JUDGMENT OF THE COURT

12 December 2024*

(Failure to fulfil obligations – Directive 2004/38/EC – Article 7(1)(b) – Child with the nationality of one EEA State residing in another EEA State – Condition of sufficient resources – Right of residence of third-country nationals who are primary carers of EEA national minors – Effectiveness of residence rights)

In Case E-16/23,

EFTA Surveillance Authority, represented by Marte Brathovde, Erlend Møinichen Leonhardsen, Hildur Hjörvar and Melpo-Menie Joséphidès, acting as Agents,

applicant,

v

The Kingdom of Norway, represented by Kristin Hallsjø Aarvik, Jon-Christian Rynning and Marie Munthe-Kaas, acting as Agents,

defendant,

APPLICATION 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,

* Translations of national provisions are unofficial and based on those contained in the documents of the case.

THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Bernd Hammermann and Michael Reiertsen, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having regard to the written pleadings of the applicant and the defendant, and the written observations submitted on behalf of:

- the Icelandic Government, represented by Inga Þórey Óskarsdóttir and Arnar Sigurður Hauksson, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the applicant, represented by Marte Brathovde and Erlend Møinichen Leonhardsen, and the defendant, represented by Kristin Hallsjø Aarvik and Jon-Christian Rynning, at the hearing on 2 July 2024,

gives the following

JUDGMENT

I INTRODUCTION

1 By an application lodged at the Court's Registry on 20 December 2023, the EFTA Surveillance Authority ("ESA") brought an action under 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 from the Court that Norway has failed to fulfil its obligations arising from Article 7(1)(b) of Directive 2004/38/EC 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 Article7(1)(b) of Directive 2004/38/EC and be accompanied by their primary carers.

2 Norway contests the form of order sought and requests that the application be dismissed.

II LEGAL BACKGROUND

EEA law

3 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; and

Norwegian EEA Supplement 2012 No 5, p. 243) ("Directive 2004/38" or "the Directive") was incorporated into the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") by Decision No 158/2007 of the EEA Joint Committee of 7 December 2007 (OJ 2008 L 124, p. 20; and EEA Supplement 2008 No 26, p. 17) ("JCD No 158/2007"), and is referred to at point 1 of Annex V (Free movement of workers) and point 3 of Annex VIII (Right of establishment) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway. The requirements were fulfilled by 9 January 2009, and the decision entered into force on 1 March 2009.

4 The third subparagraph of Article 1(1) of JCD No 158/2007 reads:

> *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'.*
> >
> > *(d) In Article 24(1) the word 'Treaty' shall read 'Agreement' and the words 'secondary law' shall read 'secondary law incorporated in the Agreement'.*

5 Together with JCD No 158/2007, the Contracting Parties issued a "Joint Declaration by the Contracting Parties to Decision of the EEA Joint Committee No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement" ("Joint Declaration"), which 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 recognise 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 Article 2 of the Directive, entitled "Definitions", reads:

For the purposes of this Directive:

1) 'Union citizen' means any person having the nationality of a Member State;

2) 'Family member' means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) 'Host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

7 Article 3(1) of the Directive, entitled "Beneficiaries", reads:

This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

8 Article 7 of the Directive, entitled "Right of residence for more than three months", reads, 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:

(a) are workers or self-employed persons in the host Member State; or

(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

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they 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; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

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 citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

…

9 Article 16(1) of the Directive, entitled "General rule for Union citizens and their family members", reads:

Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

National law

10 In Norway, Directive 2004/38 has been implemented by the Act of 15 May 2008 No 35 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm

(*lov 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her*) ("the Immigration Act").

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

12 The first paragraph of Section 112 of the Immigration Act reads:

> *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.*
>
> …

13 Guideline UDI-2011-037, issued by the Directorate of Immigration (*Utlendingsdirektoratet*, "UDI"), concerns the right of residence for EEA nationals pursuant to the first paragraph of Section 112 of the Immigration Act (*Opphold på selvstendig grunnlag for EØS-borgere*). 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".

III FACTS AND PRE-LITIGATION PROCEDURE

14 On 15 November 2019, ESA received a complaint concerning the recognition of children's residence rights under EEA law in Norway.

