JUDGMENT OF THE COURT

21 April 2021*

(*Directive 2004/38/EC – Freedom of movement and residence – Expulsion – Protection against expulsion – Genuine, present and sufficiently serious threat – Imperative grounds of public security – Exclusion orders – Applications for lifting of exclusion orders – Material change – Necessity – Proportionality – Fundamental rights – Right to family life*)

In Case E-2/20,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Borgarting Court of Appeal (*Borgarting lagmannsrett*), in the case between

The Norwegian Government, represented by the Immigration Appeals Board (*Utlendingsnemnda – UNE*),

and

L,

concerning the interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, as adapted to the Agreement on the European Economic Area,

THE COURT,

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

Registrar: Ólafur Jóhannes Einarsson,

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

having considered the written observations submitted on behalf of:

– the Norwegian Government, represented by Kristin Hallsjø Aarvik, acting as Agent;

– L, represented by Bent Endresen, advocate;

– the Danish Government, represented by Jakob Nymann-Lindegren, Maria Søndahl Wolff and Mads Peder Brøchner Jespersen, acting as Agents;

– the EFTA Surveillance Authority ("ESA"), represented by Stewart Watson, Erlend Møinichen Leonhardsen, Catherine Howdle and Carsten Zatschler, acting as Agents; and

– European Commission ("the Commission"), represented by Elisabetta Montaguti, and Jonathan Tomkin, acting as Agents;

having regard to the Report for the Hearing,

having heard oral argument of the Norwegian Government, represented by Kristin Hallsjø Aarvik; L, represented by Bent Endresen; the Danish Government, represented by Mads Peder Brøchner Jespersen; ESA, represented by Carsten Zatschler, Stewart Watson, and Erlend Møinichen Leonhardsen; the Commission, represented by Elisabetta Montaguti and Jonathan Tomkin; at the remote hearing on 29 September 2020,

gives the following

Judgment

I Legal background

EEA law

1 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), as corrected by OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34, ("the Directive") was incorporated into the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") by Decision of the EEA Joint Committee No 158/2007 (OJ 2008 L 124, p. 20, and EEA Supplement 2008 No 26, p. 17) ("Joint Committee Decision"), which added it at point 3 of Annex VIII (Right of establishment), and points 1 and 2 of Annex V (Free movement of workers). Constitutional requirements were indicated by Iceland,

Liechtenstein and Norway and were fulfilled on 9 January 2009, and the decision entered into force on 1 March 2009.

2 Article 1 of the Joint Committee Decision reads, in extract:

> …
>
> *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'.*

3 Recitals 23, 24 and 27 of the Directive read:

> *(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.*
>
> *(24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.*

(27) In line with the case-law of the Court of Justice prohibiting Member States from issuing orders excluding for life persons covered by this Directive from their territory, the right of Union citizens and their family members who have been excluded from the territory of a Member State to submit a fresh application after a reasonable period, and in any event after a three-year period from enforcement of the final exclusion order, should be confirmed.

4 Chapter VI of the Directive entitled "Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health" contains Articles 27 to 33.

5 Article 27(1) and (2) of the Directive, entitled "General principles", reads:

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

6 Article 28 of the Directive, entitled "Protection against expulsion", reads:

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

7 Article 32 of the Directive, entitled "Duration of exclusion orders", reads:

1. Persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order which has been validly adopted in accordance with Community law, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.

The Member State concerned shall reach a decision on this application within six months of its submission.

2. The persons referred to in paragraph 1 shall have no right of entry to the territory of the Member State concerned while their application is being considered.

8 Article 33 of the Directive, entitled "Expulsion as a penalty or legal consequence", reads:

1. Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.

2. If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued.

National law

9 The Act of 15 May 2008 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*, "Norwegian Immigration Act") implements the Directive in Norwegian law.

10 Section 122 of the Norwegian Immigration Act reads:

> *EEA nationals and their family members, and foreign nationals as mentioned in Section 110, fourth paragraph, of the Act who have a right of residence under Section 111, second paragraph, or Section 114, second paragraph, may be expelled when this is in the interests of public order or security. It is a condition for expulsion that the personal circumstances of the foreign national present, or must be assumed to present, a real, immediate and sufficiently serious threat to fundamental societal interests. The King may issue regulations containing further provisions on the definition of public order and security.*
>
> *A foreign national who may be expelled under the first paragraph may nevertheless not be expelled if the foreign national*
>
> > *(a) has a permanent right of residence under Sections 115 or 116, unless weighty public order or security considerations indicate that it is necessary,*
> >
> > *(b) is an EEA national who has resided in the realm for 10 years, unless it is compellingly necessary in the interests of public security, or*
> >
> > *(c) is an EEA national who is a minor, unless it is compellingly necessary in the interests of public security. However, this does not apply to minors if expulsion of the minor is necessary in order to safeguard the child's best interests.*
>
> *A foreign national who has contravened Chapter 18 of the Penal Code or has provided a safe haven for a person the foreign national knows to have committed such an offence may be expelled regardless of the provisions in the second paragraph.*
>
> *No expulsion decision is made under the provisions of this Section if, in view of the seriousness of the offence and the foreign national's connection with the realm, it would constitute a disproportionate measure against the foreign national personally or against the family members. In the assessment of whether expulsion constitutes a disproportionate measure, weight shall be given to, among other things, the person's length of residence in the realm, age, state of health, family situation, financial situation, social and cultural integration in the realm, and connection with the country of origin. In cases concerning children, the child's best interests shall be a fundamental consideration.*

