJ that children have rights directly from the Directive in a way that binds Norway under EEA rules". Third, the Ministry has either referred to UNE's view, failed to engage in dialogue with ESA or maintained, inter alia, that "there are differences between EEA law and EU law when it comes to immigration" and that "the Ministry is not certain whether only the Directive could serve as a legal basis".

54. ESA further asserts that the Norwegian Government is accountable for breaches of EEA law by all organs of the State, including its immigration authorities.

Developments postdating the deadline for compliance with the reasoned opinion and their relevance for the present case

55. ESA draws to the Court's attention certain developments which postdate the deadline for compliance with ESA's reasoned opinion.

56. First, ESA explains that, at ESA's annual package meeting with the Norwegian Government in 2021, UDI acknowledged that children, as a matter of principle, have an independent right of residence under Article 7(1)(b) of the Directive. In its reply to ESA's follow-up letter after the 2021 package meeting, the Ministry also acknowledged this. Later, in the Ministry's reply to ESA's follow-up letter after the package meeting in 2022, it was stated that "UNE has now changed its position and agrees that EEA national children can enjoy an independent right of residence under EEA law".

57. Second, ESA explains that, after the expiry of the deadline for compliance with the reasoned opinion, UDI, UNE and the Ministry have acknowledged that the source of the funds is irrelevant. The relevant guideline by UDI has been amended to reflect the fact that there is no requirement as to where the funds come from. ESA notes, however, that where the guideline gives examples of what funds can be relevant, it refers to income secured by "family members", which, Norway does not consider to encompass parents of children within the meaning of the Directive. Income of a spouse or a partner is specifically mentioned, but not the income of a parent.

58. ESA observes that it is settled case law of the ECJ that, even if the State concerned does not deny a failure to fulfil its obligations, it is incumbent upon the Court, in any event, to determine whether or not the alleged breach of obligations exists.[9] In these circumstances ESA submits that the burden of proving that its allegations are substantiated must be lower than when the breach of obligations is contested by the State concerned.

59. ESA explains that at the date of submitting the Application it is unclear whether this change to the UDI guideline is reflected in a consistent manner in the decisions of UDI, UNE and domestic courts. ESA notes that the relevant guideline – RUDI-2011-37 – is adopted by UDI itself, and presumably neither expresses the views of nor is binding upon, inter alia, UNE, the Ministry or domestic courts.

60. ESA explains further that, upon its request for Norway to provide it with any decisions by the immigration authorities similar to those concerning the complaint case underlying the Application, the Ministry shared three decisions by UNE with ESA and otherwise stated that neither UDI nor UNE has the data systems necessary to identify decisions concerning Article 7(1)(b) of the Directive. ESA asserts that administrative difficulties cannot justify failure to observe obligations arising under EEA law,[10] nor relieve the State of its duty to, within the scope of its powers, repair any and all breaches of EEA law.[11]

Second part of the plea

61. In the second part of the plea, ESA submits that Norway has breached its obligations arising from Article 7(1)(b) of the Directive by interpreting and applying Section 112(1)(c) of the Immigration Act in such a way that EEA national children, who have sufficient resources through their primary carers, cannot be accompanied by their primary carers.

62. According to ESA, it is settled case law of the ECJ that when an EU national child has an independent right of residence in a host State under Article 21 TFEU and Article 7(1)(b) of the Directive, a necessary corollary of that right is that the parent, as 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.

63. ESA refers to the ECJ's finding in Case C-200/02 *Chen* 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".

64. According to ESA, Norway does not contest that this follows from the ECJ's settled case law. However, in ESA's submission, Norway's consistent interpretation

[9] Reference is made to the judgment of 28 March 2019 in *Commission* v *Ireland*, C-427/17, EU:C:2019:269, paragraph 43.
[10] Reference is made to the judgment of 12 July 2023 in *ESA* v *Norway*, E-15/22, paragraph 38.
[11] Reference is made to the judgment of 4 July 2023 in *RS*, E-11/22, paragraph 53.

and application of Section 112(1)(c) does not allow for EEA national children who have a right of residence pursuant to Article 7(1)(b) of the Directive, and fulfil the conditions of Article 7(1)(b) of the Directive, to be accompanied by their primary carers.

65. ESA observes that Norway has consistently maintained that, due to the absence of an Article 21 TFEU equivalent in the EEA Agreement, EEA national children do not have a right pursuant to the EEA Agreement to be accompanied by their primary carers. It is Norway's view that, since the definition of "family member" in Article 2(2) of the Directive does not include primary carers, an EEA national child with an independent right of residence pursuant to Article 7(1)(b) of the Directive cannot be accompanied by their primary carer, even though, according to ESA, the ECJ has concluded the opposite.

Denying EEA national children who have sufficient resources through their primary carers the right to be accompanied by their primary carers deprives the child's independent right of any practical effect

66. ESA submits that the absence of an Article 21 TFEU equivalent in the EEA Agreement is irrelevant for the independent right of residence for EEA national children under EEA law, as, in the EEA, this right can be established on the basis of the Directive. ESA submits that this also applies to the right of the child, in such situations, to be accompanied by their primary carers.

67. ESA contends that if an EEA national child did not have the right to be accompanied by their primary carer, this would deprive the child's independent right of residence under the Directive of any practical effect, in direct conflict with the Court's explicit findings that the provisions of the Directive must not, in any event, be deprived of their effectiveness or practical effect.

68. In ESA's view, this interpretation of Article 7(1)(b) of the Directive is moreover the only interpretation of that provision suitable to also safeguard the child's fundamental rights.

69. ESA submits that, in accordance with the Court's settled case law, fundamental rights form part of the general principles of EEA law, and the provisions of the EEA Agreement are to be interpreted in the light of fundamental rights.[12] It contends further that with specific regard to the Directive the Court has held that the Directive must be interpreted in the light of and in line with fundamental rights and freedoms.[13]

70. In determining the scope of fundamental rights, ESA contends that the provisions of the European Convention on Human Rights ("ECHR") and the judgments of the European Court of Human Rights ("ECtHR") are "important sources".[14]

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[12] Reference is made to the judgments of 12 December 2003 in *Ásgeirsson*, E-2/03, paragraph 23; of 26 July 2011 in *Clauder*, E-4/11, paragraph 49; and in *Jabbi*, E-28/15, cited above, paragraph 81.
[13] Reference is made to the judgment of 9 February 2021 in *Kerim*, E-1/20, paragraph 42.
[14] Reference is made to the judgment in *Kerim*, E-1/20, cited above, paragraph 43.

71. ESA submits that, in accordance with its Recital 31, when interpreting and applying the provisions of the Directive, particular regard must be had to the principles recognised by the Charter of Fundamental Rights of the European Union ("the Charter"). Even though the Charter has not been made part of the EEA Agreement, it follows, in ESA's submission, from this interpretative guideline that when using their discretion and implementing obligations under the Directive, the EEA EFTA States must comply with the general principles underlying the fundamental rights and freedoms laid down in the EU Charter.

72. ESA observes that the right to respect for private and family life, which is enshrined in Article 8(1) ECHR and Article 7 of the Charter, has already been relied on as a fundamental right by the Court.[15]

73. In that connection, ESA observes further that the ECJ has stated, with reference to Article 8(1) ECHR, that the right to live with one's close family results in obligations which may be negative, when a State is required not to deport a person, or positive, when it is required to let a person enter and reside in its territory.[16]

74. The ECJ has noted, ESA continues, that the ECHR does not *as such* guarantee the right of an alien to enter or to reside in a particular country, but the removal of a person from a country where close members of his or her family are living may amount to an interference with the right to respect for family life as guaranteed by Article 8(1) ECHR.[17] Similarly, the ECtHR has held that Article 8 ECHR does not as such guarantee the right to the granting of a particular type of residence permit, but measures restricting the right to reside in a State may, in certain circumstances, entail a violation of Article 8 if they create disproportionate repercussions on the private or family life of the individuals concerned.

75. In ESA's submission, Article 8 ECHR may thus involve a positive obligation for the State to ensure an effective enjoyment of a person's private or family life. It asserts that the ECtHR has held that a right to family reunification between a person with a right of residence in the State and their family member may result from Article 8(1) ECHR.[18]

76. ESA contends that a number of factors are relevant for that assessment, including whether children are involved, and whether the family member has sufficient resources not to become a burden on the host State. The latter requirement follows explicitly from the wording of Article 7(1)(b) of the Directive, whereas the former is a relevant criterion when assessing whether an expulsion measure is necessary in a democratic society and

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[15] Reference is made to the judgment in *Kerim*, E-1/20, cited above, paragraph 43.
[16] Reference is made to the judgment of 27 June 2006 in *Parliament* v *Council*, C-540/03, EU:C:2006:429, paragraph 52.
[17] Reference is made to the judgment in *Parliament* v *Council*, C-540/03, cited above, paragraph 53.
[18] Reference is made to ECtHR *M.A. v. Denmark* [GC], application no. 6697/18, judgment of 9 July 2021, paragraphs 134 to 136.

proportionate to the legitimate aim pursued, and should be afforded significant weight under Article 8 ECHR.[19]

77. The principle of the best interests of the child is explicitly enshrined in Article 3(1) of the United Nations Convention on the Rights of the Child, which has been ratified by all the EEA States, and in Article 24(2) of the Charter, which, in ESA's submission, the provisions of the Directive, in accordance with Recital 31 of the Directive, must "in particular" observe. ESA argues further that the Court has already recognised the best interests of the child as a relevant principle together with fundamental rights,[20] and that it forms part of the general principles of the ECHR.

78. ESA submits that, *prima facie*, the best interest of any child would be to reside with their primary carer.

79. For these reasons, ESA submits that a general administrative practice denying all EEA national children with a right of residence in Norway pursuant to Article 7(1)(b) of the Directive the right to be accompanied by their primary carers is in breach of Article 7(1)(b) of the Directive, interpreted in light of their fundamental right to family life.

80. Indeed, in its judgment in *Q and Others*,[21] the Court has already considered the parallel question of whether Article 10 of Regulation (EU) No 492/2011 confers a corresponding right of residence on the child's primary carer to that conferred on the child. ESA notes that just as the definition of "family member" in Article 2(2) of the Directive does not encompass primary carers of children, similarly third-country national primary carers also do not fall within the scope of Article 10 of Regulation (EU) No 492/2011, which nevertheless grants parents, as primary carers, a derived right of residence from their children.[22]

81. ESA notes that the Court, when concluding that Article 10 of Regulation (EU) No 492/2011 confers such a corresponding right on the child's primary carer, reached this finding based on an interpretation of that provision in light of the requirement of respect for the child's family life, noting that the child's independent right of residence under EEA law, read in the light of the requirement of respect for family life, "necessarily implies that the child has the right to be accompanied by the person who is his primary carer, irrespective of the primary carer's nationality". Furthermore, refusing to grant permission to remain in an EEA State to a parent who is the primary carer of

[19] Reference is made to ECtHR *Üner v. Netherlands*, application no. 46410/99, judgment of 18 October 2006, paragraph 57, and ECtHR *Jeunesse v. the Netherlands* [GC], no. 12738/10, judgment of 3 October 2014, paragraphs 119 to 120.

[20] Reference is made to the judgment of 21 April 2021 in *The Norwegian Government* v *L*, E-2/20, paragraph 52, where in relation to the relevance of family life in the assessment of whether to take an expulsion decision pursuant to Article 28(1) of the Directive, the Court stated that that should "also be assessed in the light of the principles of proportionality, of the child's best interests, and of fundamental rights".

[21] Reference is made to the judgment of 23 November 2021 in *Q and Others*, E-16/20.