15 Following correspondence with Norway, ESA issued a letter of formal notice on 30 September 2020 informing Norway that it took the view that Norway, by maintaining in force legal provisions such as letter c of the first paragraph of Section 112, the third paragraph of Section 113 and the third paragraph of Section 114 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, 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.

16 In its reply to the letter of formal notice, Norway contended that there are differences between EU and EEA law as regards free movement and residence rights of EEA national children.

17 On 7 July 2021, ESA delivered a reasoned opinion to Norway, calling on it to take the measures necessary to comply with the reasoned opinion within three months, i.e. by 7 October 2021.

18 By letter dated 6 October 2021, Norway replied to the reasoned opinion maintaining that a third-country national parent of a minor with nationality of an EEA State cannot claim a derived right of residence based on the Directive alone. Norway maintained that such a right may only be derived from Article 21 of the Treaty on the Functioning of the European Union ("TFEU") read in conjunction with the Directive. Norway concluded that, in the absence of a provision 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 in general and its Article 7(2) in particular. Norway contended that Article 7(1)(b) of the Directive was correctly implemented by letter c of the first paragraph of Section 112 of the Immigration Act and that an EEA national fulfilling the requirement in Article 7(1)(b) has a right to reside in Norway.

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

20 On 13 December 2023, ESA decided by way of Decision 192/23/COL to bring the matter before the Court pursuant to Article 31 SCA.

IV PROCEDURE AND FORMS OF ORDER SOUGHT

21 On 20 December 2023, ESA lodged an application pursuant to the second paragraph of Article 31 SCA at the Court's Registry, which was registered at the Court on the same date.

22 ESA requests the Court to:

> *1. 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, 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 and

2. order Norway to bear the costs of these proceedings.

23 On 5 March 2024, Norway submitted its defence, pursuant to Article 107 of the Rules of Procedure ("RoP"). Norway contests the application and requests the Court to:

1. Dismiss the Application of the EFTA Surveillance Authority as unfounded.

2. Order the EFTA Surveillance Authority to pay the costs of the proceedings.

24 On 8 April 2024, ESA submitted its reply.

25 On 7 May 2024, the Government of Iceland submitted written observations. On the same date, Norway submitted its rejoinder. The oral hearing was held on 2 July 2024.

26 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

V ARGUMENTS SUBMITTED AND FINDINGS OF THE COURT

The form of order sought

27 As a preliminary point, it should be noted that, as is clear from the form of order sought in the application initiating proceedings, the present action for failure to fulfil obligations does not seek to call into question the compatibility of the wording of letter c of the first paragraph of Section 112 of the Immigration Act with Article 7(1)(b) of Directive 2004/38. Rather, it is confined to the issue of the application of the conditions laid down by that provision by the competent Norwegian authorities.

28 It is clear from the application that ESA's complaint is formed of two parts. ESA seeks, by the first part of its plea, a finding that letter c of the first paragraph of Section 112 of the Immigration Act, together with the relevant guideline, has been interpreted and applied by the competent Norwegian authorities in such a way that EEA national children who have sufficient resources through their primary carers cannot benefit from the right of residence in Norway, in breach of Article 7(1)(b) of Directive 2004/38. By the second part of its plea, ESA seeks a finding that Norway does not provide a derived right of residence to third-country national primary carers of EEA national children fulfilling the conditions for residence pursuant to Article 7(1)(b), in breach of that provision.

The first part of the plea, concerning the right of EEA national children to reside on the territory of another EEA State pursuant to Article 7(1)(b) of the Directive

Arguments submitted to the Court

29 ESA submits that Article 7(1)(b) of Directive 2004/38 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. ESA contends, in this regard, that the wording of Article 7(1)(b) does not exclude children from its scope.

30 ESA submits that Norway is in breach of Article 7(1)(b) of Directive 2004/38 by interpreting and applying letter c of the first paragraph of Section 112 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).

31 ESA argues that Norway's 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 is evidenced by (i) the relevant guideline from UDI; (ii) decisions of the Norwegian 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 EFTA Court, the European Court of Justice ("ECJ") and domestic courts.