11 Section 124, first and second paragraphs, of the Norwegian Immigration Act reads:

> *Expulsion precludes subsequent entry. The entry prohibition may be made permanent or time-limited, but not for periods shorter than two years. In the assessment, particular weight shall be given to the factors as mentioned in Section 122, first paragraph.*
>
> *The entry prohibition may be lifted upon application if indicated by new circumstances. If special circumstances apply, the expelled person may upon application be admitted to the realm for brief visits even if the entry prohibition is not lifted, but normally not until one year has passed since exit.*

II Facts and procedure

12 L is a Finnish national. He moved to Norway in 1998 when he was 19 years old. Before moving to Norway, he lived in Stockholm, Sweden.

13 In 2003, L met his common-law partner. They have two children, born in 2005 and 2007. L is also the stepfather of his partner's daughter born in 1999. L and his partner lived separately for a while from 2009 due to difficulties in the relationship stemming from his partner's state of health. His partner is today categorised as 100 percent disabled.

14 L has been convicted on several occasions in Norway. By judgment of 16 November 2010, L was given a brief suspended sentence and a fine under the Norwegian Road Traffic Act (*vegtrafikkloven*). By judgment of 9 May 2011 of Stavanger District Court, he was found guilty of an offence under the Norwegian Penal Code (*straffeloven*). That conviction was upheld on appeal by judgment of 29 March 2012 of Gulating Court of Appeal, which set the sentence at 11 months' imprisonment.

15 At the time of the latter judgment, L had been arrested in a major narcotics case. By judgment of 12 November 2012 of Stavanger District Court, L was convicted of three offences under the Norwegian Penal Code, relating to involvement with or aiding and abetting involvement with a significant quantity of narcotics. He was convicted of having acquired at least 14.4 kg of methamphetamine ("MET") and around 5 kg of paramethoxymethamphetamine ("PMMA"), having sold at least 12 kg of MET and around 0.5 kg of PMMA, and having contributed to the import of 6.98 kg of MET into Norway. Following a partial appeal, the conviction was upheld by judgment of 22 March 2013 by Gulating Court of Appeal. He was sentenced to 11 years' imprisonment.

16 L served his sentence in prison, some of which was spent in a section dealing with substance dependency issues. In August 2018, L was transferred to transitional housing in Stavanger, before being released on probation in the autumn of 2019. According to the request, since being transferred to transitional housing and until the present, he has been in

full-time employment. L maintained close contact with his family whilst serving his sentence. He was granted an increase in his leave allowance to 50 days per year, which was used solely to visit his partner and children. L received positive acclamation from the Norwegian Correctional Service whilst serving his sentence and was assigned tasks requiring a particularly high level of trust. The type of tasks assigned to him were given only to persons deemed not to constitute a risk for evasion or the smuggling-in of narcotics.

Expulsion procedure

17 On 20 August 2013, the Norwegian police issued an advance notice of expulsion, in response to which L submitted remarks on 12 September 2013. On 26 April 2016, the Norwegian Directorate of Immigration adopted an expulsion decision (*utvisningsvedtak*) including a permanent exclusion order (*innreiseforbud*), which entails that L is prohibited from entering Norway. L submitted an appeal against that decision on 29 September 2016. On 12 July 2017, the Immigration Appeals Board upheld the Directorate's decision. The Immigration Appeals Board found that L had resided lawfully in Norway for over 10 years. However, the Immigration Appeals Board held that it was compellingly necessary in the interests of public security to expel L, and that circumstances relating to his personal conduct constituted a genuine, present and sufficiently serious threat affecting the fundamental interests of society. Further, the Immigration Appeals Board found that the expulsion decision including a permanent exclusion order did not amount to a disproportionate intervention in relation to L and his family.