[22] Reference is made to the judgment in *Q and Others*, E-16/20, cited above, paragraphs 50 to 51.

the child exercising their rights under Article 10 of Regulation (EU) No 492/2011 "infringes that right".[23]

82. ESA submits that the same reasoning as was employed by the Court in its judgment in *Q and Others* applies to the present case. Only an interpretation of Article 7(1)(b) of the Directive to the effect that a child, who has an independent right of residence under that provision and fulfils its other conditions, has the right to be accompanied by his/her primary carer respects the child's fundamental right to family life and takes into account the best interests of the child, which, arguably, is to be accompanied by their primary carer when pursuing their fundamental right to free movement under EEA law.

Consistent and general administrative practice evidence the breach of Norway's obligations under Article 7(1)(b) of the Directive

83. ESA submits that Norway's consistent and general administrative practice of interpreting and applying Section 112(1)(c) of the Immigration Act in such a way that an EEA national child cannot be accompanied by their primary carer pursuant to Article 7(1)(b) of the Directive is evidenced by:

(i) Decisions of the immigration authorities made available to ESA, including the decisions in the complaint case underlying the Application; and

(ii) Statements of a general nature from the Ministry, both in its dialogue with ESA and in its pleadings before the Court and domestic courts.

84. ESA contends, with respect to point (i), that the decisions by UNE in the complaint case underlying the Application, as well as decisions by UNE made available to ESA confirm the practice of not allowing EEA national children to be accompanied by their primary carers, based on the view that parents cannot derive a right of residence from their children pursuant to the Directive. In the decisions, UNE has held, inter alia, that the Directive has not been implemented in such a way as to grant parents as primary carers any rights, because they are not covered by the Directive's personal scope.

85. ESA contends, with respect to point (ii), that this consistent and general practice contained in the decisions by UNE has been confirmed through statements of a general nature by the Ministry. First, the Ministry has held that there is no legal basis for granting primary carers a right of residence under the Directive. Second, the Ministry has held that the ECJ, when granting a third-country national parent a right of residence with a Union citizen child, has done so on the basis of Article 21 TFEU or Article 21 TFEU and the Directive combined, concluding that "in the absence of an equivalent to Article 21 TFEU in the EEA Agreement, it is our assessment that a [third-country national] parent may not derive rights of residence based on the Directive and Article 7(2) thereof".

[23] Reference is made to the judgment in *Q and Others*, E-16/20, cited above, paragraph 50.

86. ESA submits that this consistent and general practice by the Norwegian Government is also evidenced by court pleadings from the Norwegian Government in cases before the Court and domestic courts.

Reply

First part of the plea

87. ESA reiterates that, by the first part of the plea, ESA requests the Court to 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 the Directive, Norway has failed to fulfil its obligations arising from Article 7(1)(b) of the Directive. ESA understands the Defence to mean that Norway agrees with ESA that Article 7(1)(b) of the Directive confers an independent right of residence on EEA national children provided that the conditions set out in Article 7(1)(b) of the Directive are fulfilled, and that the condition of having "sufficient resources" does not have to be fulfilled by the EEA national themselves. ESA understands Norway, however, to deny that ESA has provided sufficient evidence of a consistent and general administrative practice that the Norwegian Government has interpreted and applied Section 112(1)(c) of the Immigration Act in such a way that EEA national children who have sufficient resources cannot benefit from a right of residence pursuant to Article 7(1)(b) of the Directive.

88. ESA submits that, through the evidence relied on in the Application, it has exceeded the evidential duty that it must discharge to establish an administrative practice that is of a consistent and general nature.

Establishing a failure to fulfil obligations on the basis of an administrative practice

89. In ESA's view, the three key issues follow from the Defence with regard to the evidential duty which ESA must discharge to establish a breach of EEA law through administrative practices. First, which evidence ESA can rely on when submitting an Application to the Court concerning a breach of EEA law evidenced through administrative practices. Second, the amount of evidence ESA must base its case on in order to discharge its burden of proof. Third, the relevance of supposed evidence to the contrary, and the requirements that such evidence presented by the authorities of an EEA State must satisfy.

90. With regard to its burden of proof, ESA emphasises that where it relies on an administrative practice to evidence a breach of EEA law, in accordance with settled case law, that practice must be "to some degree, of a consistent and general nature".[24] It contends that the parties agree on this.

[24] Reference is made to the judgment of 11 September 2013, *ESA* v *Norway*, E-6/12, paragraph 58.

91. ESA observes that, in the Defence, the Norwegian Government asserts that ESA has not provided sufficient evidence of a consistent and general administrative practice in Norway of interpreting and applying Section 112(1)(c) of the Immigration Act in such a way that EEA national children, who have sufficient resources, cannot benefit from a right of residence pursuant to Article 7(1)(b) of the Directive. This is in part because, in the view of the Norwegian Government, the evidence produced by ESA concerns the second part of ESA's plea and not the first part. ESA contends in response that the splitting of the plea in the Application into a first and a second part is a matter of structuring the arguments presented, with no legal implications.

92. ESA explains that the splitting of the plea follows the logical structure of the alleged breach. In order to reach the conclusion that a third-country national parent is not allowed to accompany their EEA national child, which is the breach set out in the second part of the plea, one necessarily first needs to address whether an EEA national child can at all have an independent right of residence pursuant to the Directive (the first part of the plea). Otherwise, the issue set out in the second part of the plea would simply not arise.

93. ESA asserts that the relevant case law concerning the right of residence for third-country national primary carers' derived from their children on which ESA relies in the Application follows the same structure. For instance, in *Chen* the ECJ first establishes that children have an independent right of residence under the heading "[t]he right of residence of a person in Catherine's situation" before concluding that the primary carer derives a right of residence from that of the child under the heading "[t]he right of residence of a person in Mrs Chen's situation".[25]

94. Hence, ESA submits that what the Norwegian Government describes in the Defence as "obiter statements which did not affect the outcome in those cases", i.e. statements concerning the residence rights of EEA national children in cases concerning the residence rights of the primary carer, can and do evidence Norway's consistent administrative practice of failing to acknowledge EEA national children's independent right of residence under EEA law irrespective of whether those statements were actually decisive for the outcome of the case. The simple assertion that certain explicit statements are obiter cannot deprive them of their probative value. This is even more so the case when those statements appear systematically. For those reasons, ESA contends, the Norwegian Government's submission that the decisions by the immigration authorities and the general statements by the immigration authorities and the Ministry relied on by ESA in its Application concern the second part of the plea, and not the first part of the plea, is therefore incorrect and must be dismissed.

95. ESA refers again to guideline RUDI-2011-37[26], as it was worded at the deadline for compliance with the reasoned opinion, and asserts that, in accordance with case law, this guidance in itself suffices to establish an administrative practice that is "to some

[25] Reference is made to the judgment in *Zhu and Chen*, C-200/02, cited above, paragraphs 18 and 42.
[26] Application, paragraph 48.

degree, of a consistent and general nature".[27] ESA contends that the Norwegian Government has not disputed this.

96. In response to the assertion by the Norwegian Government in the Defence that the statements of UNE "do not reflect the Government's view",[28] ESA contends that it has been a persistent issue in the present case to get the Ministry to engage in dialogue with ESA. Consistently the Ministry has either referred to the views of UNE or otherwise failed to engage.

97. ESA notes that it is settled case law that the EEA States are required, under Article 3 EEA, to facilitate the achievement of ESA's tasks. This obligation rests on the EEA State concerned throughout the procedure provided for by Article 31 SCA. The same applies when ESA investigates possible infringements of EEA law pursuant to Article 31 SCA. The Norwegian Government cannot both refer to the statements of UNE in its formal letters to ESA in the course of an Article 31 SCA procedure, whilst at the same time maintaining before the Court that the statements of UNE do not reflect the Norwegian Government's view. The Norwegian Government cannot cherry pick when it wishes to rely on UNE's statements and when it considers those statements to be entirely disconnected from the State's policy and positions. Therefore, in ESA's submission, when the Norwegian Government decides to reply to ESA's enquiries in the course of an Article 31 SCA procedure by way of reference to statements by UNE in a letter from the Ministry itself, those statements must be attributable to the Norwegian Government.

98. ESA submits that, in principle, single statements from an organ of the State setting out its general view are in themselves capable and sufficient to establish an administrative practice that is "to some degree, of a consistent and general nature". ESA contends that it is not required, as it has done in this case, to rely on numerous statements by various organs of the State, administrative circulars, decisions by the immigration authorities and the Norwegian Government's court pleadings in order to establish the existence of such an administrative practice.

99. ESA explains that the present case was submitted to the Court pursuant to the second paragraph of Article 31 SCA, according to which ESA may bring a matter before the Court if the State concerned has not complied with ESA's reasoned opinion within the period laid down by ESA. ESA contends that, prior to that, in accordance with the first paragraph of Article 31 SCA, ESA gave Norway numerous opportunities to submit its observations in the present case, as is set out in Section 2 of the Application.

100. ESA contends that the pre-litigation procedure, from ESA's opening of the own-initiative case to the State's reply to ESA's reasoned opinion, is intrinsically linked to the case ESA brings before the Court. ESA cannot bring a different matter to the Court than what has been addressed in the pre-litigation procedure. It would completely undermine ESA's infringement investigations if the information provided to it by the

[27] Reference is made to the judgment in *ESA* v *Norway*, E-6/12, cited above, paragraph 58.
[28] Defence, paragraph 64.

States as a part of those investigations cannot later serve as evidence of the State's administrative practice before the Court. In the same vein as ESA opens and closes its infringement proceedings on the basis of, inter alia, official statements by the authorities of the State, it must be able to bring the case to the Court on the basis of those same statements.

101. ESA contends further that the consistent administrative practice of the Norwegian Government evidenced by ESA in the Application is not altered by the numbers provided by the Norwegian Government in paragraph 45 of the Defence concerning applications handled by the police, and/or by Annexes D.1 to D.7 to the Defence.

102. ESA claims Annexes D.3, D.4, D.5 and D.6 to be inadmissible as they were all submitted solely in Norwegian. The working language of the Court is English, and in accordance with Article 29(3) RoP, all supporting documents submitted to the Court shall be in English or be accompanied by a translation into English.

103. ESA asserts that it follows from settled case law that any evidence, in order to be taken into account by the Court, must be of such nature that the Court can "attribute probative value" to it.

104. ESA submits, on this basis, that in order to ensure the right of defence of the parties, this must as a minimum require that evidence raised by a party is to be presented in such a way that it is possible for the counterpart to ascertain, or challenge, its accuracy or relevance. ESA submits that the table with numbers of supposed registrations of EEA national children with the Norwegian police in the years 2016–2023 in paragraph 45 in the Defence and Annex D.7 fails to meet this test, and no probative value should be attributed to it.

105. First, as regards the table in paragraph 45 of the Defence, ESA contends that it is not possible, on the basis of the numbers presented therein, for ESA to engage with the allegations of the Norwegian Government. ESA has previously asked to see redacted versions of these police decisions. The Norwegian Government answered that the decisions by the police are "not available to the Directorate of Immigration".

106. Second, as regards Annex D.7, ESA claims that it is not possible to ascertain on what basis the person receiving that registration certificate was granted a right of residence, as that decision refers to a right of residence under the Immigration Act "section 112 (Right of residence for more than three months for EEA nationals), section 113 (Right of residence for more than three months for family members who are EEA nationals) or section 115 (Right of permanent residence for EEA nationals)".

107. With regard to Annex D.1, ESA cannot see that it illustrates that EEA national children can have a right of residence pursuant to Article 112(1)(c)/Article 7(1)(b) of the Directive, as asserted by the Norwegian Government. The instruction simply requests the immigration authorities to suspend all processing of applications of family members of EEA national children. It does not at all mention an independent right of

residence for EEA national children. The instruction furthermore, notably, does not concern applications for residence rights for EEA national children, but for their family members.