32 Norway agrees with ESA's interpretation of Article 7(1)(b) of Directive 2004/38, namely, that the provision confers an independent right of residence on EEA national children, provided that they fulfil the conditions therein. Furthermore, Norway accepts that 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.

33 Norway, however, disagrees that there has been a failure to fulfil the obligations under Article 7(1)(b) of the Directive on the basis of its administrative practice. That is, Norway disagrees with ESA's assessment that letter c of the first paragraph of Section 112 of the Immigration Act is interpreted and applied in such a way that EEA national children cannot benefit from their right of residence in Norway.

34 In this regard, Norway maintains that a number of EEA national children are registered each year as having an independent right of residence in Norway pursuant to Article 7(1)(b) of the Directive and the condition of having sufficient resources.

Findings of the Court

35 The Court observes that, according to established case law, in proceedings pursuant to Article 31 SCA for failure to fulfil obligations, it is incumbent upon ESA to prove the allegation that the obligation has not been fulfilled. It is ESA's responsibility to place before the Court the information necessary for it to establish that the obligation has not been fulfilled, and in so doing ESA may not rely on any presumption for that purpose (see the judgment of 15 July 2021 in *ESA* v *Norway*, E-9/20, paragraph 106 and case law cited).

36 With regard in particular to a complaint concerning the actual application of a national provision, the proof of an EEA 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. Where the subject-matter of an action for failure to fulfil obligations concerns the application of a national provision, the failure can be established only as a result of sufficiently documented and detailed proof of the alleged practice, for which the EEA State concerned is answerable (compare the judgment of 12 May 2005 in *Commission* v *Belgium*, C-287/03, EU:C:2005:282, paragraph 28). The Court has held that it must be apparent from such proof that the administrative practice which infringes EEA law is, to some degree, of a consistent and general nature (see the judgment of 11 September 2013 in *ESA* v *Norway*, E-6/12, paragraph 58 and case law cited).

37 ESA has failed to furnish the Court with examples 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. As acknowledged by ESA in its reply, the decisions which ESA refers to only concern applications for a right of residence by third-country national primary carers, not EEA national children. ESA has therefore failed to provide the Court with the evidence necessary for it to determine the existence of the alleged failure, especially since the Norwegian Government specifically challenges the reliability of the information relied on, demonstrating that, in a number of those decisions, the right of residence of EEA national children was not affected by the refusal to grant a right of residence to the third-country national.

38 Moreover, other examples cited by Norway in its defence tend, on the contrary, to show that Norway recognises the independent right of residence of EEA national children.

39 Accordingly, ESA has failed to establish the existence in Norway of an administrative practice as alleged in its application.

40 The first part of ESA's plea must therefore be dismissed.

The second part of the plea, concerning a derived right of residence for third-country nationals who are primary carers of an EEA national child

Arguments submitted to the Court

41 ESA submits that 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.

42 ESA maintains that there is a consistent and general administrative practice in Norway interpreting and applying letter c of the first paragraph of Section 112 of the Immigration Act in such a way that an EEA national child cannot be accompanied by his or her primary carer pursuant to Article 7(1)(b) of the Directive. ESA claims that this is evidenced by decisions of the immigration authorities and statements of a general nature from the Norwegian Government.

43 ESA claims that Norway is in breach of Article 7(1)(b) of the Directive by interpreting and applying letter c of the first paragraph of Section 112 of the Immigration Act in such a way that EEA national children who have sufficient resources through their third-country primary carers cannot be accompanied by them.

44 Norway maintains that the Directive 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. Norway does not dispute that the administrative practice in Norway reflects its understanding of the Directive.

45 Norway submits that, with regard to the family members of EEA nationals, Article 2(2)(d) of the Directive applies only to "the dependent direct relatives in the ascending line …" of the EEA national, which third-country nationals who are primary carers of an EEA national child are not. Furthermore, Norway states that the express reservations to be found in the Joint Declaration, in respect of derived rights of residence for third-country nationals not falling within the definition of family members in the Directive, demonstrate a clear intention by the Contracting Parties to delimit any derived rights from EEA nationals to their family members within the meaning of Article 2(2) of the Directive.