18 On 8 May 2019, L lodged a writ before Oslo District Court to have the decision of the Immigration Appeals Board declared invalid. In its judgment delivered on 7 November 2019, Oslo District Court held that a permanent entry prohibition is not contrary to EEA law, but found the decision of the Immigration Appeals Board invalid. Oslo District Court held that the personal circumstances of L did not represent, or could not be assumed to represent, "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" within the meaning of the Norwegian Immigration Act. On an overall assessment, Oslo District Court found that the risk of new serious narcotics-related offences was so low that expulsion did not appear to be an obvious and well-founded measure. Even though Oslo District Court did not find that the basic requirement for expulsion of an EEA national was fulfilled, it nevertheless carried out an assessment as to whether the expulsion would be "*compellingly necessary in the interests of public security*". In that assessment, Oslo District Court found that the criterion was fulfilled given the quantity of narcotics, the fact that L's involvement related to the retention, sale as well as aiding and abetting the import of the narcotics, and his prominent role in the operation.

19 The Norwegian Government brought an appeal against Oslo District Court's judgment to Borgarting Court of Appeal, which has decided to make a reference to the Court. The request, dated 3 April 2020, was registered at the Court on the same day. Borgarting Court of Appeal has referred the following questions to the Court:

1. *Is recital 27 of the preamble to Directive 2004/38/EC to be interpreted as meaning that expulsion of an EU/EEA national together with a permanent exclusion order is contrary to Directive 2004/38/EC, even if the person in question has the possibility under Article 32(1) of applying to have the exclusion order lifted?*
2. *How are the words "material change" in Article 32(1) to be understood when the expulsion is based on personal characteristics of the EU/EEA national?*
3. *If it is assumed that the personal characteristics of the EU/EEA national justifying the expulsion will not change, will expulsion together with a permanent entry prohibition in such cases be contrary to Directive 2004/38/EC?*
4. *How is the requirement in Article 27(2), under which expulsion must be a proportionate measure, to be understood in relation to the expulsion of an EU/EEA national together with a permanent entry prohibition when the person in question has a family and children in the country from which s/he is being expelled? Does the Directive preclude expulsion together with a permanent entry prohibition in such cases?*
5. *How much weight should be attached to the absence of criminal offences whilst serving a sentence and positive development following release on probation in the determination of whether there is "a genuine, present and sufficiently serious threat" as referred to in Article 27(2)?*

20 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answer of the Court

Introductory remarks

21 The case before the referring court concerns the validity of an expulsion order in combination with a permanent exclusion order.

22 It is apparent from the wording of the request that the expulsion decision of 26 April 2016 was intended, first, to order the expulsion of L from Norway and, second, to permanently exclude him from returning. In the light of the questions put to the Court, that order must, therefore, be regarded as an exclusion order expressly referred to in Article 32 of the Directive.

23 L has resided in Norway since 1998. Having resided in the host State, Norway, for more than 10 years, L qualifies for the enhanced protection under the Directive as provided for by point (a) of Article 28(3) of the Directive.

24 Since the freedom of movement for workers represents a specific expression of the general right to move and reside freely within the EEA, the Court finds it appropriate to address the regime established under Article 28 EEA. In that respect, it must be noted that the concept of "worker", insofar as it defines the scope of a fundamental freedom within the EEA, must be interpreted broadly (see Case E-4/19, *Campbell*, judgment of 13 May 2020, paragraphs 48 and 49 and case law cited).

25 According to the request, L has been employed full-time since 2018 and remains so currently. The fact that he was not available on the employment market during his imprisonment does not mean, as a general rule, that he did not continue to be duly registered as belonging to the labour force of the host State during that period, as he actually obtained employment upon his release (compare the judgment in *Orfanopoulos & Oliveri*, Joined Cases C-482/01 and C-493/01, EU:C:2004:262, paragraph 50 and case law cited). Therefore, L is a worker within the meaning of Article 28 EEA, which is a relevant factor when assessing the nature of his residence in the host State and whether his expulsion can be justified on imperative grounds of public security. As L is economically active and, consequently, an economically contributing member of the society of his host State, this provides a strong indication of his integration into that society.

Question 1

26 By its Question 1 the referring court asks, in essence, whether recital 27 of the preamble to the Directive is to be interpreted as meaning that the expulsion of an EEA national together with a permanent exclusion order is contrary to the Directive, even if the person in question has the possibility under Article 32(1) thereof of making an application to have the exclusion order lifted.

27 The Court recalls its settled case law concerning the judicial co-operation established by Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, according to which, it is incumbent on the Court to give a reply that is as complete and as useful as possible and the Court is not precluded from providing the referring court with all the elements of interpretation of EEA law which may be of assistance in adjudicating the case before it, whether or not reference is made thereto in the question referred (see *Campbell*, cited above, paragraph 45, and case law cited). Therefore, the Court finds it appropriate to address the imposition of an expulsion order together with a permanent exclusion order, in circumstances such as those of the main proceedings, namely following the conviction of a permanent resident.

28 As regards the referring court's question concerning the duration of an exclusion order referred to in Article 32 of the Directive, the Court observes that the adoption of such a measure requires a prior examination of whether the conditions set out in Articles 27 and 28 of the Directive, for the adoption of the initial expulsion order, have been satisfied (compare the judgment in *Petrea*, C-184/16, EU:C:2017:684, paragraphs 39 to 41).