108. ESA asserts that there is a discrepancy between the Norwegian Government submitting that Annex D.1 "illustrates" that EEA national children can benefit from a right of residence pursuant to Section 112(1)(c) of the Immigration Act, whilst at the same time maintaining that "[a]ny statements on the independent right of EEA national children pursuant to Article 7(1)(b)" in the decisions of the immigration authorities annexed to the Application "are obiter statements which did not affect the outcome in those cases".

109. ESA asserts that the table presented in paragraph 45 of the Defence and Annexes D.1 to D.7 to the Defence do not challenge in substance and in detail the evidence set out in the Application. Only Annex D.2 to the Defence shows that a right of residence was granted by the police, but only to one single EEA national child on the basis of satisfying the "sufficient resources" requirement.

110. Finally, ESA contends that it is, in any event, under no duty to prove that, in addition to a consistent administrative practice in breach of EEA law, there also exists no evidence of practice to the contrary by administrative entities other than those examined by ESA. Therefore, the fact that one sufficiently detailed example to the contrary has been submitted does not alter the existence of the administrative practice evidenced by ESA in the Application. This is especially so given that the practice evidencing a consistent administrative practice whereby the Norwegian Government does not acknowledge children's independent right of residence under EEA law examined by ESA and evidenced in the Application all emanates from administrative bodies – UDI, UNE and the Ministry – that are hierarchically superior to the police in immigration cases.

Second part of the plea

111. ESA observes that Section 5.2 of the Defence is headed "The Directive does not provide a derived right of residence for primary carers". The Norwegian Government there devotes five pages to an analysis of EU law and the case law of the ECJ, but does not mention EEA law or the case law of the Court, under whose jurisdiction the present matter falls.

112. According to ESA, in the EEA, one must examine the case law of the Court and the broader landscape of EEA law to find the proper legal context.[29] This therefore includes not merely the Directive, but also the principles of EEA law, such as fundamental rights, and the objectives of the EEA Agreement, such as homogeneity. The proper legal question under EEA law is therefore not whether the primary carer of an EEA national child may derive a residence right "directly and exclusively" based on the Directive, as Norway contends. Instead, the proper legal question in EEA law is

[29] Reference is made to the judgment in *Campbell*, E-4/19, cited above, paragraph 57.

whether a third-country national parent who is a primary carer of an EEA national child, who fulfils the criteria of Article 7(1)(b) of the Directive, has a derived right of residence because of the manner in which that provision must be interpreted and applied in the context of EEA law. ESA's answer to that question is in the affirmative.

113. In this vein, ESA claims that, in *Gunnarsson*, the Court held that it could not be decisive for its reasoning 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.[30]

114. Similarly, the Court noted in *Jabbi* that the ECJ had reached its conclusion in *O and B* "on a legal basis not existing in the EEA, whereas application of the Directive appears, for the most part, to have been rejected. Consequently, an unequal level of protection of the right to free movement of persons within the EEA could ensue."[31] On this basis it confirmed in *Jabbi* that, given that relevant ECJ case law had been based on Union citizenship, "it must be examined if homogeneity in the EEA can be achieved based on an authority included in the EEA Agreement".[32]

115. ESA observes further that, in *Campbell*, the Court then held:

> 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.

116. ESA claims that the Norwegian Government, when setting out its view on the ECJ's case law on Article 21 TFEU, does not comment on these aspects of relevant case law of the Court. ESA claims that this appears to be an attempt to shift the focus towards the importance of Article 21 TFEU for the question of a derived right of residence for the third-country national primary carer of an EEA national child in order to portray the situation in the EEA as completely different and to divert attention from the fact that the Court has already dealt with the absence of Article 21 TFEU in the EEA and has found a solution in favour of free movement.

117. ESA also contends that the Norwegian Government does not mention the consequences for the free movement of EEA national children if their primary carers are deprived of a right of residence and does not address how this would not entail an

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[30] Reference is made to the judgment in *Gunnarsson*, E-26/13, cited above, paragraph 81.
[31] Reference is made to the judgment in *Jabbi*, E-28/15, cited above, paragraph 66.
[32] Reference is made to the judgment in *Jabbi*, E-28/15, cited above, paragraph 68.

unequal level of protection of the right to free movement in the EEA compared to in the EU.

Jabbi and *Campbell* highly relevant for this case

118. ESA asserts that the supposed difference between the current case and *Jabbi* and *Campbell*, as presented by the Norwegian Government, results in part from the Norwegian Government's focus on the minutiae of those judgments rather than the broader principles behind the Court's reasoning.

119. In part, ESA suggests, this is also because the Norwegian Government portrays those judgments as providing a "sui generis interpretation" which "concerned the distinct situation of derived rights of residence for third-country nationals returning with an EEA national after having genuinely resided together and established a family life in a host EEA State in accordance with Article 7".

120. In general, ESA contends that the common denominator between the present case and *Jabbi* and *Campbell* is the rights granted to third-country nationals. Neither Mr Jabbi nor Ms Campbell had ever resided in Norway before, they were not returning to Norway when the Court acknowledged their derived right of residence. On the contrary, as is also evident e.g. from *Campbell* paragraph 61, the common denominator in these cases is about making the primary rights of EEA nationals effective in the EEA. The Norwegian Government is therefore wrong to claim that a relevant difference is that the present case does not concern a return situation but a right of residence in other EEA States.

121. ESA contends that, in *Campbell*, the Court found that (1) the Directive must be interpreted differently in the EEA; (2) limitations upon free movement must be interpreted strictly; and (3) the provisions of the Directive must not be deprived of their practical effect.

122. ESA contends further that Norway's approach to the interpretation of the Directive is fundamentally flawed. First, ESA avers that its submissions do not make any reference to, or claim of, analogous interpretation. Second, ESA rejects Norway's approach, as it is not in accordance with the Court's case law. In *Campbell*, the national court specifically asked: "is Article 7(1)(b) of Directive 2004/38/EC, read in conjunction with its Article 7(2), applicable by analogy …". However, nowhere in its reasoning does the Court say that the Directive applies by analogy. Instead, the Court simply held that "Article 7(1)(b) and (2) of the Directive are applicable".

123. In conclusion, on the relevance of *Jabbi* and *Campbell*, ESA addresses what the Norwegian Government characterises as the "express reservations", which, according to the Norwegian Government, "were made by the Contracting Parties in respect of derived rights of residence for third-country nationals not falling within the definition of family members in the Directive".

124. ESA observes that, in the EFTA pillar, it is the role of the Court to interpret the Directive authoritatively.

125. In this connection, ESA claims, first, that if the phrase of the Joint Declaration concerning the rights of "family members within the meaning of the Directive" were to be understood in the manner which Norway contends, it would amount to a derogation from the rights which the Directive, interpreted in light of fundamental rights, affords the EEA national children. Second, the phrase in the Joint Declaration, as understood by Norway, would appear to ignore fundamental rights and freedoms. Rather, ESA contends that, as the Court held recently in *Criminal proceedings against LDL*, "[a]ny interpretation of th[e] Directive must be exercised in the light of and in line with fundamental rights and freedoms that form part of the general principles of EEA law".[33]

The relevance of fundamental rights

126. ESA asserts that the purpose of its reference in the Application to the interpretative guideline provided by recital 31 of the Directive, which states in the relevant part that "[t]his Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union (...)" was simply to note that it follows also from that recital that, when exercising their discretion and implementing obligations under the Directive, the EEA States must comply with the general principles underlying the fundamental rights and freedoms laid down in the EU Charter. This includes the right to a family life and the best interests of the child.

127. ESA acknowledges that Article 8 ECHR is usually examined in situations where at least one member of a family is already established in the State in question. However, in its submission, that is because the ECHR does not in general protect free movement or a right of residence in a State other than the home State.

128. ESA contends, however, that the Directive, on the other hand, establishes a clear right of residence, despite this not being strictly required by the ECHR. In ESA's submission, that right of residence must nevertheless be interpreted and applied in light of the principles protected by the ECHR. Norway's proposed interpretation would entail that an EEA national child whose primary carer is not an EEA national themselves must choose between either keeping their family life in relation to the primary carer or exercising their free movement rights. Such an interpretation completely undermines the effective interpretation and application of the fundamental freedoms at stake.

129. In ESA's submission, it remains unexplained how Norway can claim that it accepts an obligation to comply with Article 8 ECHR when interpreting and applying the Directive while, at the same time, not at all recognising the right of the child to a family life with its primary carer.

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[33] Reference is made to the judgment of 21 March 2024 in *Criminal proceedings against LDL*, E-5/23, paragraph 58.

130. In response to the Norwegian Government's rejection of the argument that it would, prima facie, be in the best interest of an EEA national child to reside with their primary carer, characterised by the Norwegian Government as "sweeping statements" which "are irrelevant for the interpretation of the Directive in respect of whether a third-country national not falling within the definition of a 'family member' has a derived right of residence", ESA asserts that the Norwegian Government is seeking to shift the focus away from the core of the case, which is, first, that the EEA national child has an independent right of residence and, second, that the necessary corollary is that it has a right to be accompanied by its primary carer.

131. ESA notes that the Norwegian Government has two additional arguments in this context.

132. First, in relation to ESA's submission that the right of the child to be accompanied by its primary carer also encompasses the right to move to another EEA State and stay or reside there – provided, of course, that the other requirements of the Directive, such as the conditions of Article 7, are fulfilled, the Norwegian Government contends that such a right to move to another EEA State would go beyond the case law of the ECJ. This argument, according to ESA, is based on a misreading of the case law.

133. Second, the Norwegian Government "disagrees with ESA's submission that its proposed interpretation of Article 7(1)(b) is the only interpretation that would be in the child's best interest". ESA emphasises, however, that this is not its submission. Rather, ESA contends that an interpretation of Article 7(1)(b) of the Directive "to the effect that a child, who has an independent right of residence under that provision and fulfils its other conditions, has the right to be accompanied by his/her primary carer" is the only interpretation which "respects the child's fundamental right to family life and takes into account the best interests of the child".

134. ESA emphasises that the scope of the present infringement action is limited to Norway's failure to recognise the right of the child to be accompanied by their primary carer in a manner which makes it effective, interpreted in light of fundamental rights.

Other provisions of EEA law which protects the interests of EEA children

135. Lastly, ESA observes that in the Defence the Norwegian Government also provides an overview of other provisions of EEA law which may protect the interests of EEA national children to be accompanied by their primary carer in a host EEA State. ESA interprets this to imply that the Norwegian Government recognises that the rights of EEA national children to be accompanied by their primary carer in a host EEA State are not respected by its interpretation of Article 7(1)(b) of the Directive. ESA asserts further that the Norwegian Government's acknowledgement of other rights that children and their parents may have does not in any way justify its breach of Article 7(1)(b), interpreted in light of fundamental rights.

136. In response to the Norwegian Government's argument concerning its practice under Article 3(2) of the Directive, ESA maintains its submission that the primary carers

of EEA national children who fulfil the requirements of Article 7(1)(b) of the Directive have a derived right of residence and that to assess them instead under Article 3(2) merely exacerbates the breach of Article 7(1)(b) which ESA, in the Application, has asked the Court to declare.

The defendant

Preliminary comments on Article 21 TFEU and EEA law

137. The Norwegian Government rejects ESA's argument that the absence of Article 21 TFEU is irrelevant for the interpretation of the Directive in the second part of its plea. Rather, the Norwegian Government sets out what, in its submission, are the distinctions between the EEA Agreement and the TFEU in respect of the concept of Union citizenship.