46 Norway maintains that, according to the case law of the ECJ, Article 21 TFEU is the sole legal basis for a derived right of residence for third-country nationals who are primary carers of EEA national children in EU law. Norway argues that 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.

47 Norway therefore concludes that, in the absence of a provision of EEA law equivalent to Article 21 TFEU, a third-country national parent may not derive rights of residence based on the Directive.

48 The Icelandic Government overall supports Norway's position that a third-country primary carer of an EEA national who is a minor cannot claim a derived right of residence based on the Directive alone, because they fall outside the personal scope of Article 2(2) of the Directive. The Icelandic Government argues that the ECJ case law presented by ESA is based on either Article 21 TFEU as the sole legal basis, or Article 21 TFEU combined with the Directive. As the Joint Declaration provides that Union citizenship is not part of the EEA Agreement, that case law has no bearing in the present case.

Findings of the Court

Existence of such an administrative practice

49 By the second part of its plea, ESA claims that Norway is in breach of Article 7(1)(b) of the Directive by interpreting and applying letter c of the first paragraph of Section 112 of the Immigration Act in such a way that EEA national children who have sufficient resources through their third-country primary carers cannot be accompanied by them.

50 Norway has confirmed both in its defence and rejoinder that, in Norwegian administrative practice, letter c of the first paragraph of Section 112 of the Immigration Act is interpreted and applied in a way which corresponds to its understanding of Article 7(1)(b) of the Directive, i.e. that it 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 that provision.

51 Therefore, the existence of such an administrative practice as set out above is undisputed.

Right of residence for EEA national children under Directive 2004/38

52 The Court observes that Article 3(1) of the Directive provides that it applies to all EEA nationals who move or reside in an EEA State, other than that of which they are nationals, and their family members, as defined in Article 2(2) of the Directive, who accompany or join them (see the judgment of 13 November 2019 in *D and E*, E-2/19, paragraph 46 and case law cited).

53 Article 7(1)(b) of the Directive grants EEA nationals the right to reside within the territory of another EEA State for more than three months if they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host EEA State during their period of residence and have comprehensive sickness insurance cover in the host EEA State (see the judgment of 26 July 2016 in *Jabbi*, E-28/15, paragraphs 72 and 78).

54 A child can rely on his or her right of freedom of movement and residence guaranteed by EEA law (compare the judgment of 13 September 2016 in *Rendón Marín*, C-165/14, EU:C:2016:675, paragraphs 43 and 44 and case law cited). The capacity of a national

of an EEA State to be the holder of rights guaranteed by Directive 2004/38 on the free movement of persons cannot be made conditional upon the attainment of the age prescribed for the acquisition of legal capacity by the person concerned to exercise those rights personally (compare the judgment of 22 June 2023 in *Staatssecretaris van Justitie en Veiligheid (Thai mother of a Dutch minor child)*, C-459/20, EU:C:2023:499, paragraph 42 and case law cited).

55 However, minor EEA nationals are equally subject to the limitations and conditions laid down in the Directive. Unless minor EEA nationals have acquired a right of permanent residence in the host State by virtue of Article 16(1) of the Directive, in which case their right of residence would not be subject to the conditions provided for in Chapter III, they can be granted a right of residence only if they fulfil the conditions prescribed in Article 7(1) (see, to that effect, the judgment of 26 July 2011 in *Arnulf Clauder*, E-4/11, paragraph 46 and case law cited).

56 As regards the limitations and conditions laid down in Article 7(1)(b) of the Directive, the Court observes that it is settled case law that to "have" sufficient resources in that provision must be interpreted as meaning that it suffices that such resources are available to the EEA national, and that the provision in question lays down no requirement whatsoever as to their origin, consequently they could be provided, inter alia, by a third-country national (compare the judgments of 10 October 2013 in *Alokpa and Moudoulou*, C-86/12, EU:C:2013:645, paragraph 27 and case law cited, and *Rendón Marín*, C-165/14, cited above, paragraph 48 and case law cited).