29 Thus, the Court observes that an exclusion order which follows an expulsion decision, such as that in the main proceedings, is only valid when it is first established that the conditions set out in Articles 27 and 28 of the Directive have been satisfied.

30 Expulsion of an EEA national can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the EEA Agreement, have become genuinely integrated into the host State. As also mentioned in recitals 23 and 24, expulsion is the most restrictive measure which can be taken against EEA nationals who have exercised their right of free movement under the Directive. Any limitations on EEA nationals who have exercised their right to move to and/or reside in that State must be consistent with Article 27 of the Directive. This provision provides that EEA States may restrict the freedom of movement of EEA nationals and their family members on grounds of public policy, public security or public health, based exclusively on the conduct of the person concerned; and in compliance with the principle of proportionality (see Case E-15/12 *Jan Anfinn Wahl* [2013] EFTA Ct. Rep. 534, paragraph 81).

31 Chapter VI of the Directive, including Articles 27 and 28, imposes safeguards for the expulsion and exclusion of EEA nationals. Article 27(2) of the Directive specifies explicitly that any previous criminal convictions shall not in themselves constitute grounds for adopting restrictive measures. However, the derogations from the free movement of persons must be interpreted restrictively, with the result that a previous conviction can justify denying entry or expulsion only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy and/or public security (see *Jan Anfinn Wahl*, cited above, paragraph 117 and case law cited).

32 The Court observes that the assessment under Article 27 of the Directive must be based exclusively on the personal conduct of the individual concerned. An expulsion is justified only if, and for as long as, the continued presence of the person concerned amounts to a genuine, present and sufficiently serious threat to one of the fundamental interests of society (see *Jan Anfinn Wahl*, cited above, paragraphs 84 and 85, and case law cited). Consequently, an EEA State must demonstrate, first, that the EEA national's personal conduct in committing the offences constitutes a genuine, present and sufficiently serious threat to a fundamental interest of society; second, that the expulsion of the individual is necessary in order to safeguard that interest; and, third, that the measure is proportionate in view of the overall consequences on the individual being expelled and the impact on his family members.

33 With regard to the first requirement, in assessing the genuine, present and sufficiently serious threat, the EEA national's residence status must be considered in accordance with Article 28 of the Directive.

34 According to Article 28(3) of the Directive, expulsion is excluded in the situation of a person enjoying enhanced protection after ten years of residence, except where the personal conduct gives rise to imperative grounds of public security, thus emphasising that an expulsion constitutes an exception to the right to residence. According to the request, L has resided in Norway since 1998. He therefore qualifies for the enhanced protection under the Directive as provided for by point (a) of Article 28(3). The concept of "imperative grounds of public security" presupposes the existence of a threat to public security which is of a particularly high degree of seriousness (compare the judgments in *Tsakouridis*, C-145/09, EU:C:2010:708, paragraph 41, and *P.I.*, C-348/09, EU:C:2012:300, paragraph 20). The imperative grounds of public security are to be defined by the EEA States, but must be interpreted strictly, so that their scope cannot be determined unilaterally by each EEA State without any control by the EEA institutions (see *Jan Anfinn Wahl*, cited above, paragraph 83, and case law cited).

35 Pursuant to recital 23, the scope for expulsion should be limited, in accordance with the principle of proportionality, to take account of the degree of integration of the persons concerned, the length of their residence in the host State, their age, state of health, family and economic situation and the links with their country of origin. Accordingly, the greater the degree of the EEA nationals' and their family members' level of integration in the host State, the greater the safeguards those persons may rely on against expulsion (compare the judgment in *K & H.F.*, Joined Cases C-331/16 and C-366/16, EU:C:2018:296, paragraph 71, and case law cited). In that regard, it follows from the wording and the structure of Article 28 of the Directive that the protection against expulsion provided for in that provision gradually increases in proportion to the degree of integration of the EEA national in the host State (compare the judgment in *B and Vomero*, Joined Cases C-316/16 and C-424/16, EU:C:2018:256, paragraph 48).

36 Thus, by subjecting all expulsion measures in the cases referred to in Article 28(3) of the Directive to the existence of "imperative grounds" of public security, a concept which is considerably stricter than that of "serious grounds" within the meaning of Article 28(2), the legislature clearly intended to limit measures based on Article 28(3) to "exceptional circumstances", as set out in recital 24 of the Directive (compare the judgment in *Tsakouridis*, cited above, paragraph 40).

37 Criminal offences can constitute a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus may be covered by the concept of "imperative grounds of public security", as long as the manner in which such offences were committed discloses particularly serious characteristics. Nevertheless, the personal conduct of the individual concerned must represent a genuine, serious and present threat, which implies the propensity of the individual to act in the same way in the future (compare the judgment in *P.I.*, cited above, paragraphs 28, 30 and 33).