138. The Norwegian Government explains that, by the JCD, the Directive was incorporated into Annex V to the EEA Agreement at point 1 and into Annex VIII at point 3, concerning the free movement of workers and the right of establishment, respectively. Article 1 of the JCD provides that Annex VIII to the EEA Agreement shall be amended as follows:

> 1) "the text of point 3 (Council Directive 73/148/EEC) shall be replaced by the following:
>
> '32004 L 0038: Directive 2004/38/EC …
>
> The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:
>
> (a) The Directive shall apply, as appropriate, to the fields covered by this Annex.
>
> (b) The Agreement applies to nationals of the Contracting Parties. However, members of their family within the meaning of the Directive possessing third country nationality shall derive certain rights according to the Directive.
>
> (c) The words 'Union citizen(s)' shall be replaced by the words 'national(s) of EC Member States and EFTA States'
>
> …"

139. According to the Norwegian Government, pursuant to point 3(b) of Annex VIII to the EEA Agreement, third-country nationals may only derive a right of residence pursuant to the Directive if they are family members of an EEA national within the meaning of the Directive.

140. The Norwegian Government explains that the JCD incorporating the Directive into the EEA Agreement is accompanied by the Joint Declaration. The Joint Declaration states that:

> The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. …
>
> The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as those rights are corollary to the right of free movement of EEA nationals…

141. The Norwegian Government thus contends that the Directive was incorporated into the EEA Agreement on the basis that the concept of Union citizenship in Articles 20 and 21 TFEU has no equivalent in the EEA Agreement, and with the express reservation that the incorporation would be without prejudice to rights which, pursuant to case law from the ECJ, is based on this concept. In other words, the Directive was incorporated into the EEA Agreement on the condition that case law from the ECJ based on Article 21 TFEU would not affect the interpretation of the Directive. Residence rights for third-country nationals fall outside the EEA Agreement except for rights granted by the Directive itself.

Case law from the Court

142. The Norwegian Government observes that, in *Gunnarsson*, the Court referred to the JCD and the accompanying Joint Declaration which states that the concept of Union citizenship has no equivalence in the EEA Agreement. The Court held that "therefore, the incorporation of Directive 2004/38 cannot introduce rights into the EEA Agreement based on the concept of Union citizenship".[34] In other words, according to the Norwegian Government, similar rights are acknowledged in the EEA as in the EU insofar as they are based on the Directive. However, rights inferred in the EU from Article 21 TFEU cannot, for lack of an equivalent provision, be recognised in the EEA.

143. The Norwegian Government acknowledges, however, that the Court nevertheless held that EEA nationals cannot be deprived of rights that they have already acquired under the EEA Agreement before the introduction of Union citizenship in the EU. The Court, therefore, concluded that the Directive could be relied upon by a non-

[34] Reference is made to the judgment in *Gunnarsson*, E-26/13, cited above, paragraph 80.

economically active EEA national residing in a host EEA State against his home EEA State.

144. In the submission of the Norwegian Government, the difference between EEA and EU law, as acknowledged as a matter of principle in *Gunnarsson*, should not be confused with the fact that the proper interpretation of the Directive may occasionally be in dispute. It has been argued that the interpretation of the Directive ultimately proffered in *Gunnarsson*, *Jabbi* and *Campbell* reached beyond the scope given to the Directive by the ECJ. However, the Court did not express the view that the Directive should be interpreted in the EEA as covering not only situations covered by the Directive in the EU, but also every situation in which a right has been granted based on Article 21 TFEU.

145. The Norwegian Government contends that the interpretation of Article 7(1)(b) of the Directive provided in *Gunnarsson* was coupled with the caveat that the Court did not consider it at odds with the case law of the ECJ.[35] On the other hand, the judgments in *Jabbi* and *Campbell* seemed to acknowledge a different interpretation of Article 7(1)(b) in the EEA context compared to the interpretation in the EU.[36]

146. Further, the Norwegian Government contends that the sui generis interpretation provided in *Jabbi* and *Campbell* concerned the distinct situation of derived rights of residence for third-country nationals returning with an EEA national after having genuinely resided together and established a family life in a host EEA State in accordance with Article 7 of the Directive.

147. The Norwegian Government thus understands the reasoning offered in *Jabbi* and *Campbell* as limited to the distinct characteristics of the "return situation" at issue in those two cases.

148. By contrast, the Norwegian Government considers the question posed in the present case is whether a person is entitled to a right of residence based on the Directive, even where that person falls outside the personal scope of the Directive. This poses a distinct legal question that has previously not been considered by the Court. It must, consequently, be assessed on its own merits.

149. In the Norwegian Government's submission, the analysis in the present case remains straightforward as a matter of EEA law.

150. The Norwegian Government observes that Advocate General Emiliou refers, in his Opinion in Case C-128/22 *Nordic Info*, to the debate before the ECJ on the question of whether non-economically active persons benefit, within the EEA, from the right to free movement under the Directive. Advocate General Emiliou refers to the fact that the Directive applies to the fields covered by Annexes VIII and V to the EEA Agreement, dedicated to the right of establishment and the free movement of workers respectively. Advocate General Emiliou emphasises that the EEA Agreement does not contain any

[35] Reference is made to the judgment in *Gunnarsson*, E-26/13, cited above, paragraph 81.
[36] Reference is made to the judgment in *Gunnarsson*, E-26/13, cited above, paragraph 58.

provisions similar to Articles 20 and 21 TFEU, which govern the movement within the EU of non-economically active citizens, and that the entire concept of 'Union citizenship' has no equivalent in the EEA Agreement. He also refers to *Gunnarsson*, in which the Court held that the Directive does apply to the movement of non-economically active persons within the EEA, irrespective of the absence in the EEA Agreement of provisions equivalent to Articles 20 and 21 TFEU.

151. The Norwegian Government contends that, according to Advocate General Emiliou, there are no compelling reasons to depart from the Court's reasoning in *Gunnarsson*.

152. The Norwegian Government contends that the Opinion of Advocate General Emiliou is in line with its own view. The Directive applies to non-economically active persons and governs their free movement within the EEA. A right of residence which has no legal basis in the Directive itself, and which stems from Article 21 TFEU, is not applicable within the EEA, due to the lack of an equivalent provision in the EEA Agreement.

153. In the submission of the Norwegian Government, Advocate General Emiliou's arguments for agreeing with the Court in *Gunnarsson* on the application of the Directive in the EEA to non-economically active persons does not apply in this case. A derived right of residence for a third-country national being the primary carer of an EEA national child did not exist in the EEA prior to the introduction of the concept of Union citizenship in the EU.[37]

154. Further, the Norwegian Government contends that the EEA Joint Committee made an express reservation in respect of residence rights which under EU law are based on the concept of Union citizenship as well as in respect of rights for third-country nationals. The latter only fall within the EEA Agreement if they are a "family member" of an EEA national within the meaning of the Directive.

First part of the plea

155. The Norwegian Government agrees with ESA that Article 7(1)(b) of the Directive confers a right of residence on EEA national children, provided that they fulfil the condition therein. Further, the condition of having "sufficient resources" does not have to be fulfilled by the EEA nationals themselves but may be fulfilled through resources from a third person, inter alia, a parent. The Norwegian Government, however, rejects the submission that there has been a failure to fulfil the obligations arising under Article 7(1)(b) of the Directive on the basis of an administrative practice in Norway.

[37] Reference is made to the introduction of the concept of Union citizenship by the Treaty on European Union (TEU) (Maastricht Treaty), which entered into force on 1 November 1993.

The applicable criteria to establish a failure to fulfil obligations on the basis of an administrative practice

156. The Norwegian Government contends that the failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice. That administrative practice must be, to some degree, of a consistent and general nature. To find that there has been a general and consistent practice, ESA may not rely on any presumption.[38]

157. In the Norwegian Government's submission, ESA has not provided sufficient evidence of a consistent and general administrative practice in Norway of interpreting and applying Section 112(1)(c) of the Immigration Act in such a way that EEA national children, who have sufficient resources, cannot benefit from a right of residence pursuant to Article 7(1)(b) of the Directive.

No consistent and general administrative practice in breach of Article 7(1)(b) of the Directive

158. The Norwegian Government explains that Guideline UDI-2011-037 is issued by UDI and concerns the right of residence for EEA nationals pursuant to Section 112(1) of the Immigration Act. At the end of the period laid down in the reasoned opinion, section 3.4 stated that "right of residence on the basis of sufficient funds presupposes that the EEA citizen can support himself with his own resources".

159. The Norwegian Government cannot see that this general statement excludes the possibility of children fulfilling the criteria in Article 7(1)(b) of the Directive indirectly through the resources of, inter alia, a parent or primary carer. The statement only reflects the condition that EEA nationals pursuant to Article 7(1)(b) must have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host EEA State.

160. The Norwegian Government asserts that, because of the number of EEA national children that are registered each year as having an independent right of residence, the guideline does not prove that there has been a failure to fulfil obligations arising under Article 7(1)(b) of the Directive on the basis of an administrative practice in Norway.

161. The Norwegian Government rejects the submission by ESA that decisions by the immigration authorities confirm the practice of not allowing EEA children to benefit from the right of residence in Article 7(1)(b) of the Directive, even though they have sufficient resources through their primary carer.

162. The Norwegian Government asserts that UDI has provided the Ministry with information on the number of EEA national children that have been registered with the police, pursuant to Section 117(1) of the Immigration Act, as having an independent

[38] Reference is made to the judgment of 7 June 2007 in *Commission* v *Hellenic Republic*, C-156/04, EU:C:2007:316, paragraph 50.

right of residence based on Section 112(1)(c) and satisfying the condition of having "sufficient resources".

Year	**Number**
2016	6
2017	6
2018	11
2019	7
2020	4
2021	13
2022	11
2023	5

163. The Norwegian Government submits these numbers to show that Norway recognises the right of residence of EEA national children pursuant to Article 7(1)(b) of the Directive. Further, according to the Norwegian Government, they demonstrate that Norway has a consistent and general administrative practice under which EEA national children who have sufficient resources benefit from the right of residence in Article 7(1)(b).

164. The Norwegian Government submits further that numbers from the EEA registration system also show that EEA national children are recognised as fulfilling the requirement of sufficient resources in Article 7(1)(b) of the Directive through resources from a third party.

165. The Norwegian Government notes that, as evidence of a consistent and general administrative practice in breach of Article 7(1)(b) of the Directive, ESA refers to one decision by UDI and seven decisions by UNE.[39] Three of those decisions concern the claimant in *Q and Others*. Six of those decisions predate the end of the period laid down in the reasoned opinion by almost two years. Importantly, according to the Norwegian Government, they all concern applications for a right of residence by third-country national parents but who were not dependent on their EEA national child.

[39] Reference is made to UNE's decision of 11 April 2018, UDI's decision of 10 April 2019, UNE's decision of 27 August 2019, UNE's decision of 4 October 2019, UNE's decision of 13 November 2019, UNE's decision of 10 December 2019, UNE's decision of 15 December 2021 and UNE's decision of 12 July 2022.

166. Although the Norwegian Government acknowledges that some statements in UNE's decisions suggest that EEA national children do not have an independent right of residence pursuant to Section 112(1)(c) of the Immigration Act and Article 7(1)(b) of the Directive, it asserts, however, that all the decisions concern the right of residence for the third-country national parent, and thus are irrelevant for the first part of ESA's plea.

167. The Norwegian Government observes that UNE held, in its decisions, that the Directive does not grant the third-country national parent a derived right of residence, as the parent is not dependent on the EEA national child. The Norwegian Government emphasises that in the EU a derived right of residence for the primary carer of a Union citizen is based on Article 21 TFEU. As there is no equivalent provision in the EEA Agreement, there is no legal basis for such derived right of residence in the EEA. Any statements by UNE on the independent right of EEA national children pursuant to Article 7(1)(b) of the Directive are obiter statements that did not affect the outcome in these cases and, as such, are not evidence of a consistent and general practice that EEA national children cannot benefit from the right in Article 7(1)(b).