57 Thus, Article 7(1)(b) of the Directive merely requires that the EEA nationals concerned have sufficient resources at their disposal to prevent them from becoming an unreasonable burden on the social assistance system of the host EEA State during their period of residence, without establishing any other conditions, in particular as regards the origin of those resources (compare the judgment of 2 October 2019 in *Bajratari*, C-93/18, EU:C:2019:809, paragraphs 33 and 34).

Residence rights for third-country national primary carers

58 In its application, ESA argues that when an EEA national child has an independent right of residence in a host State, under Article 7(1)(b) of the Directive, a necessary corollary of that right is that the child's primary carer, regardless of nationality, must be allowed to reside with the child in the host State.

59 Norway maintains that the Directive 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).

60 The Court observes, as noted above, that it is settled case law that the Directive grants a right to reside in the host EEA State to a minor child who is a national of another EEA State and who satisfies the conditions of Article 7(1)(b). Therefore, the Court must examine whether the same provision of the Directive must be interpreted as meaning that it precludes an EEA State from refusing to allow a third-country national to reside

in its territory, where that third-country national is the primary carer of that minor child who is an EEA national.

61 It should be recalled that the provisions of the Directive do not confer any autonomous right on third-country nationals. Any rights conferred on third-country nationals are derived from those enjoyed by an EEA national through the exercise of his or her freedom of movement (see, inter alia, the judgment of 2 July 2024 in *MH*, E-6/23, paragraph 37 and case law cited). The purpose and justification of those derived rights, in particular rights of entry and residence of family members of an EEA national, are based on the fact that a refusal to allow family members such rights would be liable to interfere with the EEA national's freedom of movement by discouraging that national from exercising his or her rights of entry into and residence in the host EEA State (compare the judgment of 16 July 2015 in *Singh and Others*, C-218/14, EU:C:2015:476, paragraph 50 and case law cited).

62 Moreover, there may be situations where the right of entry and residence of a third-country national has such an intrinsic connection with the freedom of movement of an EEA national that a refusal of rights to the third-country national would interfere with that freedom of the EEA national (compare the judgment in *Alokpa and Moudoulou*, C-86/12, cited above, paragraph 23 and case law cited).

63 As regards the present case, it must first be observed that third-country national primary carers of minor EEA nationals cannot be regarded as beneficiaries of Directive 2004/38, within the meaning of Article 3(1).

64 As is apparent from Article 2(2) of Directive 2004/38, the concept of "family member", within the meaning of that directive, is limited, as regards the relatives in the ascending line of an EEA national, to "dependent direct relatives in the ascending line". Consequently, where a minor EEA national is dependent on a third-country national, the third-country national cannot rely on being a "dependent" direct relative in the ascending line, within the meaning of the Directive, with a view to having the benefit of a right of residence in the host EEA State (compare the judgment in *Rendón Marín*, C-165/14, cited above, paragraph 50 and case law cited).

65 However, a refusal to allow a third-country primary carer of a minor child who is an EEA national and who has a right of residence under Directive 2004/38 to reside with that EEA national in the host EEA State would deprive that national's right of residence of any useful effect, since enjoyment by a child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host EEA State for the duration of such residence (compare the judgments in *Rendón Marín*, C-165/14, cited above, paragraphs 51 and 52 and *Alokpa and Moudoulou*, C-86/12, cited above, paragraph 28).

66 Thus, while the provisions of Directive 2004/38 grant a right to reside in the host EEA State to a minor child who is a national of another EEA State and who satisfies the conditions of Article 7(1)(b), those same provisions allow a primary carer to reside with

the child in the host EEA State (compare the judgments of 30 June 2016 in *NA*, C-115/15, EU:C:2016:487, paragraph 79, and *Alokpa and Moudoulou*, C-86/12, cited above, paragraph 29).

67 Norway maintains that, according to the case law of the ECJ, Article 21 TFEU is the sole legal basis for a derived right of residence for third-country nationals who are primary carers of children who are citizens of the European Union. Norway has argued that the ECJ's reference to the Directive in its case law only entails that the conditions in Article 7(1)(b) must be fulfilled in order to enjoy a derived right of residence pursuant to Article 21 TFEU. Thus, according to Norway, the Directive is not capable of giving rise to such a derived right of residence.