38 Therefore, whether an individual represents a sufficiently serious and genuine threat that is "present", implies the existence of an imminent future risk which, in turn, implies that an up-to-date assessment takes place at a time proximate to the proposed expulsion of the individual concerned (compare the judgments in *Tsakouridis*, cited above, paragraph 32, and *Orfanopoulos & Oliveri*, cited above, paragraphs 78 to 82). As follows from Article 33(2) of the Directive, if an expulsion decision is enforced more than two years after it was taken, a new assessment of the situation of the individual concerned at the time of enforcement of that decision must be carried out. Consequently, a decision taken several years before the execution of an expulsion order cannot adequately assess whether a person, at the time of the expulsion, continues to pose a serious and genuine threat. Moreover, national authorities must ensure that they take account of the most recent information, including positive developments (compare the judgments in *Santillo*, 131/79, EU:C:1980:131, paragraph 18, and *Orfanopoulos & Oliveri*, cited above, paragraph 82).

39 The Court observes that, in the present case, an advance notice of expulsion was issued in August 2013. The expulsion decision was adopted in April 2016 in conjunction with a permanent entry prohibition. L currently still resides in Norway. Approximately five years have passed since the decision on expulsion and permanent exclusion was adopted. In this regard, the Court observes that it follows from settled case law that the national courts must take into consideration, in reviewing the lawfulness of an expulsion measure taken against a national of another EEA State, factual matters which occurred after the final decision of the competent authorities which may point to the cessation or the substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public policy or public security. That is so, above all, if a lengthy period has elapsed between the date of the expulsion order and that of the review of that decision by the competent court (compare the judgment in *B and Vomero*, cited above, paragraph 94, and case law cited).

40 With regard to the second requirement, the Court recalls that Article 27(2) of the Directive emphasises that the assessment has to show that the expulsion of the individual is necessary in order to safeguard a fundamental interest of society. Consequently, an expulsion measure must be based on an individual examination of the specific case. An expulsion measure can be justified on imperative grounds of public security within the meaning of Article 28(3) of the Directive only if, having regard to the exceptional seriousness of the threat, such a measure is necessary for the protection of the interests it aims to secure, provided that that objective cannot be attained by less strict means, having regard to the length of residence of the EEA national in the host State and in particular to the serious negative consequences such a measure may have for EEA nationals who have become genuinely integrated into the host State (see, as regards "necessity" in the proportionality test, Case E-8/17 *Kristoffersen* [2018] EFTA Ct. Rep. 383, paragraph 122; and compare the judgment in *Tsakouridis*, cited above, paragraph 49).

41 With regard to the third requirement, the assessment of proportionality as set out in Article 27(2) of the Directive, the expulsion will be proportionate if a balance has been struck between the exceptional nature of the threat to public security as a result of the individual's personal conduct and the overall consequences on the individual being expelled including the impact on his family members. Such an assessment must take into account the aspects described above, together with the risk of compromising the social rehabilitation of the EEA national in the EEA State in which he has become genuinely integrated, which is not only in his interest but also in that of the society in general (compare the judgment in *B and Vomero*, cited above, paragraph 75 and case law cited, and see also recitals 23 and 24 of the Directive). The individual's convictions must be taken into account but these constitute only one element in that complex of factors to be assessed in the individual examination of the specific case (compare the judgments in *Tsakouridis*, cited above, paragraph 51, and *Metock and Others*, C-127/08, EU:C:2008:449, paragraph 74).

42 According to Article 32(1) of the Directive, persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion. As regards the exclusion order, the Court notes that is apparent from Articles 27 and 28, read in the light of Article 32, that permanent exclusion orders are, in principle, not contrary to EEA law, provided that they satisfy the conditions set out in those provisions and may be lifted in accordance with Article 32 of the Directive (compare the judgment in *Adoui and Cornuaille*, 115/81 and 116/81, EU:C:1982:183, paragraph 12).

43 Recital 27 and Article 32(1) of the Directive recognise the right of EEA nationals and their family members, who have been excluded from the territory of an EEA State, to submit an application for lifting of the exclusion order after a reasonable period, and in any event after three years from enforcement of the final exclusion order. The procedural possibility of periodically applying for reassessment is one of the safeguards which protects free movement under the Directive.

44 If the expulsion order is combined with an exclusion order, the exclusion order must equally adhere to the assessment of necessity and proportionality. In particular, the duration of any subsequent exclusion must be limited to what is necessary to safeguard the fundamental interest that the expulsion and exclusion is intended to protect by way of an overall assessment (compare the judgment in *Byankov*, C-249/11, EU:C:2012:608, paragraph 43).