168. The Norwegian Government emphasises that UNE has not handled cases concerning an independent right of EEA national children pursuant to Article 7(1)(b) of the Directive. A right of residence pursuant to Section 112(1) of the Immigration Act does not require a decision from the immigration authorities, but EEA nationals with a right of residence must register with the police.

169. The Norwegian Government rejects ESA's submission that a consistent and general practice by the Norwegian Government is also evidenced by its court pleadings before the Court, the ECJ and domestic courts. The pleadings referred to do not concern EEA national children's right of residence pursuant to Article 7(1)(b) of the Directive and the first part of ESA's plea. Rather, they concern the interpretation of EEA law in the absence of an equivalent provision to Article 21 TFEU in the EEA Agreement. They are not evidence of a failure to fulfil obligations under Article 7(1)(b).

170. In the Norwegian Government's submission, ESA has not established that there has been a failure to fulfil obligations arising under Article 7(1)(b) of the Directive on the basis of an administrative practice in Norway. Every year a number of EEA national children are registered as having an independent right of residence based on Article 7(1)(b) of the Directive and satisfying the condition of having "sufficient resources". The EEA national children have fulfilled this requirement, inter alia, through resources from a third party.

171. The Norwegian Government considers the few, isolated statements by UNE to be irrelevant for the first part of ESA's plea, as they concern, instead, the second part of the plea. The statements do not reflect the Government's view nor the administrative practice in Norway relating to EEA national children's independent right of residence pursuant to Article 7(1)(b) of the Directive.

Second part of the plea

172. The Norwegian Government notes that ESA claims, in the second part of its plea, that Norway is in breach of Article 7(1)(b) of the Directive by interpreting and applying Section 112(1)(c) of the Immigration Act in such a way that EEA national children, who have sufficient resources through their primary carers, cannot be accompanied by their primary carers.

173. Accordingly, the Norwegian Government considers it a question of whether Article 7(1)(b) of the Directive grants a third-country national, who is a primary carer of an EEA national child fulfilling the conditions for residence in a host EEA state pursuant to Article 7(1)(b), a derived right of residence in that state. This is, in essence, the first question referred to the Court in *Q and Others*.

174. Hence, the second part of ESA's plea is a question of the correct interpretation of EEA law. The Norwegian Government does not dispute that there is an administrative practice in Norway according to which there is no legal basis in the Directive for a derived right of residence for third-country nationals who are primary carers of an EEA national child fulfilling the conditions for residence pursuant to Article 7(1)(b) of the Directive.

175. The Norwegian Government maintains that the Directive, interpreted as EU law, does not provide a derived right of residence for third-country nationals who are primary carers of an EEA national child fulfilling the conditions for residence pursuant to Article 7(1)(b) of the Directive.

176. Consequently, the Norwegian Government asserts that the Court must consider whether there is a sufficient legal basis in the EEA Agreement for a different interpretation of the Directive in the EEA context. The Norwegian Government submits that this question must be answered in the negative. Such an interpretation cannot be based on the objective of the Directive.

<u>The Directive does not provide a derived right of residence for primary carers</u>

177. In the submission of the Norwegian Government, it follows from Article 3(1) of the Directive that the Directive applies to all EEA nationals who move to or reside in an EEA State other than that of which they are a national. The Directive also applies to their family members as defined in Article 2(2).

178. The Norwegian Government contends further that Article 7(1)(b) of the Directive thus confers a right of residence on an EEA national and their "family members", while Article 7(2) provides that this shall also extend to "family members" who are not nationals of an EEA State.

179. The notion of a "family member" is defined in Article 2(2) of the Directive. Pursuant to point (d), this includes "dependent direct relatives in the ascending line…". In the Norwegian Government's submission, applying *a contrario* reasoning, direct

relatives in the ascending line who are not dependent on the EEA national are thus excluded. Consequently, such relatives are not beneficiaries of rights under Article 3(1) and cannot infer derived rights of residence pursuant to Article 7(2). The wording of the Directive is clear on this matter.

180. According to the Norwegian Government, this literal interpretation is, moreover, supported by a contextual interpretation. Article 3(2) of the Directive specifically regulates the rights of family members of an EEA national other than those who fall within the definition in Article 2(2). It requires EEA States, in accordance with their national legislation, to facilitate entry and residence for such family members not falling within the definition in Article 2(2).

181. The Norwegian Government asserts that the case law of the ECJ strongly confirms the Norwegian Government's interpretation.

182. The Norwegian Government contends that two issues arise in cases involving an EEA national dependent on a third-country national who is a direct relative in the ascending line, i.e. an EEA national child and a third-country national parent.

183. The *first question* is whether the third-country national parent may provide the Union citizen with "sufficient resources" within the meaning of Article 7(1) of the Directive. If that is answered in the affirmative, the next question is whether the third-country national is entitled to a derived right of residence under Article 7(2) of the Directive.

184. The wording of Article 7(1)(b) of the Directive only requires the Union citizen to "have" sufficient resources. Therefore, the ECJ has held that "it suffices that such resources are available to the Union citizens, and that provision lays down no requirement whatsoever as to their origin...".[40] On this basis the Norwegian Government agrees with ESA that EEA national children may satisfy the condition of "sufficient resources" through, inter alia, their parent.

185. Regarding the *second question* of whether a third-country national parent may infer rights pursuant to Article 7(2) of the Directive, the ECJ has observed that the wording of the Directive calls for a negative answer. This follows from the definition of a "family member" in Article 2(2) as noted in several cases, e.g. *Alokpa*:

> It is clear from the case-law of the Court that the status of "dependent" family member of a Union citizen holding a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence, so that, when the converse situation occurs and the holder of the right of residence is dependent on a third-country national, the third-country national cannot rely on being a 'dependent' relative in the ascending line of that right-holder, within the meaning of Directive

[40] Reference is made to the judgments in *Zhu and Chen*, C-200/02, cited above, paragraph 30, and *Alokpa*, C-86/12, cited above, paragraph 27.

2004/38, with a view to having the benefit of a right of residence in the host Member State.[41]

186. The ECJ has nevertheless ultimately concluded that a third-country national parent caring for a child of Union citizenship may derive rights of residence under EU law. The Norwegian Government asserts that, for the purposes of EEA law, however, this reasoning has not led the ECJ to grant residence rights for the child's carer based on the Directive alone. Instead, the ECJ has referred either to Article 21 TFEU as the sole legal basis or to Article 21 TFEU and the Directive as a combined legal basis for this conclusion.

187. The Norwegian Government submits that it is apparent from case law[42] that a third-country national parent, who is a primary carer of a minor with Union citizenship, may not derive a residence right directly and exclusively based on the Directive. Rather, Article 21 TFEU is the legal basis for the derived right of residence for the Union citizen's primary carer.

188. In the Norwegian Government's submission, this follows, first, from the fact that such a person falls outside of the personal scope of the Directive. This rules out the possibility that the person concerned is entitled to residence rights exclusively based on the Directive.

189. Second, this is confirmed by the fact that the ECJ refers either solely to Article 21 TFEU or to Article 21 TFEU and the Directive (referring to them as "the same provisions") instead of employing the Directive alone as the legal basis.[43]

190. Third, the foregoing also follows implicitly from *Iida* as well as ordinary canons of interpreting EU case law and the principle of precedent. The ECJ explicitly rejected in *Iida* the possibility that the Directive could in and of itself serve as a legal basis for the rights in question and considered exclusively Article 21 TFEU as the legal basis. There is no direct conflict between this reasoning and referring to Article 21 TFEU together with the Directive as the legal basis, as the ECJ did in *Zhu and Chen*. This is testified by *Iida* itself. By contrast, in the Norwegian Government's submission, there would be a direct conflict if *Zhu and Chen* as well as *Alokpa* were to be interpreted to the effect that the Directive alone provided sufficient legal basis. This would mean that the ECJ first ignored the principle of precedent in *Iida* and thereafter reversed itself again in *Alokpa,* which would be a novelty in EU jurisprudence.

191. Finally, the necessity of Article 21 TFEU as a legal basis is apparent, according to the Norwegian Government, from the final paragraphs in *Alokpa*. Here, the ECJ solely referred to Article 21 TFEU as legal grounds for granting derived residence rights

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[41] Reference is made to the judgments in *Alokpa*, C-86/12, cited above, paragraphs 25 to 26; *Zhu and Chen*, C-200/02, cited above, paragraphs 43 to 44; and of 8 November 2012 in *Iida*, C-40/11, EU:C:2012:691, paragraphs 54 to 55.

[42] Reference is made to the judgments in *Zhu and Chen*, C-200/02, cited above; *Iida*, C-40/11, cited above; *Alokpa*, C-86/12, cited above; and *NA*, C-115/15, cited above.

[43] Reference is made to the judgment in *Alokpa*, C-86/12, cited above, paragraph 29, and of 13 September 2016 in *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 52.

to the parent, depending on whether the minor with Union citizenship fulfilled the conditions in Article 7(1)(b) of the Directive or not.

192. The Norwegian Government emphasises that the point is not the distinction between primary law and secondary law in the EU. The crucial point is that there is no legal basis in EEA law for a derived right of residence for primary carers of an EEA national in the absence of a provision equivalent to Article 21 TFEU in the EEA Agreement.

ESA's submissions concerning the objective of the Directive and the practical effect of its provisions

193. The Norwegian Government understands ESA not to deny that, in the EU, a derived right of residence for a third-country national who is the primary carer of an EU national is based on Article 21 TFEU. Nevertheless, ESA argues that the absence of an equivalent provision in the EEA Agreement is irrelevant. The Norwegian Government cannot see that ESA's interpretation is possible in this case.

194. While the objective of the Directive is to facilitate and strengthen the exercise of the fundamental and individual right to move and reside freely within the territory of the EEA States, this right is subject to the limitations and conditions laid down in the Directive. The clear wording and context of the provisions of the Directive cannot, the Norwegian Government asserts, be ignored to achieve this general objective.

195. Further, the Norwegian Government contends, according to well established case law, an EEA legal act cannot be interpreted only by reference to its wording but must also be interpreted in light of its context and objective. However, the context and objective cannot override the wording. On the contrary, a teleological interpretation presupposes ambiguous wording, i.e. that the text of the relevant provisions is open to different interpretations.

196. The ECJ has held that a right of residence must be granted pursuant to Article 21 TFEU to a third-country national who is the primary carer of a Union citizen, despite the fact that the provisions in the Directive do not apply, because the effectiveness of the Union citizenship would be undermined if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the EU as a whole, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status.

197. The Norwegian Government asserts that the same reasoning cannot be extended to this case. First, the concept of Union citizenship does not exist under EEA law and the Directive was incorporated into the EEA Agreement with the express reservation that it shall be without prejudice to case law based on this concept. The right of residence for non-economically active EEA nationals is governed by the provisions of the Directive. That right cannot be compared to the rights granted to Union citizens pursuant to Article 21 TFEU by virtue of their status. Second, the consequence of the refusal of a derived right of residence pursuant to the Directive to a primary carer of an

EEA national is not that the EEA national would be obliged to leave the territory of the EEA as a whole. The EEA national would have a right to reside in his home EEA State.

198. Further, if the children are Union citizens, they can reside with their primary carer in any EU Member State, as Union citizens in the EU may rely on Articles 20 and 21 TFEU.