68 As pointed out by ESA, it is settled case law in the context of the EU legal order that, where Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor who is a national of another Member State and who satisfies the conditions laid down in Article 7(1)(b) of that directive, *those same provisions* allow a parent who is that minor's primary carer to reside with him or her in the host Member State (compare the judgments of 19 October 2004 in *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraphs 46 and 47; *Alokpa and Moudoulou*, C-86/12, cited above, paragraph 29; *Rendón Marín*, C-165/14, cited above, paragraph 52 and *NA*, C-115/15, cited above, paragraph 79).

69 Thus, according to ECJ case law, in so far as children fulfil the conditions laid down in Article 7(1)(b) of the Directive for entitlement to a right of residence in the host Member State, the primary carer could rely on a derived right of residence in the host Member State based both on Article 21 TFEU and the provisions of Directive 2004/38.

70 As a result, Norway's assertion that, according to ECJ case law, the Directive does not provide a derived right of residence for third-country nationals who are primary carers of children who are citizens of the Union fulfilling the conditions for residence pursuant to Article 7(1)(b) cannot be upheld.

71 The Court also observes that the interpretation put forward by Norway would be inconsistent with the overall context of Directive 2004/38 which, according to settled case law, establishes a gradual system as regards the right of residence in the host State which reproduces, in essence, the stages and conditions set out in the various instruments of EEA law and case law preceding that directive and culminates in the right of permanent residence (compare the judgment of 17 April 2018 in *B and Vomero*, C-316/16 and C-424/16, EU:C:2018:256, paragraph 51 and case law cited).

72 Indeed, if a primary carer of a minor child who is an EEA national is refused a right to reside with that child in the host EEA State, such a refusal would deprive the child's right of residence of any useful effect and thus clearly be contrary to the aim pursued

by the Directive in establishing such a right of residence (compare the judgment in *Alokpa and Moudoulou*, C-86/12, cited above, paragraph 28 and case law cited).

73 That interpretation is supported by the objectives of the Directive which, as is apparent from recitals 1 to 4, are, in particular, to facilitate and strengthen the exercise of the right of free movement and residence of all EEA nationals. Since the freedom of movement for persons is the foundation of the Directive, any limitations to that freedom must be interpreted strictly. Therefore, in the light of the context and the aims pursued, the provisions of the Directive cannot be interpreted restrictively, and must not in any event be deprived of their practical effect (see the judgments in *Arnulf Clauder*, E-4/11, cited above, paragraph 34, and *MH*, E-6/23, cited above, paragraph 77 and case law cited).

74 Interpreting Article 7(1)(b) of Directive 2004/38 so that the primary carer of a child to whom that provision grants a right of residence could not reside with that child in the host EEA State would run counter to that purpose.

75 The Court concludes that, where minor EEA nationals satisfy the conditions laid down in Article 7(1)(b) of Directive 2004/38, their right of residence in the host EEA State conferred by the Directive necessarily implies a right for their third-country national primary carers to reside with them in the host EEA State in order for the children's right to be effective.

Conclusion

76 Accordingly, the Court finds that, by maintaining in force letter c of the first paragraph of Section 112 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 be accompanied by their primary carers, Norway has failed to fulfil its obligations arising from Article 7(1)(b) of Directive 2004/38.

VI COSTS

77 Under Article 121(2) RoP, where each party succeeds on some and fails on other heads, the Court may order that the costs shall be shared or that each party shall bear its own costs. Since both ESA and Norway have been partially successful, each party shall bear its own costs. The costs incurred by the Icelandic Government, which has submitted observations to the Court, are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Declares that, by maintaining in force letter c of the first paragraph of Section 112 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 be accompanied by their primary carers, Norway has failed to fulfil its obligations arising from Article 7(1)(b) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.**

2. **Dismisses the application as to the remainder.**

3. **Orders each party to bear its own costs.**

Páll Hreinsson Bernd Hammermann Michael Reiertsen

Delivered in open court in Luxembourg on 12 December 2024.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President