45 Consequently, the answer to Question 1 must be that permanent exclusion orders are, in principle, not contrary to EEA law, provided that they satisfy the conditions set out in Articles 27 and 28 of the Directive and may be lifted in accordance with Article 32 thereof. An expulsion measure must be based on an individual examination. As regards EEA nationals who have legally resided for a period of more than 10 years in the host State,

expulsions may only be adopted, pursuant to Articles 27 and 28(3) of the Directive, on imperative grounds of public security, in circumstances where the personal conduct of the individual concerned poses an exceptionally serious threat that an expulsion measure is necessary for the protection of one of the fundamental interests of society. This is provided that such protection cannot be attained by less strict means, having regard to the length of residence of the EEA national in the host State and in particular to the serious negative consequences such a measure may have on an EEA national and his/her family members, who have become genuinely integrated into the host State. Any subsequent exclusion decision must be limited to what is necessary to safeguard the fundamental interest that the expulsion intended to protect. The exclusion decision must adhere to the principle of proportionality. The exclusion order must be lifted if a material change in the circumstances which justified the exclusion order is established, and that the conditions for the exclusion order are no longer fulfilled.

Questions 4 and 5

46 The Court considers it appropriate to address Questions 4 and 5 together, following the criteria and structure set out in the answer to Question 1. By Question 5, the referring court seeks guidance on the relevance of an absence of criminal offences and the positive development of an individual while serving a prison sentence and following release on probation in the assessment of "a genuine, present and sufficiently serious threat" as specified in Article 27(2) of the Directive. Question 4 essentially addresses the interpretation of the principle of proportionality and in particular the relevance in this assessment of the individual's family and children.

47 As stated in relation to Question 1, the expulsion of an individual is proportionate if a balance has been struck between the exceptional nature of the threat to public security as a result of the individual's personal conduct and the overall consequences on the individual being expelled and the impact on his family members. Such an assessment must take into account the aspects described above in relation to Question 1, together with the risk of compromising the social rehabilitation of the EEA national in the EEA State in which he has become genuinely integrated (compare the judgment in *Byankov*, cited above, paragraph 43, and see also recitals 23 and 24 of the Directive).

48 In relation to Question 5, in addition to its findings in the answer to Question 1 on the assessment of "a genuine, present and sufficiently serious threat", the Court notes that it has to be established that the individual has a propensity to act in the same way in the future (compare the judgment in *K & H.F.*, cited above, paragraph 56 and case law cited). Factors such as the absence of criminal offences whilst in prison and subsequently, under probation, together with other evidence of plausible re-integration into society are elements that point to the absence of a propensity to engage in criminal conduct capable of posing a threat to public security and have to be taken into account in the overall assessment of the conduct of the individual (compare the judgment in *B and Vomero*, cited above, paragraphs

70 and 73). Social rehabilitation of an EEA national in the host State is in the interest of the society in general and can be achieved through probation measures (compare the judgment in *B and Vomero*, cited above, paragraph 75).

49 As stated in the request, L spent part of his prison sentence in a section dealing with substance dependency issues. He was released on probation in 2019 and received positive acclamation from the Norwegian Correctional Service. He was assigned tasks requiring a particularly high level of trust, meaning the types of tasks were given only to persons deemed not to constitute a risk for evasion or for the smuggling of narcotics into prison.

50 In Question 4, the referring court asks in particular about the relevance of family life in balancing the interests for the purposes of the principle of proportionality. It is settled case law that fundamental rights form part of the general principles of EEA law. The Court has held that the provisions of the European Convention on Human Rights, which enshrines in Article 8(1) the right to respect for private and family life, and the judgments of the European Court of Human Rights ("ECtHR") are important sources for determining the scope of these fundamental rights. In that regard, it must be noted that the EEA States, in particular their courts, must not only interpret their national law in a manner consistent with EEA law but are also under an obligation to ensure that the interpretation and application of acts incorporated into the EEA Agreement does not result in a conflict with fundamental rights protected by EEA law (see Case E-1/20 *Kerim*, judgment of 9 February 2021, not yet reported, paragraph 43, and case law cited).

51 With regard to the relevance of family life in this assessment, as referred to in Question 4, Article 28(1) of the Directive expressly mentions "family and economic situation" as a relevant factor to be considered in the assessment of an expulsion decision on grounds of public policy or public security (compare the judgment in *Tsakouridis*, cited above, paragraph 52). Criteria which should be considered in this respect include the individual's family situation, such as the length of the relationship, and other factors expressing the nature of the couple's family life, whether there are children from the relationship, step-children, or other dependants, and their respective ages. Furthermore, the seriousness of the difficulties which the spouse, or his/her equivalent, and children are likely to encounter in the country to which the applicant is to be expelled and the solidity of social, cultural and family ties with the host State and with the home State should be emphasised.

52 These factors should also be assessed in the light of the principles of proportionality, of the child's best interests, and of fundamental rights (compare the judgment in *K.A. and Others*, C-82/16, EU:C:2018:308, paragraph 93). The principle of the child's best interests is all the more relevant in circumstances, such as those of the present case, where the other parent is 100 percent disabled which may have an impact on the care of the children in question. Therefore, L's family situation, including his common-law partner and children living in Norway, including step-children, is relevant to the overall assessment to be made by the national court.