199. Therefore, the Norwegian Government asserts that, in the absence of an equivalent provision to Article 21 TFEU in the EEA Agreement, a third-country national who is the primary carer of an EEA national child may not claim a derived right of residence based on Article 7(1)(b) of the Directive.

The differences between this case and *Jabbi* and *Campbell*

200. According to the Norwegian Government, ESA's submission that, in the absence of an equivalent provision to Article 21 TFEU in the EEA Agreement, the Directive must be interpreted differently to ensure the same result in the EEA cannot be achieved in this case because of the differences between it and *Jabbi* and *Campbell*.

201. The Norwegian Government observes that *Jabbi* and *Campbell* concerned whether an EEA national who has exercised his or her right of free movement could invoke this right against his or her home EEA State. In this respect, the Court held that a right to move freely from the home EEA State to another EEA State cannot be fully achieved if that person may be deterred from exercising the freedom by obstacles raised by the home EEA State to the entry and residence of a spouse in that state.

202. While the Norwegian Government acknowledges that in paragraph 57 of *Campbell* the Court held that, in the absence of Article 21 TFEU, the Directive must be interpreted differently under EEA law, in order to realise the objective of the Directive, the Norwegian Government asserts that the premise of the statement in paragraph 57 is still that such an objective is possible within the realm of interpretation.

203. In paragraph 80 of *Gunnarsson*, the Court emphasised that "the incorporation of Directive 2004/38 cannot introduce rights into the EEA based on the concept of Union citizenship".

204. According to the Norwegian Government, this is in line with the fact that the Court in *Jabbi* and *Campbell* considered that the relevant provisions lent themselves to analogous use, which necessarily warrants a concrete assessment. Therefore, the fact that the Court applied provisions of the Directive by analogy in *Jabbi* and *Campbell* is no authority for the proposition that the same is possible in this case.

205. The Norwegian Government asserts that there are important differences between *Jabbi* and *Campbell* and the present case. First, it observes that an EEA national, according to Article 2(1) of the Directive, is "any person having the nationality of a Member State". The analogy at issue in *Jabbi* and *Campbell*, accordingly, concerned Articles 3 and 7 and was, therefore, limited to allowing such co-residence by family

members in the EEA national's own or home EEA State. Second, the consequence of this analogy in *Jabbi* and *Campbell* was to extend the main rule under the Directive of co-residence (the derived right of residence for family members pursuant to Article 2(2)), from 29 to all 30 EEA States. Third, even such an incremental change was severely limited by the specific conditions of preceding continuous residence in another EEA State subject to the conditions in Article 7(1)(b).[44]

206. In the Norwegian Government's submission, all of these features that both legally and factually allowed for an analogy in *Jabbi* and *Campbell* are different in the present case.

207. The Norwegian Government contends that, according to point 3(b) of Annex VIII to the EEA Agreement, the Directive only applies to nationals of the Contracting Parties. However, third-country nationals that are family members within the meaning of the Directive shall derive certain rights according to the Directive. A third-country national who is not dependent on the EEA child is not a family member within the meaning of the Directive and, consequently, has no derived right of residence according to the Directive.

208. The Norwegian Government asserts that to interpret the Directive "differently", to nevertheless include a derived right of residence for third-country nationals not falling within the definition of family members in the Directive, due to the absence of an EEA provision equivalent to Article 21 TFEU, would entail homogenous law making, by bridging clear and intentional legal differences in the two systems. This conflicts with the principle of separation of powers, including the prerogative of the Contracting Parties under Article 118 EEA to extend the scope of the EEA Agreement. It follows from settled case law that this falls outside the realm of the judicial function.

209. The ECJ had the legal basis for granting such a right in Article 21 TFEU. However, in the EEA the Court cannot grant a similar right without introducing rights in the EEA on the basis of Article 21 TFEU, contrary to the promise in *Gunnarsson*. Were the Court to do so, that would, in the Norwegian Government's submission, entail ignoring the intent of the Contracting Parties as set out in the JCD and the attached Joint Declaration and, in practice, rewrite the Directive.

ESA's argument that the ECJ's interpretation of the Directive is contrary to the child's fundamental rights

210. The Norwegian Government understands ESA to argue that to deny third-country nationals a derived right of residence pursuant to Article 7(1)(b) of the Directive is contrary to the fundamental rights of the child. It understands ESA to argue further that the only interpretation of that provision that would safeguard the child's fundamental rights is to include a derived right of residence for the EEA national child's primary carer.

[44] Reference is made to the judgment in *Jabbi*, E-28/15, cited above, paragraph 80.

211. The Norwegian Government notes ESA's reference to recital 31 of the Directive and understands ESA to argue that, when interpreting and applying the provisions of the Directive, particular regard must be had to the principles of the Charter. It understands ESA to argue further that, even though the Charter is not part of the EEA Agreement, it follows from "this interpretative guideline" that when using their discretion and implementing obligations under the Directive, EEA States must comply with the general principles underlying the fundamental rights and freedoms laid down in the EU Charter.

212. In the Norwegian Government's view, ESA's arguments in this respect are flawed.

213. First, the Charter is not part of the EEA Agreement. Second, in accordance with the case law of the ECJ, the preamble to an EU act has no legal binding force and cannot be relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording.

214. The Norwegian Government contends that the reference to the Charter in recital 31 of the Directive provides no legal basis for interpreting Article 7(1)(b) of the Directive to include a derived right of residence for third-country national primary carers.

215. The Norwegian Government observes that ESA refers to general statements by the ECJ on the positive and negative obligations of Member States pursuant to Article 8 ECHR and that ESA submits, in support of its interpretation of Article 7(1)(b) of the Directive, that, prima facie, the best interest of the child would be to reside with their primary carer.

216. In the Norwegian Government's submission, such sweeping statements are irrelevant for the interpretation of the Directive in respect of whether a third-country national not falling within the definition of a "family member" has a derived right of residence. Further, the Norwegian Government continues, the statement is neither correct nor appropriate in this case.

217. The Norwegian Government acknowledges that Norway has an obligation to ensure that its interpretation and application of the Directive does not conflict with Article 8 ECHR. Whether a refusal to grant a right of residence is contrary to Article 8 ECHR in an individual case will, however, depend on the circumstances in that specific case. In the context of Article 8 ECHR, it is of importance, according to the Norwegian Government, that it protects the right of an established family situation, which requires a distinction to be made between the right to move and reside in an EEA State and the right to retain a residence right in an EEA State in which the EEA national is already established.

218. The Norwegian Government observes that, in *Q and Others*, the EEA national had a right of residence pursuant to Article 10 of Regulation (EU) No 492/2011 because

he was enrolled in the Norwegian general education system and exercised his right to pursue his studies in the host EEA State. The Court held that, in such a situation, it would infringe his right pursuant to Article 10, read in light of the requirement of respect for family life, to refuse his primary carer the permission to remain in the EEA State.[45]

219. The Norwegian Government understands ESA's position to be that Article 7(1)(b) of the Directive must generally be interpreted to include a derived right of residence for the primary carer of an EEA national child. Accordingly, in contrast to *Q and Others*, the present case does not only concern the issue of whether a third-country national has a derived right of residence to continue to reside in the host EEA State together with the EEA national child. It also concerns the issue of whether third-country nationals not falling within the definition of a family member can move to and establish themselves in any EEA State together with the EEA national child based on a derived right of residence as the primary carer of that child pursuant to Article 7(1)(b).

220. Such a right would go beyond the case law of the ECJ, which in the Norwegian Government's submission mainly concerns the right of the primary carer to stay in the Member State in which the Union citizen child is born or resides.

221. The Norwegian Government rejects ESA's submission that its proposed interpretation of Article 7(1)(b) of the Directive is the only interpretation that would be in the child's best interest. Where the EEA national child resides in his home EEA State with all his family, it may not be in the best interest of the child to leave that state and move to another EEA State with his primary carer only. In this situation, the EEA national child would be deprived of his right to family life with close family members other than the primary carer and his/her ties to the home state, which would be contrary to the child's best interest.

222. The Norwegian Government asserts that ESA's interpretation, according to which Article 7(1)(b) of the Directive grants a third-country national, who is the primary career of an EEA national, a derived right of residence in another EEA State, cannot be based on Article 8 ECHR or general principles of EEA law.

223. The Norwegian Government emphasises that there are other provisions of EEA law which protect the interests of EEA national children to be accompanied by their primary carer in a host EEA State.

224. The Norwegian Government observes that, pursuant to Article 12(3) of the Directive, children (including stepchildren) of an EEA national and the parent who has actual custody, regardless of nationality, retain the right of residence in the host EEA State upon the EEA national's death or departure where the child is enrolled at an educational establishment. Where the parent (or stepparent) of the child was a worker, the primary carer may also have derived right of residence pursuant to Article 10 of Regulation (EU) No 492/2011.

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[45] Reference is made to the judgment in *Q and Others*, E-16/20, cited above, paragraph 50.

225. The Norwegian Government notes, further, that Article 3(2) of the Directive requires EEA States to facilitate entry and residence for any other family member, irrespective of nationality, not falling within the definition in Article 2(2). This includes e.g. where they "are members of the household of the Union citizen having the primary right of residence".

226. Family members not falling within Article 2(2) do not have the right of entry and residence in the host EEA State pursuant to Article 3(2). Rather they have the possibility of being granted such a right, taking into consideration their relationship with the EEA national or any other circumstances, such as their financial or physical dependence on the EEA national. A refusal to grant a right of residence to an EEA national child's primary carer pursuant to Article 3(2) has to be read in light of the requirement of respect for family life, as a general principle of EEA law. The Norwegian Government asserts that the immigration authorities would accordingly carry out a balanced and reasonable assessment of all the current and relevant circumstances of the case which takes account of the various interests in play and, in particular, of the best interests of the child concerned.

Rejoinder

227. The Norwegian Government understands that, with the Reply, ESA maintains that the Court should declare that Norway, by maintaining in force Section 112(1)(c) of the Immigration Act, together with the relevant guideline, has failed to fulfil its obligations arising from Article 7(1)(b) of the Directive, as interpreted in light of the fundamental right to family life.

228. The Norwegian Government notes that the parties share a common understanding of the following:

(i) Article 7(1)(b) of the Directive confers an independent right of residence on EEA national children, provided that they fulfil the conditions therein.

(ii) In Norwegian administrative practice, Section 112(1)(c) of the Immigration Act is interpreted and applied in accordance with the Government's interpretation of Article 7(1)(b) of the Directive, i.e. in a way where said article does not provide a legal basis for a derived right of residence for third-country nationals who are primary carers of an EEA national child fulfilling the conditions for residence pursuant to Article 7(1)(b).

229. The Norwegian Government understands the parties to disagree, however, on the following:

(i) Whether ESA has presented sufficient evidence of a consistent and general administrative practice in Norway where EEA national children, who have sufficient resources through their primary carers, do not benefit from a right of residence pursuant to Article 7(1)(b) of the Directive.

(ii) Whether third-country nationals, who are primary carers of an EEA national child fulfilling the conditions for residence pursuant to Article 7(1)(b) of the Directive, have a derived right of residence from Article 7(1)(b).

230. Consequently, in the Norwegian Government's submission, the positions of the parties may be summarised as follows:

(i) The first part of the plea: The parties agree on the law but disagree on whether ESA has presented sufficient evidence to prove an administrative practice in breach of EEA law.

(ii) The second part of the plea: The parties disagree on the correct interpretation of EEA law. However, if ESA's interpretation of Article 7(1)(b) of the Directive is correct, the Norwegian Government accepts that there is sufficient evidence of an administrative practice in breach of EEA law.

231. The Norwegian Government maintains all its submissions made in the Defence.

First part of the plea

232. The Norwegian Government maintains that ESA has not presented evidence of a consistent and general practice under which EEA national children do not have an independent right of residence pursuant to Article 7(1)(b) of the Directive.