53 In such cases, the national authorities should, when assessing the necessity of the expulsion, consider alternatives to the expulsion of the individual, such as close monitoring of that person or requiring periodic reporting. Therefore, an expulsion order should not be made where, in the overall circumstances, the terms of the restriction measure would result in undue interference with the right to family life and where the objective of ensuring the protection of public security can be achieved through measures that interfere less with the right to the respect for family life (compare the judgment of the ECtHR in *Üner* v. *the Netherlands*, CE:ECHR:2006:1018JUD004641099, §§ 57 to 60).

54 Therefore, the answer to Questions 4 and 5 must be that social rehabilitation of an EEA national in the State in which he/she has become genuinely integrated is in the interest of the society in general. The good behaviour of the individual concerned during the period of imprisonment, and subsequently, under probation, together with other evidence of re-integration into society mitigate against a present threat to public security. Family and children of the individual, including step-children, are an important consideration in the assessment of the necessity of a restrictive measure under Chapter VI of the Directive in the light of the principle of proportionality, of the child's best interests, and of fundamental rights. In assessing the necessity of the expulsion, consideration of any alternatives to the expulsion must be part of the overall assessment.

Questions 2 and 3

55 By its Questions 2 and 3, the referring court seeks, in essence, guidance on the interpretation of the notion of "material change" in the context of the application to lift an exclusion order referred to in Article 32(1) of the Directive. The referring court asks in particular whether an expulsion order combined with a permanent exclusion order is justified if it is assumed that the personal conduct of the EEA national will not change. The Court finds it appropriate to address these questions together.

56 According to the wording of Article 32 of the Directive, a "material change" is linked to the initial circumstances which justified the decision ordering the exclusion. As stated above in answer to Question 1, if an exclusion order is combined with an expulsion, the exclusion order is only justified if the expulsion was validly adopted. Where the exclusion order is based on an assessment that the individual's conduct represents a genuine, present and sufficiently serious threat to society, the reference to a "material change" refers to an assessment of the change in the circumstances which justified the initial decision ordering expulsion (compare the judgment in *Shingara and Radiom*, Joined Cases C-65/95 and C-111/95, EU:C:1997:300, paragraph 39).

57 The Court notes that whilst the questions referred speak of "personal characteristics", this term is not used in the context of the Directive. The Court reaffirms that a decision taken according to Chapter VI of the Directive must adhere to the requirements of Articles 27 and 28. Article 27(2) of the Directive provides that measures taken on grounds of public

policy or public security shall be based exclusively on the "personal conduct" of the individual concerned (see *Jan Anfinn Wahl*, cited above, paragraph 115). Thus, as argued by the Commission in its written observations, Article 27 of the Directive precludes the exclusion of an EEA national from the territory of the host State exclusively on the basis of what is assumed to be an indelible or unalterable personal characteristic.

58 Article 32(1) of the Directive, which provides for the right of EEA nationals to lodge applications for the lifting of exclusion decisions, and Article 33(2) of the Directive, which requires EEA States to assess the necessity of maintaining an expulsion decision by an assessment of any "material change" in an individual's personal conduct, both presuppose that such a change in an individual's personal conduct is, in fact, possible.

59 In the assessment of what constitutes a "material change" with regard to an application to lift an exclusion order, it is for the EEA State to assess the facts of the individual case. However, in so doing, it is necessary to carry out a broad assessment when determining what constitutes a "material change" at the time of the application. Such an assessment encompasses all the requirements established in the answer to Question 1, taking into account any factor reducing the propensity of the individual to engage in the same criminal conduct as that which led to the initial decision of the competent authority. Furthermore, that assessment should be carried out on a case-by-case basis and in a manner which does not compromise the right to a renewed application for lifting the exclusion order. It follows from the wording of Article 32(1) of the Directive that a change is considered material if it removes the justification for the initial decision which justified the restriction on the freedom of movement. As the Commission submitted at the hearing, the assessment whether the individual still represents a threat to the fundamental interests of the society has to provide an objective indication that an individual has genuinely repudiated his past conduct and is unlikely to re-offend.

60 If the conditions for exclusion are no longer fulfilled, the exclusion order must be lifted.

61 Factors which could provide evidence of a material change will depend on the nature of the individual's conduct and the threat to society it presented. Any evidence showing that the individual has engaged in positive and legal activities such that it is unlikely that he/she would revert to the type of activities that led to the expulsion must be taken into account. Such factors could include, but are not limited to, evidence that a person has refrained from engaging in further criminality, evidence of re-integration in the host society, starting and keeping up a stable economic activity, the results of psychological assessments, credible expressions of remorse, evidence of having engaged positively and constructively in society. In particular, social rehabilitation of an EEA national in the State in which he has become genuinely integrated is also in the interest of the society in general (compare the judgment in *B and Vomero*, cited above, paragraph 75). The Court notes that social rehabilitation is one of the main aims of probation measures.