233. The Norwegian Government asserts that a failure to fulfil EEA obligations through an administrative practice may only be established by sufficiently documented and detailed proof of the alleged practice. To find that there has been a general and consistent practice, ESA may not rely on any presumption.

234. The Norwegian Government observes that with regard to complaints concerning the implementation of a national provision, the ECJ has held that "proof of a Member State's failure to fulfil its obligations requires production of evidence different from that usually taken into account in an action for failure to fulfil obligations concerning solely the terms of a national provision, and that in those circumstances the failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice of the national administration and/or courts, for which the Member State concerned is answerable".[46]

235. When assessing whether there exists a consistent and general administrative practice in breach of EEA law, the Norwegian Government contends that the Court must examine all the relevant evidence presented as a whole. Singular statements or decisions do not constitute evidence of a consistent and general practice. Since the State's practice otherwise complies with EEA law, ESA's submission is misplaced.

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[46] Reference is made to the judgment of 27 April 2006 in *Commission* v *Germany*, C-441/02, EU:C:2006:253, paragraph 49.

ESA's evidence of the alleged contradictory practice

236. The Norwegian Government observes that section 3.4 of the relevant guideline, UDI-2011-037, on the application of Section 112(1)(c) of the Immigration Act, provided that "a right of residence on the basis of sufficient resources requires that the EEA national can provide for himself with his own resources".

237. The Norwegian Government repeats the submission made in the Defence, namely, that this statement only reflects the condition that EEA nationals, pursuant to Article 7(1)(b) of the Directive, must have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host EEA State.

238. The Norwegian Government avers that nowhere did the guideline state that EEA national children do not have an independent right of residence pursuant to Article 7(1)(b) of the Directive.

239. The Norwegian Government asserts that the guideline was later amended, on 25 May 2022, clarifying that the source of the necessary resources is irrelevant. In the Reply, ESA submits that this amendment was made "following a change of views within UDI". The Norwegian Government rejects this submission, arguing that the amendment was only a *clarification* of what already followed from Norwegian administrative practice.

240. Accordingly, the Norwegian Government maintains that the wording of the guideline does not evidence a consistent and general practice under which EEA national children cannot benefit from the right of residence pursuant to Article 7(1)(b) of the Directive.

241. The Norwegian Government contends that ESA still has not provided any evidence of decisions where EEA national children, with sufficient resources through their primary carers, are denied a right of residence pursuant to Article 7(1)(b) of the Directive. The decisions to which ESA refers only concern applications for a right of residence by third-country national primary carers, not EEA national children. The Norwegian Government repeats its submission made in the Defence, namely, that EEA nationals, including children, do not need to apply for a right of residence pursuant to Article 7(1) of the Directive. Instead, they must simply register with the police within three months upon arrival in Norway.

242. In the Norwegian Government's submission, the *conclusions* of the decisions regarding third-country national *primary carers* do not demonstrate a practice contrary to the parties' common understanding that EEA national *children* have a right of residence pursuant to Article 7(1)(b) of the Directive. However, ESA nonetheless maintains that the "reasoning in those decisions is evidence also of the practice concerning the independent right of residence of the children". Thus, the evidence relied upon by ESA is the reasoning in the decisions presented, not the results.

243. The Norwegian Government asserts that the statements in UNE's decisions do not evidence a consistent and general practice in breach of EEA national children's independent right of residence pursuant to Article 7(1)(b) of the Directive.

244. First, the Norwegian Government contends that the decisions relied on by ESA concern a different question, namely, whether third-country national primary carers may derive a right of residence from their EEA national children. The decisions in question are from UNE, which handles complaints in cases concerning applications for a right of residence by third-country nationals. In this connection, the Norwegian Government reiterates its submission that the denial of a derived right of residence for third-country national parents of EEA national children does not imply that the EEA national children themselves do not enjoy an independent right of residence according to Article 7(1)(b) of the Directive.

245. Second, the Norwegian Government contends that because of this fact, it is evident that the highlighted statements regarding EEA national children did not affect the outcome of the decisions regarding their parents, since the results in those decisions were based on the third-country national parents not being dependent on their EEA national child. As this is a separate ground for refusal of an application for a right of residence by a third-country national parent, statements in these decisions regarding the rights of EEA national children are in fact *obiter*.

246. Third, the Norwegian Government notes that ESA has referred to just nine decisions in the Application.[47] Five of those decisions concern the claimant in *Q and Others*.[48] Two decisions concern the application for a right of residence by a third-country national who was the parent of EEA national children. The children, however, lived in Norway with their other parent of EEA nationality. Accordingly, the EEA national children's right of residence was not affected by the refusal to grant a right of residence to the third-country national, their other parent.[49] Further, in one case, the third-country national did not have sufficient resources to support herself and her EEA national child.[50]

247. In sum, ESA has only presented a small number of decisions where *obiter* statements in their reasoning imply that EEA national children lack an independent right of residence pursuant to Article 7(1)(b) of the Directive. In the Norwegian Government's submission, the obiter statements in the decisions concerning applications for a right of residence by third-country national parents must therefore be viewed as isolated statements not capable of establishing a general and consistent administrative practice in breach of Article 7(1)(b) at the deadline for compliance with the reasoned opinion, 7 October 2021.

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[47] Application, Annex A.3

[48] Reference is made to UDI's decision of 10 April 2019 and UNE's decisions of 13 November 2019, of 10 December 2019, of 4 February 2020 and of 15 December 2021.

[49] Reference is made to UNE's decisions of 11 April 2018 and of 4 October 2019.

[50] Reference is made to UNE's decision of 13 July 2022.

248. The Norwegian Government notes that ESA relies, in its submission, on statements by the immigration authorities and the Ministry in the pre-litigation procedure. In close connection with these submissions, ESA contends that the Ministry has failed to engage with ESA.

249. First, regarding the statements referred to by ESA, the Norwegian Government maintains that ESA has not presented statements by the Norwegian Government in the pre-litigation procedure which are evidence of official statements from the Norwegian Government that EEA national children may not have a right of residence pursuant to Article 7(1)(b) of the Directive. In this regard, the Norwegian Government underlines the difference between statements in administrative decisions and statements in the context of the pre-litigation procedure in the present case.

250. Second, with regard to ESA's submissions on the Ministry's failure to engage with ESA, the Norwegian Government does not dispute that EEA States are required, under Article 3 EEA, to facilitate ESA's tasks and that this obligation rests on the EEA State throughout the procedure provided for in Article 31 SCA. However, the Norwegian Government maintains that it has cooperated with ESA and complied with its duties under Article 3 EEA.

The evidence relied upon by the Norwegian Government

251. The Norwegian Government understands ESA, in the Reply, to raise various objections to the evidence of registrations of EEA national children presented by the Norwegian Government.

252. The Norwegian Government explains that, in the Defence, it introduced data on the number of EEA national children that have been registered with the police as having an independent right of residence based on Section 112(1)(c) of the Immigration Act and satisfying the condition of having "sufficient resources". This was presented in this table:

Year	**Number**
2016	6
2017	6
2018	11
2019	7
2020	4
2021	13
2022	11

2023	5

253. The Norwegian Government asserts that the number of EEA national children registered on the abovementioned ground is based on a manual search of the police's databases for the respective years. The background to this is that EEA nationals who meet the requirements in Section 112(1) of the Immigration Act are registered without any formal decision. Instead, upon meeting said requirements, they are registered with the police and issued with a registration certificate.

254. The Norwegian Government claims that, based on available information, it has tried to give an overview of practice in Norway and presented evidence of registration of EEA national children. The evidence presented shows that EEA national children have been registered pursuant to the Immigration Act Section 112(1)(c) in various police districts in Norway, i.e. Hordaland Police District, Troms Police District, Innlandet Police District, Trøndelag Police District and Vest Police District.

255. The Norwegian Government asserts that this evidence shows an administrative practice of registering EEA national children as residents of Norway on the basis of having "sufficient funds". The Norwegian Government rejects ESA's submission that the table presented lacks probative value due to ESA allegedly not being able to ascertain, or challenge, its accuracy or relevance. Instead, the Norwegian Government submits that the evidence shows that Norway recognises the independent right of residency of EEA national children pursuant to Article 7(1)(b) of the Directive.

256. As regards the instruction presented in Annex D.1, the Norwegian Government understands ESA to reject the submission that this instruction "illustrates that EEA national children can have a right of residence pursuant to Article 112(1)(c)/Article 7(1)(b) of the Directive …". The Government maintains, however, that the instruction does indeed support the submission that EEA national children enjoy that right.

257. First, the Norwegian Government notes that the instruction presented undoubtedly mentions, as reference persons for third-country nationals, "a minor EEA national who resides in the realm and has sufficient funds to support himself and any accompanying family members and who has medical insurance cf. the Immigration Act section 112 first paragraph (c)".

258. Second, in addition to its wording, the instruction as such clearly acknowledges that EEA national children can enjoy an independent right of residence under EEA law in Norway. The instruction entailed that the processing of all applications for residence permits by third-country family members of EEA national children was suspended on 25 May 2020. If Norway had not provided an independent right of residence for EEA national children, there would have been no reason to suspend the processing of applications for residence cards from their third-country national parents. Thus, the Norwegian Government fails to see how there may have been a consistent

administrative practice in breach of EEA law. It asserts that the aim of the instruction was to suspend any decisions from UDI and UNE contrary to EEA law. The issuing of the instruction shows that the Norwegian Government treated the issues raised by ESA and by the claimant in *Q and Others* with the utmost importance, by taking the most pertinent action at hand.

259. Third, the instruction must be distinguished from the *obiter* statements in the decisions regarding third-country national parents or primary carers of EEA national children, on which ESA relies.

Second part of the plea

260. The Norwegian Government maintains that, in order to answer the question whether third-country national parents may derive a right of residence from their EEA national child, one must begin by interpreting the wording of the Directive in its context.

261. In response to ESA's claims in the Reply that the Norwegian Government does not mention EEA law or the case law of the Court in section 5.2 of the Defence, the Norwegian Government asserts that the Directive is the relevant EEA law in this case, together with general principles of EEA law.

262. The Norwegian Government asserts that the parties seemingly agree that, pursuant to ECJ case law, the Directive itself does not provide a derived right of residence for third-country national primary carers. However, the parties disagree on the role that the Directive plays for the establishment of a derived right of residence for primary carers alongside Article 21 TFEU in EU law.

263. The Norwegian Government maintains that Article 21 TFEU is the sole legal basis for said derived right in EU law. The ECJ's reference to the Directive in its case law only entails that the conditions in Article 7(1)(b) of the Directive must be fulfilled in order to enjoy a derived right of residence pursuant to Article 21 TFEU.

264. Despite the agreed fact that the Directive does not in itself provide a derived right of residence in EU law, the Norwegian Government understands ESA to submit that Article 7(1)(b) of the Directive must be interpreted and applied to include such a derived right of residence in the EEA "because of the manner in which that provision must be interpreted and applied in the context of EEA law".

265. The Norwegian Government maintains that the EEA Agreement lacks the necessary legal basis for such an interpretation.

The context to the incorporation of the Directive into the EEA Agreement – amendments and Joint Declaration

266. The Norwegian Government reiterates that in the Defence it underlined the importance of the context in which the Directive was incorporated into the EEA Agreement. First, it asserts that the JCD incorporating the Directive amended the

wording of the Directive by, inter alia, delimiting the personal scope of the Directive to "nationals of the Contracting Parties" and "members of their family within the meaning of the Directive". Second, this JCD was accompanied by a Joint Declaration by the Contracting Parties, also delimiting any derived rights to an EEA national's "family members within the meaning of the Directive". Furthermore, both these sources underline the Contracting Parties' common understanding of immigration policy not being part of the EEA Agreement.