62 In the light of the above, it cannot be correct to assume that a material change will never occur, as the referring court seems to presuppose in Question 3. Such an assumption would compromise an individual's right to make a renewed application for the lifting of the exclusion order. A finding of a "material change" has to be based on the overall assessment of the specific case at the time of the application submitted in accordance with Article 32 of the Directive (see, to that effect, *Jan Anfinn Wahl*, cited above, paragraph 84).

63 The Court notes that Article 32(1) of the Directive applies following the execution of an expulsion order. However, it appears from the case file that the expulsion order has not yet been executed more than two years since it was issued. In that case, Article 32 does not apply. Where an EEA State seeks to enforce an expulsion order in such a situation, where it has been issued in conformity with the requirements of Articles 27 to 29 of the Directive, Article 33(2) of the Directive requires that an EEA State must assess whether the individual concerned is currently and genuinely a threat to public security, and whether there has been "any material change" in the circumstances since the expulsion order was issued. The purpose of this assessment is to examine whether the conditions for expulsion are still met.

64 The answer to Questions 2 and 3 is that a "material change" for the purposes of Article 32 of the Directive is one that removes the justification for the initial decision under Chapter VI of the Directive to restrict freedom of movement based on the individual's conduct. It cannot be assumed that a material change in personal conduct will not occur and each application must be assessed on a case-by-case basis. Account must be taken of all factors which could provide evidence of a material change in personal conduct. This will depend on the nature of the individual's conduct and the threat to society it presented. Any evidence showing that the individual has engaged in positive and legal activities such that it is unlikely that he/she would revert to the type of activities that led to the expulsion must be taken into account. Such factors could include, but are not limited to, evidence that a person has refrained from engaging in further criminality, evidence of reintegration in the host society, starting and keeping up a stable economic activity, the results of psychological assessments, credible expressions of remorse, evidence of having engaged positively and constructively in society, and in particular the social rehabilitation of the EEA national in the State in which he/she has become genuinely integrated.

IV Costs

65 The costs incurred by the Danish Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Borgarting Court of Appeal hereby gives the following Advisory Opinion:

1. **Permanent exclusion orders are, in principle, not contrary to EEA law, provided that they satisfy the conditions set out in Articles 27 and 28 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 and may be lifted in accordance with Article 32 thereof. An expulsion measure must be based on an individual examination. As regards EEA nationals who have legally resided for a period of more than 10 years in the host State, expulsions may only be adopted, pursuant to Articles 27 and 28(3) of Directive 2004/38/EC, on imperative grounds of public security, in circumstances where the personal conduct of the individual concerned poses an exceptionally serious threat that an expulsion measure is necessary for the protection of one of the fundamental interests of society. This is provided that such protection cannot be attained by less strict means, having regard to the length of residence of the EEA national in the host State, and in particular to the serious negative consequences such a measure may have for an EEA national and his/her family members who have become genuinely integrated into the host State. Any subsequent exclusion decision must be limited to what is necessary to safeguard the fundamental interest that the expulsion intended to protect. The exclusion decision must adhere to the principle of proportionality.**

2. **Social rehabilitation of an EEA national in the State in which he/she has become genuinely integrated is in the interest of the society in general. The good behaviour of the individual concerned during the period of imprisonment and subsequently, under probation, together with other evidence of re-integration into society mitigate against a present threat to public security. Family and children of the individual, including step-children, are an important consideration in the assessment of the necessity of a restrictive measure under Chapter VI of Directive 2004/38/EC in light of the principle of proportionality, of the child's best interests, and of fundamental rights. In assessing the necessity of the expulsion, consideration of any alternatives to the expulsion must be part of the overall assessment.**

3. **A material change for the purposes of Article 32 of Directive 2004/38/EC is one that removes the justification for the initial decision under Chapter VI of the directive to restrict freedom of movement based on the individual's conduct. It cannot be assumed that a material change in personal conduct will not occur and each application must be assessed on a case-by-case basis. Account must be taken of all factors which could provide evidence of a material change in personal conduct. This will depend on the nature of the individual's conduct and the threat to society it presented. Any evidence showing that the individual has engaged in positive and legal activities such that it is unlikely that he/she would revert to the type of activities that led to the expulsion must be taken into account. Such factors could include, but are not limited to, evidence that a person has refrained from engaging in further criminality, evidence of reintegration in the host society, starting and keeping up a stable economic activity, the results of psychological assessments, credible expressions of remorse, evidence of having engaged positively and constructively in society, and in particular the social rehabilitation of the EEA national in the State in which he/she has become genuinely integrated.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 21 April 2021.

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
President