267. The Norwegian Government submits that the Directive must be interpreted in light of this context. Since the adaptations of an EEA legal act through a JCD in fact changes the EEA legal act, the adapted text constitutes an integral part of that EEA legal act. Accordingly, the adapted text must, in principle, be reviewed in the same manner as the rest of the Directive.

268. As regards joint declarations, the Norwegian Government asserts that the Court has previously attached weight to these in its case law.[51]

269. According to the Norwegian Government, the JCD and the accompanying Joint Declaration must be interpreted themselves in order to determine their impact on the interpretation of the Directive. In the Norwegian Government's submission, the JCD and Joint Declaration demonstrate a clear intention by the Contracting Parties to delimit any derived rights from EEA nationals to their family members within the meaning of the Directive. Third-country national parents not dependent on the EEA national are not family members within the meaning of the Directive, see Article 2(2) of the Directive, and are thus excluded.

270. The Norwegian Government submits that the adaptations to the Directive in the JCD must be interpreted in light of its wording, context and purpose, in accordance with the Court's case law.[52]

271. The Norwegian Government contends that, in light of their similarities, the same should apply to the Joint Declaration. When referring to "family members", the adaptations and Declaration refer to the "meaning of the Directive". The term "family member" is defined in Article 2(2) of the Directive. Therefore, the wording of the JCD and Joint Declaration clearly express the intention that the definition of "family member" in the Directive itself should be decisive. Furthermore, this conclusion is reinforced by the context and purpose for the adaptations in the JCD and Joint Declaration.[53] Both sources underline that immigration policy falls outside the EEA Agreement.

272. The Norwegian Government contends that the context to the incorporation of the Directive demonstrates a clear intention by the Contracting Parties to delimit any

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[51] Reference is made to the judgment of 27 November 2017 in *Marine Harvest* v *ESA*, E-12/16, paragraph 79.
[52] Reference is made to the judgment of 10 December 1998 in *Sveinbjörnsdóttir*, E-9/97, paragraphs 25 to 32.
[53] Reference is made to the judgment in *Sveinbjörnsdóttir*, E-9/97, cited above, paragraph 28, in which, according to the Norwegian Government, the Court seemingly attached substantive weight to the purpose of the relevant exception.

derived rights from EEA nationals to their family members within the meaning of the Directive, i.e. not third-country national parents not dependent on the EEA national, see Article 2(2) of the Directive. This is reflected both in the amended text of the Directive, the recitals of the JCD and the Joint Declaration by the Contracting Parties accompanying that decision.

273. The Norwegian Government contends that it is against this background that the Court must assess whether homogeneity in result may be achieved. Due to the context of the Directive, as well as the differences between the present case and the previous case law of the Court, the Norwegian Government submits that this question must be answered in the negative.

The homogeneity objective and the case law of the Court

274. The Norwegian Government understands the interpretation sought by ESA to be based largely on the homogeneity objective. The Norwegian Government observes that, pursuant to Article 6 of the EEA Agreement, provisions of EEA law, in so far as they are identical in substance to corresponding EU law, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the ECJ.

275. The Norwegian Government asserts that, in order to reach homogeneity with EU law in the present case, one must interpret the Directive *differently* in the EEA than in the EU. The principle of homogeneity may not in itself provide the basis for the interpretation sought by ESA if that interpretation lacks an underlying authority in the Agreement.[54]

276. On the Norwegian Government's understanding, ESA claims that this authority may be found in the homogeneity objective and the case law of the Court. The Norwegian Government disagrees. The core of the Norwegian Government's submissions is that the present case differs substantially from *Jabbi* and *Campbell*.

277. The Norwegian Government maintains that the interpretation in *Jabbi* and *Campbell* is sui generis which concerned the distinct situation of derived rights of residence for third-country nationals returning with an EEA national after having genuinely resided together and established a family life in a host EEA State in accordance with Article 7 of the Directive.

278. When discussing the relevance of *Jabbi* and *Campbell* for the present case, the Norwegian Government understands ESA first to claim that the common denominator between the present case and *Jabbi* and *Campbell* is that the derived right is granted to third-country nationals and, equally, that those third-country nationals had never resided in Norway before and were not returning to Norway.

279. With regard to *Campbell*, this is plainly mistaken. As is evident, Ms Campbell had resided in Norway and moved to Sweden. Nonetheless, an important distinction

[54] Reference is made to the judgment in *Jabbi*, E-28/15, cited above, paragraph 68.

between the present case and *Jabbi* and *Campbell* is that the third-country national seeking a derived right of residence in the latter cases fell within the definition of family member in Article 2(2) of the Directive (spouse). A primary carer of an EEA national minor, such as in the present case, does not. Further, the EEA (Norwegian) nationals in *Jabbi* and *Campbell* had previously exercised their free movement right, prior to returning to Norway with their third-country national spouse. The present case does, however, not concern a return situation but the establishment of a right of residence in an EEA State upon the arrival of both the third-country national and their EEA national child.

280. In sum, the facts in the present case differ substantially from the facts in *Jabbi* and *Campbell* on key points for the interpretation of the Directive. Due to these differences, in the submission of the Norwegian Government, the second plea, unlike the situation in *Jabbi* and *Campbell*, concerns immigration policy which the Contracting Parties have made express reservation for: i.e. concerning the right of residence for a third-country national not falling within the definition of a family member in the Directive. Therefore, the fact that the Court in *Jabbi* and *Campbell* held that the Directive must be interpreted differently in the EEA than in the EU in a return situation does not entail the same result in the present case.

281. Due to the present case not concerning a return situation or a situation where a free movement right has previously been exercised, the Norwegian Government asserts that its interpretation will not, in contrast to what ESA submits, deprive the provisions of the Directive of their practical effect.

282. The Norwegian Government is of the impression that if an EEA child itself wishes to exercise its right of free movement under the Directive by moving to Norway, they could, in practice, exercise this right. In practice, an EEA national child moving to Norway of his or her own right would do so in the capacity as a student or worker, and it appears highly hypothetical and unpractical that an EEA national child wishing to move to an EFTA State without having resided there before would refrain from doing so due to the lack of a derived residence right for their primary carer. Therefore, the Norwegian Government asserts that its position does not, in practice, deprive the EEA national child's independent right of residence under the Directive of its effectiveness.

Fundamental rights forming part of the general principles of EEA law

283. Lastly, the Norwegian Government maintains that its interpretation of the Directive is in full conformity with fundamental rights, as part of the general principles of EEA law, which Norway certainly recognises.

284. The Norwegian Government asserts that ESA has not presented any case law from the Court or the ECJ which entails that Norway's interpretation of the Directive conflicts with fundamental rights. Furthermore, the Norwegian Government notes that ESA agrees that the right to private life under the ECHR does not require the establishment of a derived right of residence in the case at hand.

285. Having regard to the specificities of this case and the importance of the ECHR and the case law of the ECtHR when determining the content of fundamental rights in EEA law,[55] the Norwegian Government asserts that it has not identified any grounds for interpreting the fundamental right to private life under the EEA Agreement differently in this context. Consequently, the Norwegian Government fails to see how the fundamental right to private life can justify rewriting the Directive.

286. The Norwegian Government claims that ESA appears to mix fundamental (human) rights in EEA law with the principle of free movement.

287. As to ESA's submission on the alleged silence from the Norwegian Government regarding the obligation to secure the best interest of the child, the Norwegian Government refers to its submission in paragraph 125 of the Defence, where it clearly recognises that EEA legal acts must be interpreted in accordance with EEA fundamental rights, as part of the general principles of EEA law.

288. Furthermore, the Norwegian Government contends that if Norway's interpretation of Article 7(1)(b) of the Directive were to lead to a conflict with fundamental rights in a particular case, the Norwegian Government would ensure respect for fundamental rights through the application of Article 3(2) of the Directive, interpreted in light of the right to respect for family life.

289. Lastly, the Norwegian Government observes that in the Defence it provided an overview of other provisions of EEA law which protect the interests of EEA national children. The Norwegian Government finds it difficult to understand how ESA deduces that Norway, by providing an overview of other provisions of EEA law which protect the interests of EEA national children, "apparently recognises that the rights of EEA national children to be accompanied by their primary carer in a host EEA State is not respected by its interpretation of Article 7(1)(b) of the Directive". The Norwegian Government considers it evident from the Defence and the Rejoinder that it is the Norwegian Government's submission that its interpretation of the Directive corresponds with the fundamental rights forming part of the general principles of EEA law.

The Government of Iceland

Observations by the Government of Iceland

290. The Government of Iceland supports Norway's request that the Application of ESA be dismissed as unfounded, and ESA be ordered to pay the costs of the proceedings.

291. The Government of Iceland maintains that a third-country national who is the primary carer of an EEA national child cannot derive residence rights from their child

[55] Reference is made to the judgment in *Kerim*, E-1/20, cited above, paragraph 43.

based on the Directive. The EFTA States are not bound by the TFEU and thus Articles 20 and 21 of the TFEU have no bearing on the EEA Agreement.

Legal assessment

292. The Government of Iceland submits that the dispute in the case concerns the scope of Article 2(2) of the Directive rather than the interpretation of Article 7(1)(b). When the requirements of Article 2(2) are not met, the requirements of Article 7(1)(b) are inevitably also not met for the family member in question.

293. The Government of Iceland asserts that the scope of the Directive is clear. The plain meaning of Article 2(2) exclude direct relatives in the ascending line who are not dependent on the EEA national. Thus, a third-country national who is the primary carer of an EEA national child cannot derive a right from the child based on the Directive. In essence, an adult may not use the child as an "anchor".

294. The Government of Iceland contends that Articles 2(2) and 7(1)(b) of the Directive cannot be interpreted against their clear wording with a general reference to the principle of homogeneity, so as to incorporate EU fundamental rules on Union Citizenship into the EEA Agreement.

295. In the Government of Iceland's submission, Article 3(2)(a) of the Directive specifies procedural guarantees for family members other than those stipulated in Article 2(2) but does not grant them direct rights based on the Directive. In such cases, the State in question must examine the personal situation of the applicant in question and a refusal must be justified.

296. The Government of Iceland considers ESA's plea, in principle, to request that the Court applies the Directive contrary to its clear definition of family members in Article 2(2). This can only be done with a legal amendment to the Directive itself.

297. The Government of Iceland finds the case law presented by ESA to have no bearing in this case.

298. Union citizens have certain rights under the TFEU, e.g. according to Article 21 TFEU, which are greater than rights derived under the Directive alone. As there is no equivalence in the EEA Agreement, in the submission of the Government of Iceland, EU law and the EEA Agreement are not fully legally comparable in this respect.

299. The Government of Iceland asserts that there is no infringement of the fundamental rights of the child.

300. The ECHR has in its case law affirmed that States are entitled, as a matter of international law and subject to their treaty obligations, to control the entry of aliens into their territory and their residence there.[56]

[56] Reference is made to ECtHR *Uner v. Netherlands*, application no. 46410/99, cited above, paragraph 54.

301. The Government of Iceland emphasises that minors do not on their own account decide to migrate. Such decisions and responsibilities are in the hands of their adult carers.

Conclusion

302. In summary, the Government of Iceland argues that the concept of Union Citizenship is not part of the EEA Agreement. The scope of the Directive is clear, such that a third-country national who is the primary carer of an EEA minor cannot derive a right from the minor based on the Directive. Furthermore, case law of the ECJ and the Court presented by ESA in the Application has no bearing on this case. Moreover, there is no infringement of the fundamental rights of the family in the present case.

Páll Hreinsson

Judge-Rapporteur